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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0869; Product Identifier 2019–NM–162–AD; Amendment 39–19842; AD 2020–03–18]

RIN 2120–AA64

Airworthiness Directives; Airbus Defense and Space S.A. (Formerly Known as Construcciones Aeronauticas, S.A.) Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2017–19–08 and AD 2018–19–02, which applied to Airbus Defense and Space S.A. Model C–212–CB, C–212–CC, C–212–CD, C–212–CE, and C–212–DF airplanes. AD 2018–19–02 required repetitive inspections of the rudder pedal control system support box and shaft and applicable corrective actions; accomplishing those actions terminated the requirements of AD 2017–19–08. This AD continues to require repetitive inspections and applicable corrective actions; and also requires a modification of the rudder pedal adjustment system; as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. This AD was prompted by a determination that a modification must be done in order to address the unsafe condition. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective April 2, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of April 2, 2020.

ADDRESSES: For the material incorporated by reference (IBR) in this AD, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 89990 1000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this IBR material on the EASA website at *https://ad.easa.europa.eu.* You may view this IBR material at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0869.

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–2019–0869; 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: Shahram Daneshmandi, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3220; email *shahram.daneshmandi@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2019–0221, dated September 5, 2019 (''EASA AD 2019–0221'') (also referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Airbus Defense and Space S.A. Model C–212–CB, C–212–CC, C–212–CD, C–212–CE, C–212–DD, C–212–DF, and C–212–EE airplanes. Model C–212–DD and C–212–EE airplanes are not certified by the FAA and are not included on the U.S. type certificate data sheet; this AD therefore does not include those airplanes in the applicability. EASA AD 2019–0221 supersedes EASA AD 2018–0051, dated March 2, 2018 (which corresponds to FAA AD 2018–19–02, Amendment 39–19402 (83 FR 46857, September 17, 2018) (''AD 2018–19–02'')).

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2017–19–08, Amendment 39–19038 (82 FR 43835, September 20, 2017) (''AD 2017–19–08'') and AD 2018–19–02. AD 2018–19–02 applied to certain Airbus Defense and Space S.A. Model C–212–CB, C–212–CC, C–212–CD, C–212–CE, and C–212–DF airplanes. Accomplishing the actions required by AD 2018–19–02 terminated all of the requirements of AD 2017–19–08. The NPRM published in the **Federal Register** on November 18, 2019 (84 FR 63580). The NPRM was prompted by a determination that a modification must be done in order to address the unsafe condition. The NPRM proposed to continue to require repetitive inspections and applicable corrective actions. The NPRM also proposed to require a modification of the rudder pedal adjustment system.

The FAA is issuing this AD to address failure of the rudder pedal control system support structure, which could result in reduced controllability of the airplane. See the MCAI for additional background information.

Comments

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

Conclusion

The FAA reviewed the relevant data and determined that air safety and the public interest require adopting this final rule as proposed, except for minor editorial changes. The FAA has determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for addressing the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Related IBR Material Under 1 CFR Part 51

EASA AD 2019–0221 describes procedures for repetitive inspections of the rudder pedal control system support box and shaft, and a modification of the

rudder pedal adjustment system. The modification is terminating action for the repetitive inspections. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

The FAA estimates that this AD affects 37 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Retained actions from AD 2018–19–02	8 work-hours × $85 per hour = $680	$0	$680	$25,160
New actions	9 work-hours × $85 per hour = $765	20,000	20,765	768,305

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

ESTIMATED COSTS OF ON-CONDITION ACTION

Labor cost	Parts cost	Cost per product
9 work-hours × $85 per hour = $765	$20,000	$20,765

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2017–19–08, Amendment 39–19038 (82 FR 43835, September 20, 2017), and AD 2018–19–02, Amendment 39–19402 (83 FR 46857, September 17, 2018), and adding the following new AD:

2020–03–18 Airbus Defense and Space S.A. (Formerly Known as Construcciones Aeronauticas, S.A.): Amendment 39–19842; Docket No. FAA–2019–0869; Product Identifier 2019–NM–162–AD.

(a) Effective Date

This AD is effective April 2, 2020.

(b) Affected ADs

This AD replaces AD 2017–19–08, Amendment 39–19038 (82 FR 43835, September 20, 2017), and AD 2018–19–02, Amendment 39–19402 (83 FR 46857, September 17, 2018).

(c) Applicability

This AD applies to Airbus Defense and Space S.A. Model C–212–CB, C–212–CC, C–212–CD, C–212–CE, and C–212–DF airplanes, certificated in any category, as identified in European Union Aviation Safety Agency (EASA) AD 2019–0221, dated September 5, 2019 (''EASA AD 2019–0221'').

(d) Subject

Air Transport Association (ATA) of America Code 27, Flight Controls.

(e) Reason

This AD was prompted by reports of failures of the rudder pedal control system support structure. The FAA is issuing this AD to address failure of the rudder pedal control system support structure, which could result in reduced controllability of the airplane.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2019–0221.

(h) Exceptions to EASA AD 2019–0221

For purposes of determining compliance with the requirements of this AD:

(1) Where EASA AD 2019–0221 refers to its effective date, this AD requires using the effective date of this AD.

(2) The ''Remarks'' section of EASA AD 2019–0221 does not apply to this AD.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

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

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Section, Transport Standards Branch, FAA; or EASA; or Airbus Defense and Space S.A.'s EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(j) Related Information

For more information about this AD, contact Shahram Daneshmandi, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206 231 3220; email *shahram.daneshmandi@faa.gov.*

(k) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on April 2, 2020.

(i) European Union Aviation Safety Agency (EASA) AD 2019–0221, dated September 5, 2019.

(ii) [Reserved]

(4) For information about EASA AD 2019–0221, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 89990 6017; email *ADs@easa.europa.eu;* Internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.*

(5) You may view this material at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0869.

(6) You may view this material 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 12, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–03935 Filed 2–26–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0727; Product Identifier 2019–NM–090–AD; Amendment 39–19840; AD 2020–03–15]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Airbus SAS Model A321–211, –212, –213, –231, and –232 airplanes. This AD was prompted by a report of erroneous positioning of affected parts on the skin of the fuselage during the pre-drill phase, which could result in unwanted drill-starts. This AD requires inspections for the presence of unwanted drill-starts on affected parts, and an inspection for cracks and corrective action if necessary, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective April 2, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of April 2, 2020.

ADDRESSES: For the material incorporated by reference (IBR) in this AD, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 89990 1000; email *ADs@easa.europa.eu*; internet *www.easa.europa.eu.* You may find this IBR material on the EASA website at *https://ad.easa.europa.eu.* You may view this IBR material at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0727.

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–2019–0727; 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: Sanjay Ralhan, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3223; email *sanjay.ralhan@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2019–0098, dated May 3, 2019 (''EASA AD 2019–0098'') (also referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Airbus SAS Model A321–211, –212, –213, –231, and –232 airplanes.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Airbus SAS Model A321–211, –212, –213, –231, and –232 airplanes. The NPRM published in the **Federal Register** on October 28, 2019 (84 FR 57657). The NPRM was prompted by a report of erroneous positioning of affected parts (internal upper doublers of the forward emergency exit doors (#2 position), left-hand and right-hand sides) on the skin of the fuselage during the pre-drill phase, which could result in unwanted drill-starts. The NPRM proposed to require inspections for the presence of unwanted drill-starts on affected parts, and an inspection for cracks and corrective action if necessary.

The FAA is issuing this AD to address unwanted drill-starts, which could affect the fatigue properties of affected fuselage skin parts and possibly result

in cracking of fuselage skin. See the MCAI for additional background information.

Comments

The FAA gave the public the opportunity to participate in developing this final rule. The FAA has considered the comment received. An anonymous person stated support for the NPRM.

Change Made to This Final Rule

EASA AD 2019–0098, which is referenced in paragraph (g) of this AD, specifies to report inspection results to Airbus within a certain compliance time. The FAA has added paragraph (h)(3) to this AD to clarify the compliance times for the reporting required by this AD.

Conclusion

The FAA reviewed the relevant data, considered the comment received, and determined that air safety and the public interest require adopting this final rule with the change described previously and minor editorial changes. The FAA has determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for addressing the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

The FAA also determined that these changes will not increase the economic burden on any operator or increase the scope of this final rule.

Related IBR Material Under 1 CFR Part 51

EASA AD 2019–0098 describes procedures for inspections for the presence of unwanted drill-starts on affected parts (internal upper doublers of the forward emergency exit doors (#2 position), left-hand and right-hand sides), high frequency eddy current (HFEC) inspections for cracks, and corrective actions including repair of cracked parts. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

The FAA estimates that this AD affects 51 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 73 work-hours × $85 per hour = Up to $6,205	$0	Up to $6,205	Up to $316,455.

The FAA estimates that it would take about 1 work-hour per product to comply with the reporting requirement in this AD. The average labor rate is $85 per hour. Based on these figures, the FAA estimates the cost of reporting the inspection results on U.S. operators to be $4,335, or $85 per product.

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

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
93 work-hours × $85 per hour = $7,905	$4,300	$12,205

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

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

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

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

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

(3) Will not have a significant economic impact, positive or negative,

on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

AD 2020–03–15 Airbus SAS: Amendment 39–19840; Docket No. FAA–2019–0727; Product Identifier 2019–NM–090–AD.

(a) Effective Date

This AD is effective April 2, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus SAS Model A321–211, –212, –213, –231, and –232 airplanes, certificated in any category, as identified in European Union Aviation Safety Agency (EASA) AD 2019–0098, dated May 3, 2019 (''EASA AD 2019–0098'').

(d) Subject

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

(e) Reason

This AD was prompted by a report of erroneous positioning of affected parts on the skin of the fuselage during the pre-drill phase, which could result in unwanted drill-starts. The FAA is issuing this AD to address unwanted drill-starts, which could affect the fatigue properties of affected fuselage skin parts and possibly result in cracking of fuselage skin.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2019–0098.

(h) Exceptions to EASA AD 2019–0098

For purposes of determining compliance with the requirements of this AD:

(1) Where EASA AD 2019–0098 refers to its effective date, this AD requires using the effective date of this AD.

(2) The ''Remarks'' section of EASA AD 2019–0098 does not apply to this AD.

(3) Paragraph (3) of EASA AD 2019–0098 specifies to report inspection results to Airbus within a certain compliance time. For this AD, report inspection results at the applicable time specified in paragraph (h)(3)(i) or (ii) of this AD.

(i) If the inspection was done on or after the effective date of this AD: Submit the report within 90 days after the inspection.

(ii) If the inspection was done before the effective date of this AD: Submit the report within 90 days after the effective date of this AD.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

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

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

(3) *Required for Compliance (RC):* For any service information referenced in EASA AD 2019–0098 that contains RC procedures and tests: Except as required by paragraph (i)(2) of this AD, RC procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(4) *Paperwork Reduction Act Burden Statement:* A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 1 hour per response, including the time for reviewing instructions, 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.

(j) Related Information

For more information about this AD, contact Sanjay Ralhan, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3223; email *sanjay.ralhan@faa.gov.*

(k) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2019–0098, dated May 3, 2019.

(ii) [Reserved]

(3) For information about EASA AD 2019–0098, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 89990 6017; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.*

(4) You may view this material at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0727.

(5) You may view this material 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 7, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–03966 Filed 2–26–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0868; Product Identifier 2019–NM–152–AD; Amendment 39–19843; AD 2020–03–19]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Dassault Aviation Model MYSTERE–FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes. This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. This AD requires revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective April 2, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of April 2, 2020.

ADDRESSES: For service information identified in this final rule, contact Dassault Falcon Jet Corporation, Teterboro Airport, P.O. Box 2000, South Hackensack, NJ 07606; telephone 201–440–6700; internet *https://www.dassaultfalcon.com*. You may view this service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0868.

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–2019–0868; 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: Tom Rodriguez, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3226; email *Tom.Rodriguez@faa.gov*.

SUPPLEMENTARY INFORMATION:

Discussion

The European Union Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2019–0200R1, dated August 29, 2019 (''EASA AD 2019–0200R1'') (also referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Dassault Aviation Model MYSTERE–FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes, except those on which the Supplemental Structural Inspection Program (SSIP) (Dassault Service Bulletin 730) has been embodied into the airplane's maintenance program. You may examine the MCAI in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0868.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Dassault Aviation Model MYSTERE–FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes. The NPRM published in the **Federal Register** on November 18, 2019 (84 FR 63585). The NPRM was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The NPRM proposed to require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. The FAA is issuing this AD to address fatigue cracking, damage, and corrosion in principal structural elements, which could result in reduced structural integrity of the airplane. See the MCAI for additional background information.

Comments

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

Conclusion

The FAA reviewed the relevant data and determined that air safety and the public interest require adopting this final rule as proposed, except for minor editorial changes. The FAA has determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for addressing the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

Dassault Aviation has issued Chapter 5–40–00, Airworthiness Limitations, of the Dassault Falcon 20 Retrofit 731 Maintenance Manual, Revision 13, dated January 1, 2019. This service information describes procedures for airworthiness limitations for safe life limits and certification maintenance requirements. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

The FAA estimates that this AD affects 56 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD.

The FAA has determined that revising the existing maintenance or inspection program takes an average of 90 workhours per operator, although the FAA recognizes that this number may vary from operator to operator. In the past, the FAA has estimated that this action takes 1 work-hour per airplane. Since operators incorporate maintenance or inspection program changes for their affected fleet(s), the FAA has determined that a per-operator estimate is more accurate than a per-airplane estimate. Therefore, the FAA estimates the total cost per operator to be $7,650 (90 work-hours × $85 per work-hour).

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2020–03–19 Dassault Aviation: Amendment 39–19843; Docket No. FAA–2019–0868; Product Identifier 2019–NM–152–AD.

(a) Effective Date

This AD is effective April 2, 2020.

(b) Affected ADs

This AD affects AD 2010–26–05, Amendment 39–16544 (75 FR 79952, December 21, 2010) (''AD 2010–26–05'').

(c) Applicability

This AD applies to Dassault Aviation Model MYSTERE–FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes, certificated in any category, except those on which the Supplemental Structural Inspection Program (SSIP) (Dassault Service Bulletin 730) has been embodied into the airplane's existing maintenance or inspection program.

(d) Subject

Air Transport Association (ATA) of America Code 05, Time Limits/Maintenance Checks.

(e) Reason

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, damage, and corrosion in principal structural elements, which could result in reduced structural integrity of the airplane.

(f) Compliance

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

(g) Maintenance or Inspection Program Revision

Within 90 days after the effective date of this AD, revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in Chapter 5–40–00, Airworthiness Limitations, of the Dassault Falcon 20 Retrofit 731 Maintenance Manual, Revision 13, dated January 1, 2019. The initial compliance time for doing the tasks is at the time specified in Chapter 5–40–00, Airworthiness Limitations, of the Dassault Falcon 20 Retrofit 731 Maintenance Manual, Revision 13, dated January 1, 2019, or within 90 days after the effective date of this AD, whichever occurs later.

(h) No Alternative Actions or Intervals

After the existing maintenance or inspection program has been revised as required by paragraph (g) of this AD, no alternative actions (*e.g.,* inspections) or intervals may be used unless the actions or intervals are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (j)(1) of this AD.

(i) Terminating Action for Certain Requirements of AD 2010–26–05

Accomplishing the actions required by this AD terminates the requirements of paragraph (g)(1) of AD 2010–26–05 only for Model MYSTERE–FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes on which the SSIP has not been embodied into the airplane's existing maintenance or inspection program.

(j) Other FAA AD Provisions

The following provisions also apply to this AD:

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

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Section, Transport Standards Branch, FAA; or the European Union Aviation Safety Agency (EASA); or Dassault Aviation's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(k) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA AD 2019–0200R1, dated August 29, 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–2019–0868.

(2) For more information about this AD, contact Tom Rodriguez, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3226; email *Tom.Rodriguez@faa.gov.*

(l) 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) Chapter 5–40–00, Airworthiness Limitations, of the Dassault Falcon 20 Retrofit 731 Maintenance Manual, Revision 13, dated January 1, 2019.

(ii) [Reserved]

(3) For service information identified in this AD, contact Dassault Falcon Jet Corporation, Teterboro Airport, P.O. Box 2000, South Hackensack, NJ 07606; telephone 201–440–6700; internet *https://www.dassaultfalcon.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.html.*

Issued on February 12, 2020.

Gaetano A. Sciortino,

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

[FR Doc. 2020–03965 Filed 2–26–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0016; Product Identifier 2018–NM–168–AD; Amendment 39–19839; AD 2020–03–14]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Airbus SAS Model A350–941 and –1041 airplanes. This AD was prompted by reports of loss of retention of the regulator inlet filter retainer on certain crew oxygen cylinder assemblies. This AD requires an inspection of the crew oxygen cylinder assembly for any discrepancy and replacement of an affected crew oxygen cylinder assembly with a serviceable part, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective April 2, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of April 2, 2020.

ADDRESSES: For the material incorporated by reference (IBR) in this AD, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 89990 1000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this IBR material on the EASA website at *https://ad.easa.europa.eu.* You may view this IBR material at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0016.

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–2019–0016; 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: Kathleen Arrigotti, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3218; email *Kathleen.Arrigotti@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2019–0168, dated July 16, 2019 (''EASA AD 2019–0168'') (also referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for all Airbus SAS Model A350–941 and –1041 airplanes.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Airbus SAS Model A350–941 and –1041 airplanes. The NPRM published in the **Federal Register** on February 22, 2019 (84 FR 5611). The NPRM was prompted by reports of loss of retention of the regulator inlet filter retainer on certain crew oxygen cylinder assemblies. The NPRM proposed to require an operational check of the crew oxygen cylinder assembly, replacement of an affected assembly, and eventual replacement of all affected assemblies with redesigned serviceable assemblies.

The FAA issued a supplemental NPRM (SNPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Airbus SAS Model A350–941 and –1041 airplanes. The SNPRM published in the **Federal Register** on November 7, 2019 (84 FR 60003). The FAA issued the SNPRM to include additional part numbers that are affected by the unsafe condition.

The FAA is issuing this AD to address loss of retention of the regulator inlet filter retainer on certain crew oxygen cylinder assemblies. This condition could lead to particle ingestion into the regulator during ground handling, possibly resulting in ignition/fire during system ground operational testing. See the MCAI for additional background information.

Comments

The FAA gave the public the opportunity to participate in developing this final rule. The following presents the comments received on the SNPRM and the FAA's response to each comment.

Support for the SNPRM

The Air Line Pilots Association, International (ALPA) expressed support for the SNPRM.

Request To Exclude Requirement To Inspect On-Wing Oxygen Cylinders

Delta Air Lines (DAL) requested the removal of the proposed requirement (in the SNPRM) that on-wing oxygen cylinders be removed and inspected within 6 months of the effective date of the proposed AD. DAL noted that paragraph (1) of EASA AD 2019–0168 implies that all affected cylinders need to be inspected, including on-wing units, but paragraph 3.2 of Airbus Alert Operators Transmission A35P0110–17, Rev. 01, dated April 11, 2019, states that there is no consequence from the loose filter retainer condition on the crew oxygen system function during flight. DAL stated that it does not agree that on-wing oxygen cylinders need to be removed and inspected within the 6-month compliance time specified in the proposed AD if there are no consequences of failure during flight.

The FAA disagrees with the commenter's request. EASA has confirmed that the oxygen system may fail due to improper cylinder installation on-wing. Therefore, the FAA has determined the actions specified in this AD are necessary to address the identified unsafe condition.

Note that this AD does not require inspecting spare (off-wing) oxygen cylinders. Paragraph (3) of EASA AD 2019–0168 prevents the installation of the non-serviceable parts, which will address any spare oxygen cylinders. The FAA has added paragraph (h)(4) to this AD to clarify that the inspection required by this AD is only for on-wing oxygen cylinder assemblies.

Request To Correct Omission in Paragraph (h)(3)

DAL requested that paragraph (h)(3) of the proposed AD (in the SNPRM) be revised to include a reference to paragraph (1) of EASA AD 2019–0168. The commenter suggested that paragraph (h)(3) should state ''Replace the language in paragraphs (1 and 2) of EASA AD 2019–0168 . . . .'' The commenter did not provide justification for this request.

The FAA agrees with the commenter's request because in paragraph (h)(3) of the proposed AD (in the SNPRM) the reference to paragraph (1) of EASA AD 2019–0168 was inadvertently omitted.

We have revised paragraph (h)(3) of this AD to refer to paragraphs (1) and (2) of EASA AD 2019–0168.

Conclusion

The FAA reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this final rule with the changes described previously and minor editorial changes. The FAA has determined that these minor changes:

- Are consistent with the intent that was proposed in the SNPRM for addressing the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the SNPRM.

The FAA also determined that these changes will not increase the economic burden on any operator or increase the scope of this final rule.

Related IBR Material Under 1 CFR Part 51

EASA AD 2019–0168 describes procedures for an inspection of the crew oxygen cylinder assembly for any discrepancy (a loose part making a sound during agitation of the cylinder) and replacement of an affected crew oxygen cylinder. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

The FAA estimates that this AD affects 13 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
172 work-hours × $85 per hour = $14,620	$6,940	$21,560	$280,280

The FAA has received no definitive data that will enable the agency to provide cost estimates for the on-condition replacements specified in this AD.

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 our 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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

AD 2020–03–14 Airbus SAS: Amendment 39–19839; Docket No. FAA–2019–0016; Product Identifier 2018–NM–168–AD.

(a) Effective Date

This AD is effective April 2, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Airbus SAS Model A350–941 and –1041 airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 35, Oxygen.

(e) Reason

This AD was prompted by reports of loss of retention of the regulator inlet filter retainer on certain crew oxygen cylinder assemblies. The FAA is issuing this AD to address loss of retention of the regulator inlet filter retainer on certain crew oxygen cylinder assemblies. This condition could lead to particle ingestion into the regulator during ground handling, possibly resulting in ignition/fire during system ground operational testing.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2019–0168, dated July 16, 2019 (''EASA AD 2019–0168'').

(h) Exceptions to EASA AD 2019–0168

(1) Where EASA AD 2019–0168 refers to its effective date this AD requires using the effective date of this AD.

(2) The ''Remarks'' section of EASA AD 2019–0168 does not apply to this AD.

(3) Where paragraphs (1) and (2) of EASA AD 2019–0168 state ''the instructions of the

AOT,'' replace that language with ''paragraph 4.2.2., Inspection Requirements, of the AOT.''

(4) Where paragraph (1) of EASA AD 2019–0168 specifies to ''inspect each affected part,'' this AD requires a one-time inspection of any ''affected part'' that is installed on-wing.

(i) No Reporting Required

Although the service information referenced in EASA AD 2019–0168 specifies to submit certain information to the manufacturer, this AD does not include that requirement.

(j) No Return of Parts Required

Although the service information referenced in EASA AD 2019–0168 specifies to return affected parts to the manufacturer, this AD does not include that requirement.

(k) Other FAA AD Provisions

The following provisions also apply to this AD:

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

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

(3) *Required for Compliance (RC):* For any service information referenced in EASA AD 2019–0168 that contains RC procedures and tests: Except as required by paragraph (k)(2) of this AD, RC procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(l) Related Information

For more information about this AD, contact Kathleen Arrigotti, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206 231 3218; email *Kathleen.Arrigotti@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.

(i) European Union Aviation Safety Agency (EASA) AD 2019–0168, dated July 16, 2019.

(ii) [Reserved]

(3) For information about EASA AD 2019–0168, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 89990 6017; email *ADs@easa.europa.eu;* Internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.*

(4) You may view this material at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0016.

(5) You may view this material 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 7, 2020.

Gaetano A. Sciortino,

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

[FR Doc. 2020–03968 Filed 2–26–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0877; Product Identifier 2019–NM–146–AD; Amendment 39–19847; AD 2020–03–23]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc., Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Bombardier, Inc., Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes. This AD was prompted by a report that a fouling condition was found between the generator power cables and the support brackets of the auxiliary-aft fuel tank during production. This AD requires a visual inspection of the generator power cables for damage, installation of protective conduits and edging grommets, and applicable corrective actions. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective April 2, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of April 2, 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 *http://www.bombardier.com.* You may view this service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0877.

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–2019–0877; 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: Thomas Niczky, Aerospace Engineer, Avionics and Electrical Systems Services Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7347; fax 516–794–5531; email *9-avs-nyaco-cos@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian AD CF–2019–22, dated May 27, 2019

(''Canadian AD CF–2019–22'') (also referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Bombardier, Inc., Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes. You may examine the MCAI in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0877.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Bombardier, Inc., Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes. The NPRM published in the **Federal Register** on December 2, 2019 (84 FR 65935). The NPRM was prompted by a report that a fouling condition was found between the generator power cables and the support brackets of the auxiliary-aft fuel tank during production. The NPRM proposed to require a visual inspection of the generator power cables for damage, installation of protective conduits and edging grommets, and applicable corrective actions. The FAA is issuing this AD to address damage to the insulation sleeve of the generator power cables that can potentially cause a short circuit, arcing, and a malfunction of one or both main generators. See the MCAI for additional background information.

Comments

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

Conclusion

The FAA reviewed the relevant data and determined that air safety and the public interest require adopting this final rule as proposed, except for minor editorial changes. The FAA has determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for addressing the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

Bombardier has issued Service Bulletin 601R–24–131, dated June 28, 2012. This service information describes procedures for visual inspection of the generator power cables for damage, installation of protective insulation and edging grommets, and applicable corrective actions. Corrective actions include repair. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

The FAA estimates that this AD affects 9 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
22 work-hours × $85 per hour = $1,870	$524	$2,394	$21,546

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

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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):

2020–03–23 Bombardier, Inc.: Amendment 39–19847; Docket No. FAA–2019–0877; Product Identifier 2019–NM–146–AD.

(a) Effective Date

This AD is effective April 2, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc., Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, certificated in any category, as identified in Bombardier Service Bulletin 601R–24–131, dated June 28, 2012.

(d) Subject

Air Transport Association (ATA) of America Code 24, Electrical power.

(e) Reason

This AD was prompted by a report that a fouling condition was found between the generator power cables and the support brackets of the auxiliary-aft fuel tank during production. The FAA is issuing this AD to address damage to the insulation sleeve of the generator power cables that can potentially cause a short circuit, arcing, and a malfunction of one or both main generators.

(f) Compliance

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

(g) Required Actions

Within 18 months after the effective date of this AD, visually inspect the generator power cables and wire strands for damage, install protective conduits and edging grommets, and do all applicable corrective actions, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 601R–24–131, dated June 28, 2012. Do all applicable corrective actions before further flight.

(h) 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.

(i) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) Canadian AD CF–2019–22, dated May 27, 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–2019–0877.

(2) For more information about this AD, contact Thomas Niczky, Aerospace Engineer, Avionics and Electrical Systems Services Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7347; fax 516–794–5531; email *9-avs-nyaco-cos@faa.gov.*

(j) 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 601R–24–131, dated June 28, 2012.

(ii) [Reserved]

(3) 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 *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.html.*

Issued on February 14, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–03934 Filed 2–26–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0526; Product Identifier 2019–NM–023–AD; Amendment 39–19841; AD 2020–03–17]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc., Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA superseding Airworthiness Directive (AD) 2015–24–04, which applied to certain Bombardier, Inc., Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, Model CL–600–2C10 (Regional Jet Series 700, 701, & 702) airplanes, Model CL–600–2D15 (Regional Jet Series 705) airplanes, Model CL–600–2D24 (Regional Jet Series 900) airplanes, and Model CL–600–2E25 (Regional Jet Series 1000) airplanes. AD 2015–24–04 required repetitive inspections of the cage assembly for damaged or detached window louver panel assemblies (WLPAs) and blowout panels (BOPs), and corrective actions if necessary. This AD requires one-time inspections of the WLPAs and BOPs, corrective actions if necessary, and a revision of the existing maintenance or inspection program, as applicable, to incorporate new airworthiness limitations, which would terminate the inspection requirement. This AD was prompted by a determination that new airworthiness limitations, as well as additional actions, are necessary to address the unsafe condition. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective April 2, 2020.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of April 2, 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 *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–2019–0526.

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–2019–0526; 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: 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–2015–28R2, dated February 4, 2019 (referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Bombardier, Inc., Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, Model CL–600–2C10 (Regional Jet Series 700, 701, & 702) airplanes, Model CL–600–2D15 (Regional Jet Series 705) airplanes, Model CL–600–2D24 (Regional Jet Series 900) airplanes, and Model CL–600–2E25 (Regional Jet Series 1000) airplanes. You may examine the MCAI in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0526.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2015–24–04, Amendment 39–18336 (80 FR 74673, November 30, 2015) (''AD 2015–24–04''). AD 2015–24–04 applied to certain Bombardier, Inc., Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, Model CL–600–2C10 (Regional Jet Series 700, 701, & 702) airplanes, Model CL–600–2D15 (Regional Jet Series 705) airplanes, Model CL–600–2D24 (Regional Jet Series 900) airplanes, and Model CL–600–2E25 (Regional Jet Series 1000) airplanes. The NPRM published in the **Federal Register** on September 20, 2019 (84 FR 49484). The NPRM was prompted by a determination that new airworthiness limitations, as well as additional actions, are necessary to address the unsafe condition. The NPRM proposed to require one-time inspections of the WLPAs and BOPs, corrective actions if necessary, and a revision of the existing maintenance or inspection program, as applicable, to incorporate new airworthiness limitations, which would terminate the inspection requirement. The FAA is issuing this AD to address damaged or detached WLPAs and BOPs, which could delay smoke detection in the cargo compartment in the event of a fire and result in an uncontrolled fire in the cargo compartment. See the MCAI for additional background information.

Action Since the NPRM Was Issued

Since the NPRM was issued, the FAA has determined that the applicability identified in paragraph (c) of this AD needs to be revised to better identify the affected airplanes. Therefore, the FAA has revised paragraph (c) of this AD to add that affected airplanes have a Class C cargo compartment configuration, which matches the applicability in the MCAI. This revision does not change the number of affected airplanes of U.S. registry.

Comments

The FAA gave the public the opportunity to participate in developing this final rule. The following presents the comments received on the NPRM and the FAA's response to the comments.

Support for the NPRM

The Air Line Pilots Association, International indicated its support for the NPRM.

Request for Clarification of Global Alternative Method of Compliance (AMOC)

Air Wisconsin Airlines requested clarification that the content and intent of Global AMOC 2015–24–04, Log #19–02, dated February 13, 2019, is acceptable for the repetitive inspections specified in the proposed AD. Air Wisconsin stated that the section of the global AMOC which states, in part, ''Operators shall perform the initial inspection and phase-in schedule per SB 601R–25–201 and SB 670BA–25–100, as mandated by AD and continue with the instructions as per published airplane maintenance manual (AMM) tasks . . .'' which are ''. . . AMM Task 25–50–00–220–801 and AMM Task 25–50–00–220–803, in lieu of the accomplishment instructions specified in SB 601R–25–201 and SB 670BA–25–100.'' Air Wisconsin concluded that paragraph (j) of the proposed AD does not indicate any previously approved AMOCs are acceptable, or specify the method of compliance for repetitive inspections, although implied through the required implementation of Certification Maintenance Requirements (CMR) Task C26–25–115–01 and Maintenance Review Manual (MRM) Task 255000–208.

The FAA acknowledges the commenter's concern and provides the following clarification. Global AMOC 2015–24–04, Log #19–02, dated February 13, 2019, was issued specifically for the actions required by AD 2015–24–04, which is superseded by this final rule. This AD already incorporates CMR Task C26–25–115–01, as specified in Bombardier CL–600–2B19 Temporary Revision (TR) 2A–69, dated August 30, 2018 (required by paragraph (g)(2) of this AD), and MRM Task 255000–208, as specified in CRJ Series Regional Jet (Bombardier) TR MRB–0079, dated May 29, 2017 (required by paragraph (h)(2) of this AD). Accomplishing the actions required by paragraphs (g)(2) and (h)(2) of this AD terminates the repetitive inspections specified in paragraphs (g)(1) and (h)(1) of this AD, which require the inspections be done in accordance with Bombardier Service Bulletins 601R–25–201 and 670BA–25–100, both Revision C, both dated May 11, 2017. Therefore, this AD has not been changed in this regard.

Conclusion

The FAA reviewed the relevant data, considered the comment received, and determined that air safety and the public interest require adopting this final rule with the change described previously and minor editorial changes. The FAA has determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for addressing the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

The FAA also determined that these changes will not increase the economic burden on any operator or increase the scope of this final rule.

Related Service Information Under 1 CFR Part 51

Bombardier has issued the following service information:

- Bombardier Service Bulletin 601R–25–201, Revision C, dated May 11, 2017.
- Bombardier Service Bulletin 670BA–25–100, Revision C, dated May 11, 2017.

This service information describes procedures for repetitive detailed inspections for damage of the cage assembly, WLPAs, and BOPs, and repair or replacement of damaged parts. These documents are unique since they apply to different airplane models.

Bombardier has also issued the following service information:

- Bombardier CL–600–2B19 Temporary Revision (TR) 2A–69, dated August 30, 2018.
- CRJ Series Regional Jet (Bombardier) TR MRB–0079, dated May 29, 2017.

This service information describes an airworthiness limitation task for a detailed inspection of the aft cargo compartment WLPAs and BOPs. These TRs are unique since they apply to different airplane models.

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

Costs of Compliance

The FAA estimates that this AD affects 1,008 airplanes of U.S. registry.

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

ESTIMATED COSTS FOR REQUIRED ACTIONS *

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Retained Inspections from AD 2015–24–04 ...	2 work-hours × $85 per hour = $170	$0	$170	$171,360

*Table does not include estimated costs for revising the maintenance or inspection program.

The FAA has determined that revising the maintenance or inspection program takes an average of 90 work-hours per operator, although the agency recognizes that this number may vary from operator to operator. In the past, the FAA has estimated that this action takes 1 work-hour per airplane. Since operators incorporate maintenance or inspection program changes for their affected fleet(s), the FAA has determined that a per-operator estimate is more accurate than a per-airplane estimate. Therefore, the FAA estimates the total cost per operator to be $7,650 (90 work-hours × $85 per work-hour).

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

Authority for This Rulemaking

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

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

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 above, I certify that this AD:

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2015–24–04, Amendment 39–18336 (80 FR 74673, November 30, 2015), and adding the following new AD:

2020–03–17 Bombardier, Inc.: Amendment 39–19841; Docket No. FAA–2019–0526; Product Identifier 2019–NM–023–AD.

(a) Effective Date

This AD is effective April 2, 2020.

(b) Affected ADs

This AD replaces AD 2015–24–04, Amendment 39–18336 (80 FR 74673, November 30, 2015) (''AD 2015–24–04'').

(c) Applicability

This AD applies to the Bombardier, Inc., airplanes, certificated in any category, identified in paragraphs (c)(1) through (4) of this AD, with a Class C cargo compartment configuration.

(1) Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, serial numbers 7003 and subsequent.

(2) Model CL–600–2C10 (Regional Jet Series 700, 701, & 702) airplanes, serial numbers 10002 and subsequent.

(3) Model CL–600–2D15 (Regional Jet Series 705) airplanes and Model CL–600–2D24 (Regional Jet Series 900) airplanes, serial numbers 15001 and subsequent.

(4) Model CL–600–2E25 (Regional Jet Series 1000) airplanes, serial numbers 19001 and subsequent.

(d) Subject

Air Transport Association (ATA) of America Code 25, Equipment/Furnishings.

(e) Reason

This AD was prompted by reports of damaged decompression window louver panel assemblies (WLPAs), and detached blowout panels (BOPs). The FAA is issuing this AD to address damaged or detached WLPAs and BOPs. A detached WLPA or BOP could delay smoke detection in the cargo compartment in the event of a fire, and could result in an uncontrolled fire in the cargo compartment.

(f) Compliance

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

(g) Inspections, Corrective Action, and Terminating Action for Model CL–600–2B19 Airplanes

(1) At the applicable time specified in paragraph (g)(1)(i) or (ii) of this AD: Do detailed inspections for damaged or detached WLPAs, and do all applicable corrective actions before further flight, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 601R–25–201, Revision C, dated May 11, 2017.

(i) For airplanes with the accumulation of 780 total flight hours or more as of December 15, 2015 (the effective date of AD 2015–24–04): Inspect within 100 flight hours after December 15, 2015.

(ii) For airplanes that have accumulated less than 780 total flight hours as of December 15, 2015 (the effective date of AD 2015–24–04): Inspect before accumulating 880 total flight hours after December 15, 2015.

(2) Within 30 days after the effective date of this AD, revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in Task C26–25–115–01, ''Detailed Inspection of the Window Louver Panel Assembly (WLPA) in Aft Cabin/Cargo Compartment Bulkhead,'' provided in Bombardier CL–600–2B19

Temporary Revision (TR) 2A–69, dated August 30, 2018 (which is a TR to Appendix A—Certification Maintenance Requirements (CMR), of Part 2 of the Bombardier CL–600–2B19 Maintenance Requirements Manual (MRM), CSP–A–053). The initial compliance time for accomplishing the task is within 880 flight hours from the last inspection performed as specified in Bombardier Service Bulletin 601R–25–201, Revision C, dated May 11, 2017. Accomplishing the actions required by this paragraph terminates the inspection requirement in paragraph (g)(1) of this AD.

(h) Inspections, Corrective Action, and Terminating Action for Model CL–600–2C10, CL–600–2D15, CL–600–2D24, and CL–600–2E25 Airplanes

(1) At the applicable time specified in paragraph (h)(1)(i) or (ii) of this AD: Do detailed inspections for damaged or detached WLPAs and BOPs, and do all applicable corrective actions before further flight, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 670BA–25–100, Revision C, dated May 11, 2017.

(i) For airplanes with the accumulation of 780 total flight hours or more as of December 15, 2015 (the effective date of AD 2015–24–04): Inspect within 100 flight hours after December 15, 2015.

(ii) For airplanes that have accumulated less than 780 total flight hours as of December 15, 2015 (the effective date of AD 2015–24–04): Inspect before accumulating 880 total flight hours after December 15, 2015.

(2) Within 30 days after the effective date of this AD, revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in Task 255000–208, ''Detailed Inspection of the Aft Cargo Compartment Window-Louver Panel Assembly and Blowout Panels Along with Their Respective Cage Assemblies,'' as specified in CRJ Series Regional Jet (Bombardier) TR MRB–0079, dated May 29, 2017 (which is a TR to Part 1 of the Bombardier CRJ Series Regional Jet MRM, CSP B–053). The initial compliance time for accomplishing the task is within 880 flight hours from the last inspection performed in accordance with Bombardier Service Bulletin 670BA–25–100, Revision C, dated May 11, 2017. Accomplishing the actions required by this paragraph terminates the inspection requirement in paragraph (h)(1) of this AD.

(i) Credit for Previous Actions

(1) This paragraph provides credit for actions required by paragraph (g)(1) of this AD, if those actions were performed before the effective date of this AD using the service information identified in paragraphs (i)(1)(i) through (iii) of this AD.

(i) Bombardier Service Bulletin 601R–25–201, dated July 21, 2015, which was incorporated by reference in AD 2015–24–04, Amendment 39–18336 (80 FR 74673, November 30, 2015).

(ii) Bombardier Service Bulletin 601R–25–201, Revision A, dated October 21, 2015, which is not incorporated by reference in this AD.

(iii) Bombardier Service Bulletin 601R–25–201, Revision B, dated February 2, 2016, which is not incorporated by reference in this AD.

(2) This paragraph provides credit for actions required by paragraph (h)(1) of this AD, if those actions were performed before the effective date of this AD using the service information identified in paragraphs (i)(2)(i) through (iii) of this AD.

(i) Bombardier Service Bulletin 670BA–25–100, dated July 21, 2015, which was incorporated by reference in AD 2015–24–04, Amendment 39–18336 (80 FR 74673, November 30, 2015).

(ii) Bombardier Service Bulletin 670BA–25–100, Revision A, dated October 21, 2015, which is not incorporated by reference in this AD.

(iii) Bombardier Service Bulletin 670BA–25–100, Revision B, dated February 2, 2016, which is not incorporated by reference in this AD.

(j) 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.

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

(k) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) Canadian AD CF–2015–28R2, dated February 4, 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–2019–0526.

(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 (l)(3) and (4) of this AD.

(l) 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 601R–25–201, Revision C, dated May 11, 2017.

(ii) Bombardier Service Bulletin 670BA–25–100, Revision C, dated May 11, 2017.

(iii) Bombardier CL–600–2B19 Temporary Revision 2A–69, dated August 30, 2018.

(iv) CRJ Series Regional Jet (Bombardier) Temporary Revision MRB–0079, dated May 29, 2017.

(3) 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 *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.html.*

Issued on February 12, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–03967 Filed 2–26–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0872; Product Identifier 2019–NM–156–AD; Amendment 39–19848; AD 2020–03–24]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Dassault Aviation Model MYSTERE–FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes. This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. This AD requires revising the existing maintenance or inspection program, as applicable, to incorporate

new or more restrictive airworthiness limitations. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective April 2, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of April 2, 2020.

ADDRESSES: For service information identified in this final rule, contact Dassault Falcon Jet Corporation, Teterboro Airport, P.O. Box 2000, South Hackensack, NJ 07606; telephone 201–440–6700; internet *https://www.dassaultfalcon.com.* You may view this service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0872.

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–2019–0872; 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: Tom Rodriguez, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3226; email *Tom.Rodriguez@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The European Union Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2019–0201, dated August 20, 2019 (''EASA AD 2019–0201'') (also referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Dassault Aviation Model MYSTERE–FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes, on which the Supplemental Structural Inspection Program (SSIP) (Dassault Service Bulletin 730) has been embodied into the airplane's maintenance program. You may examine the MCAI in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0872.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Dassault Aviation Model MYSTERE–FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes. The NPRM published in the **Federal Register** on November 19, 2019 (84 FR 63822). The NPRM was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The NPRM proposed to require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. The FAA is issuing this AD to address fatigue cracking, damage, and corrosion in principal structural elements, which could result in reduced structural integrity of the airplane. See the MCAI for additional background information.

Comments

The FAA gave the public the opportunity to participate in developing this final rule. The FAA has considered the comment received. An anonymous commenter indicated support for the NPRM.

Conclusion

The FAA reviewed the relevant data, considered the comment received, and determined that air safety and the public interest require adopting this final rule as proposed, except for minor editorial changes. The FAA has determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for addressing the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

Dassault Aviation has issued Chapter 5–40–01, Airworthiness Limitations, of the Dassault Falcon 20 Retrofit 731 Maintenance Manual, Revision 10, dated January 1, 2019. This service information describes airworthiness limitations for safe life limits and certification maintenance requirements. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

The FAA estimates that this AD affects 57 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD.

The FAA has determined that revising the existing maintenance or inspection program takes an average of 90 work-hours per operator, although the FAA recognizes that this number may vary from operator to operator. In the past, the FAA has estimated that this action takes 1 work-hour per airplane. Since operators incorporate maintenance or inspection program changes for their affected fleet(s), the FAA has determined that a per-operator estimate is more accurate than a per-airplane estimate. Therefore, the FAA estimates the total cost per operator to be $7,650 (90 work-hours × $85 per work-hour).

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2020–03–24 Dassault Aviation: Amendment 39–19848; Docket No. FAA–2019–0872; Product Identifier 2019–NM–156–AD.

(a) Effective Date

This AD is effective April 2, 2020.

(b) Affected ADs

This AD affects AD 2010–26–05, Amendment 39–16544 (75 FR 79952, December 21, 2010) (''AD 2010–26–05'').

(c) Applicability

This AD applies to Dassault Aviation Model MYSTERE–FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes, certificated in any category, on which the Supplemental Structural Inspection Program (SSIP) (Dassault Service Bulletin 730) has been embodied into the airplane's existing maintenance or inspection program.

(d) Subject

Air Transport Association (ATA) of America Code 05, Time Limits/Maintenance Checks.

(e) Reason

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, damage, and corrosion in principal structural elements, which could result in reduced structural integrity of the airplane.

(f) Compliance

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

(g) Maintenance or Inspection Program Revision

Within 90 days after the effective date of this AD, revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in Chapter 5–40–01, Airworthiness Limitations, of the Dassault Falcon 20 Retrofit 731 Maintenance Manual, Revision 10, dated January 1, 2019. The initial compliance time for doing the tasks is at the time specified in Chapter 5–40–01, Airworthiness Limitations, of the Dassault Falcon 20 Retrofit 731 Maintenance Manual, Revision 10, dated January 1, 2019, or within 90 days after the effective date of this AD, whichever occurs later.

(h) No Alternative Actions or Intervals

After the existing maintenance or inspection program has been revised as required by paragraph (g) of this AD, no alternative actions (*e.g.,* inspections) or intervals may be used unless the actions or intervals are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (j)(1) of this AD.

(i) Terminating Action for Certain Requirements of AD 2010–26–05

Accomplishing the actions required by this AD terminates the requirements of paragraph (g)(1) of AD 2010–26–05 only for Model MYSTERE–FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes on which the SSIP has been embodied into the airplane's existing maintenance or inspection program.

(j) Other FAA AD Provisions

The following provisions also apply to this AD:

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

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Section, Transport Standards Branch, FAA; or the European Union Aviation Safety Agency (EASA); or Dassault Aviation's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(k) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA AD 2019–0201, dated August 20, 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–2019–0872.

(2) For more information about this AD, contact Tom Rodriguez, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3226; email *Tom.Rodriguez@faa.gov*.

(l) 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) Chapter 5–40–01, Airworthiness Limitations, of the Dassault Falcon 20 Retrofit 731 Maintenance Manual, Revision 10, dated January 1, 2019.

(ii) [Reserved]

(3) For service information identified in this AD, contact Tom Rodriguez, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3226.

(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.html*.

Issued on February 14, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–03936 Filed 2–26–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0871; Product Identifier 2019–NM–139–AD; Amendment 39–19846; AD 2020–03–22]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain The Boeing Company Model 787–8 airplanes. This AD was prompted by a report of fatigue cracking at certain frame tie rod locations of the wing. This AD requires repetitive inspections for cracking of the left- and right-side frame tie rod assemblies and stub beam upper chords, and applicable on-condition actions. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective April 2, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publications listed in this AD as of April 2, 2020.

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; telephone 562–797–1717; internet *https://www.myboeingfleet.com*. You may view this service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0871.

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–2019–0871; 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: Greg Rutar, Aerospace Engineer, Airframe Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3529; email: *greg.rutar@faa.gov*.

SUPPLEMENTARY INFORMATION:

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain The Boeing Company Model 787–8 airplanes. The NPRM published in the **Federal Register** on November 19, 2019 (84 FR 63825). The NPRM was prompted by a report of fatigue cracking at certain frame tie rod locations of the wing. The NPRM proposed to require repetitive inspections for cracking of the left- and right-side frame tie rod assemblies and stub beam upper chords, and applicable on-condition actions.

The FAA is issuing this AD to address cracking in the frame tie rod assemblies and consequent failure of a principal structural element to sustain limit load, which could adversely affect the structural integrity of the airplane and result in possible decompression of the airplane.

Comments

The FAA gave the public the opportunity to participate in developing this final rule. The FAA has considered the comment received. Boeing indicated its support for the NPRM.

Conclusion

The FAA reviewed the relevant data, considered the comment received, and determined that air safety and the public interest require adopting this final rule as proposed, except for minor editorial changes. The FAA has determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for addressing the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Boeing Alert Requirements Bulletin B787–81205–SB570041–00 RB, Issue 001, dated March 7, 2019. The service information describes procedures for repetitive high frequency eddy current (HFEC) inspections for cracking of the left- and right-side frame tie rod assemblies, repetitive ultrasonic (UT) inspections for cracking of the left- and right-side stub beam upper chords, and applicable on-condition actions. On-condition actions include repair. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

The FAA estimates that this AD affects 55 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspections	19 work-hours × $85 per hour = $1,615 per inspection cycle.	$0	$1,615 per inspection cycle.	$88,825 per inspection cycle.

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

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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):

2020–03–22 The Boeing Company: Amendment 39–19846 ; Docket No. FAA–2019–0871; Product Identifier 2019–NM–139–AD.

(a) Effective Date

This AD is effective April 2, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 787–8 airplanes, certificated in any category, as identified in Boeing Alert Requirements Bulletin B787–81205–SB570041–00 RB, Issue 001, dated March 7, 2019.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by a report of fatigue cracking at certain frame tie rod locations of the wing. The FAA is issuing this AD to address cracking in the frame tie rod assemblies and consequent failure of a principal structural element to sustain limit load, which could adversely affect the structural integrity of the airplane and result in possible decompression of the airplane.

(f) Compliance

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

(g) Required Actions

Except as specified by paragraph (h) of this AD: At the applicable times specified in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin B787–81205–SB570041–00 RB, Issue 001, dated March 7, 2019, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Alert Requirements Bulletin B787–81205–SB570041–00 RB, Issue 001, dated March 7, 2019.

Note 1 to paragraph (g) of this AD: Guidance for accomplishing the actions required by this AD can be found in Boeing Alert Service Bulletin B787–81205–SB570041–00, Issue 001, dated March 7, 2019, which is referred to in Boeing Alert Requirements Bulletin B787–81205–SB570041–00 RB, Issue 001, dated March 7, 2019.

(h) Exceptions to Service Information Specifications

(1) For purposes of determining compliance with the requirements of this AD: Where Boeing Alert Requirements Bulletin B787–81205–SB570041–00 RB, Issue 001, dated March 7, 2019, uses the phrase ''the issue 001 date of Requirements Bulletin B787–81205–SB570041–00 RB,'' this AD requires using the effective date of this AD.

(2) Where Boeing Alert Requirements Bulletin B787–81205–SB570041–00 RB, Issue 001, dated March 7, 2019, specifies contacting Boeing for repair instructions: This AD requires doing the repair and applicable on-condition actions before further flight using a method approved in accordance with the procedures specified in paragraph (i) of this AD.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, 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) 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

For more information about this AD, contact Greg Rutar, Aerospace Engineer, Airframe Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3529; email: *greg.rutar@faa.gov*.

(k) Material Incorporated by Reference

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

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

(i) Boeing Alert Requirements Bulletin B787–81205–SB570041–00 RB, Issue 001, dated March 7, 2019.

(ii) [Reserved]

(3) 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*..

(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.html*.

Issued on February 14, 2020.

Gaetano A. Sciortino,

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

[FR Doc. 2020–03964 Filed 2–26–20; 8:45 am]

BILLING CODE 4910–13–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1601

[3046–AB14]

2019 Adjustment of the Penalty for Violation of Notice Posting Requirements; Correction

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final rule; correction and correcting amendment.

SUMMARY: The EEOC is correcting the RIN Number of its item titled ''2019 Adjustment of the Penalty for Violation of Notice Posting Requirements,'' and adding to the authority citation to identify the statutory authority for the EEOC to make adjustments to the penalty for violating notice posting requirements.

DATES: Effective February 27, 2020.

FOR FURTHER INFORMATION CONTACT: Raymond L. Peeler, Assistant Legal Counsel, at (202) 663–4537 or John Gwynn, Attorney-Advisor, at (202) 663–4177. Requests for this notice in an alternative format should be made to the Office of Communications and Legislative Affairs at (202) 663–4191 (voice), 1–800–669–6820 (TTY), 1–844–234–5122 (ALS Video Phone), or the Publications Information Center at 1–800–669–3362 (toll free).

SUPPLEMENTARY INFORMATION: On March 21, 2019, the EEOC's 2019 Adjustment of the Penalty for Violation of Notice Posting Requirements was published in the **Federal Register**. (84 FR 10410). The rule provided notice of an annual inflationary adjustment to the penalty for covered employers that fail to post a notice of employee rights under federal employment anti-discrimination laws as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (FCPIA), as amended. This publication also inadvertently repeated an old regulatory identification number (RIN) from a past year's penalty adjustment. The correct RIN number for this item is 3046–AB14.

As discussed in March 21 publication's preamble, the FCPIA, as amended by the Debt Collection Improvement Act of 1996 and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, requires federal agencies, including the EEOC, to issue regulations adjusting for inflation the maximum civil penalty that may be imposed pursuant to its statutes. This publication also adds the authority for making these adjustments to the statutory authority for 29 CFR part 1601.

Regulatory Procedures

The Commission finds that public notice-and-comment on this rule is unnecessary, because the revision makes no substantive change; it merely corrects the RIN identifier to ease any effort by the public to locate this regulation on regulations.gov and to distinguish the 2019 penalty adjustment from those made in other years. It additionally adds to the list of authorities for the regulation to increase the transparency of all statutes that the EEOC relies upon in issuing its procedural regulations at 29 CFR part 1601. The correction is therefore exempt from the notice-and-comment requirements of 5 U.S.C. 553(b) under 5 U.S.C. 553(b)(B).

This technical correction also is not ''significant'' for purposes of Executive Order 12866, as reaffirmed by E.O. 13563, and therefore is not subject to review by Office of Management and Budget.

Regulatory Analysis

Since this technical correction contains no substantive changes to the law, the EEOC certifies that it contains no new information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35), it requires no formal cost-benefit analysis pursuant to E.O. 12866, it creates no significant impact on small business entities subject to review under the Regulatory Flexibility Act, and it imposes no new economic burden requiring further analysis under the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

This Correction concerns a penalty adjustment that is a ''rule'' for purposes of the Congressional Review Act, but not a major rule. As a result, this Correction, with the original penalty adjustment appended, was provided to Congress and the General Accountability Office pursuant to the requirements of 5 U.S.C. 801 shortly before publication of this correction.

List of Subjects in 29 CFR Part 1601

Administrative practice and procedure.

Accordingly, 29 CFR part 1601 is corrected by making the following correcting amendment:

PART 1601—PROCEDURAL REGULATIONS

■ 1. The authority citation for part 1601 is revised to read as follows:

Authority: 29 U.S.C. 621–634; 28 U.S.C. 2461 note; 5 U.S.C. 301; Pub. L. 99–502; 100 Stat. 3341; Secretary's Order No. 10–68; Secretary's Order No. 11–68; sec. 2 Reorg. Plan No. 1 of 1978, 43 FR 19807; Executive Order 12067, 43 FR 28967.

Dated: January 28, 2020.

For the Commission.

Janet Dhillon,

Chair.

[FR Doc. 2020–02144 Filed 2–26–20; 8:45 am]

BILLING CODE 6570–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2018–0532]

RIN 1625–ZA38

Navigation and Navigable Waters, and Shipping; Technical, Organizational, and Conforming Amendments for U.S. Coast Guard Field District 1; Correction

AGENCY: Coast Guard, DHS.

ACTION: Final rule; correction.

SUMMARY: The Coast Guard is correcting a final rule that appeared in the **Federal Register** on January 31, 2020. The final rule announced technical changes to local regulated navigation areas, special local regulations, safety zones and security zones within District 1 of the U.S. Coast Guard. The rule has an effective date of March 2, 2020. This correction fixes an incorrect table entry number in the amendatory instructions of the final rule for an entry related to safety zones, fireworks displays, air shows and swim events in the Captain of the Port Long Island Sound Zone.

DATES: This correction is effective on March 2, 2020.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Craig D. Lapiejko, Coast Guard; telephone (617) 223–8351, email *Craig.D.Lapiejko@uscg.mil.*

SUPPLEMENTARY INFORMATION:

Correction

In FR Doc. 2020–01294 appearing on page 5570 in the **Federal Register** of Friday, January 31, 2020, the following correction is made:

§ 165.151 [Corrected]

■ On page 5570, in the first column, in part 165, in amendment 6.c., ''7.48'' is corrected to read ''7.49''.

Dated: February 19, 2019.

M.W. Mumbach,

Chief, Office of Regulations and Administrative Law, U.S. Coast Guard.

[FR Doc. 2020–03586 Filed 2–26–20; 8:45 am]

BILLING CODE 9110–04–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. 2020–3]

DMCA Designated Agent Post Office Box Waiver Request Process

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: This final rule makes non-substantive technical amendments to the U.S. Copyright Office's regulations governing the submission of designated agent and service provider information to the Office pursuant to the Digital Millennium Copyright Act (''DMCA'').

DATES: Effective February 27, 2020.

FOR FURTHER INFORMATION CONTACT: Regan A. Smith, General Counsel and Associate Register of Copyrights, by email at *regans@copyright.gov,* or Mark Gray, Attorney-Advisor, by email at *mgray@copyright.gov.* Each can be contacted by telephone by calling (202) 707–8350.

SUPPLEMENTARY INFORMATION: Effective December 1, 2016, the Copyright Office adopted regulations governing the submission of designated agent and service provider information to the Office pursuant to the Digital Millennium Copyright Act (''DMCA'') in connection with the implementation of an electronic registration system launched the same day.[1] Under that rule, service providers must provide their physical street address and may not provide a post office box absent ''exceptional circumstances (*e.g.,* where there is a demonstrable threat to an individual's personal safety or security, such that it may be dangerous to publicly publish a street address where such individual can be located).'' [2] Service providers seeking to provide a post office box as their address are required to first obtain a waiver of the street address requirement from the Copyright Office. To request a waiver, a service provider ''must send a signed letter, addressed to the [Office],'' that contains, among other things, ''a detailed statement providing the reasons supporting the request, with explanation of the specific threat(s) to an individual's personal safety or security.'' [3] Upon receipt, the Office evaluates these requests to determine whether the circumstances warrant a waiver.

Based on its experience administering the current waiver system, the Office has determined that it is unnecessary to require that waiver requests be sent by mail, and that also permitting electronic requests to be sent via email would be beneficial both to service providers and the Office. Moreover, it would further the goals of the designation regulations. Because waiver requests must be approved in advanced of being able to designate an agent, the amount of time that passes between the service provider submitting its request and the Office receiving and acting on the request can impact the service provider's safe harbor protection under 17 U.S.C. 512. Thus, it is in everyone's best interest that the Office receive these requests as quickly as possible. Not only is email a much faster and more efficient method of delivery than ordinary mail, but because of the Office's physical location within the U.S. Capitol Complex, all mail, including waiver requests, undergo mandatory off-site security screening and decontamination before arriving at the Offices, which can further delay delivery beyond what a service provider might normally anticipate.

Because this rule only adds an additional, optional method by which a request for a waiver may be submitted to the Office, this final rule is a non-substantive, procedural change not ''alter[ing] the rights or interests of parties,'' and thus is not subject to the notice and comment requirements of the Administrative Procedure Act.[4] Furthermore, the Office finds good cause that permitting notice and comment would be ''contrary to the public interest'' in this instance.[5] Because this final rule will make it even easier and faster for service providers to seek waivers, it is in the public's best interest that it take effect without delay. For these same reasons, the Office is making this final rule effective immediately upon publication in the **Federal Register**.[6]

List of Subjects in 37 CFR Part 201

Copyright, General provisions.

Final Regulations

For the reasons set forth in the preamble, the Copyright Office amends 37 CFR part 201 as follows:

PART 201—GENERAL PROVISIONS

■ 1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

■ 2. Amend § 201.38 as follows:

■ a. Revise paragraph (b)(1)(ii) to read as follows:

§ 201.38 Designation of agent to receive notification of claimed infringement.

* * * * *

(b) * * *

(1) * * *

(ii) A post office box may not be substituted for the street address for the service provider, except in exceptional circumstances (*e.g.,* where there is a demonstrable threat to an individual's personal safety or security, such that it may be dangerous to publicly publish a street address where such individual can be located) and, upon written request by the service provider, the Register of Copyrights determines that the circumstances warrant a waiver of this requirement. To obtain a waiver, the service provider must make a written request submitted either by email, to *poboxwaiver@copyright.gov,* or by signed letter, addressed to the ''U.S. Copyright Office, Office of the General Counsel'' and sent to the address for time-sensitive requests set forth in § 201.1(c)(1). Requests must contain the following information: The name of the service provider; the post office box address that the service provider wishes to use; a detailed statement providing the reasons supporting the request, with explanation of the specific threat(s) to an individual's personal safety or security; and an email address for any responsive correspondence from the Office. There is no fee associated with making this request. If the request is approved, the service provider may display the post office box address on its website and will receive instructions from the Office as to how to complete the Office's electronic registration process.

Dated: February 10, 2020.

Maria Strong,

Acting Register of Copyrights and Director of the U.S. Copyright Office.

Approved by:

Carla D. Hayden,

Librarian of Congress.

[FR Doc. 2020–03260 Filed 2–26–20; 8:45 am]

BILLING CODE 1410–30–P

[1] 81 FR 75695 (Nov. 1, 2016). Technical amendments to these regulations were subsequently adopted, effective May 10, 2017. 82 FR 21696 (May 10, 2017).

[2] 37 CFR 201.38(b)(1)(i)–(ii).

[3] 37 CFR 201.38(b)(1)(ii).

[4] *See Nat'l Mining Ass'n* v. *McCarthy,* 758 F.3d 243, 250 (D.C. Cir. 2014) (''The critical feature of a procedural rule is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.'') (internal quotation marks omitted); 5 U.S.C. 553(b) (notice and comment not required for ''interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice'').

[5] *See* 5 U.S.C. 553(b) (notice and comment not required ''when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest'').

[6] *See id.* at 553(d) (''The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—(1) a substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule.'').

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 64

[Docket ID FEMA–2020–0005; Internal Agency Docket No. FEMA–8619]

Suspension of Community Eligibility

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: This rule identifies communities where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP) that are scheduled for

suspension on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will not occur and a notice of this will be provided by publication in the **Federal Register** on a subsequent date. Also, information identifying the current participation status of a community can be obtained from FEMA's Community Status Book (CSB). The CSB is available at *https://www.fema.gov/national-flood-insurance-program-community-status-book.*

DATES: *Effective Dates:* The effective date of each community's scheduled suspension is the third date (''Susp.'') listed in the third column of the following tables.

FOR FURTHER INFORMATION CONTACT: If you want to determine whether a particular community was suspended on the suspension date or for further information, contact Adrienne L. Sheldon, PE, CFM, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 400 C Street SW, Washington, DC 20472, (202) 212–3966.

SUPPLEMENTARY INFORMATION: The NFIP enables property owners to purchase Federal flood insurance that is not otherwise generally available from private insurers. In return, communities agree to adopt and administer local floodplain management measures aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits the sale of NFIP flood insurance unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR part 59. Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. We recognize that some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue to be eligible for the sale of NFIP flood insurance. A notice withdrawing the suspension of such communities will be published in the **Federal Register**.

In addition, FEMA publishes a Flood Insurance Rate Map (FIRM) that identifies the Special Flood Hazard Areas (SFHAs) in these communities. The date of the FIRM, if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may be provided for construction or acquisition of buildings in identified SFHAs for communities not participating in the NFIP and identified for more than a year on FEMA's initial FIRM for the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column. The Administrator finds that notice and public comment procedures under 5 U.S.C. 553(b), are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives 6-month, 90-day, and 30-day notification letters addressed to the Chief Executive Officer stating that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications were made, this final rule may take effect within less than 30 days.

National Environmental Policy Act. FEMA has determined that the community suspension(s) included in this rule is a non-discretionary action and therefore the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) does not apply.

Regulatory Flexibility Act. The Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, Section 1315, 42 U.S.C. 4022, prohibits flood insurance coverage unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the communities unless remedial action takes place.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This rule meets the applicable standards of Executive Order 12988.

Paperwork Reduction Act. This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 44 CFR Part 64

Flood insurance, Floodplains.

Accordingly, 44 CFR part 64 is amended as follows:

PART 64—[AMENDED]

■ 1. The authority citation for Part 64 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp.; p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp.; p. 376.

§ 64.6 [Amended]

■ 2. The tables published under the authority of § 64.6 are amended as follows:

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Region IV				
Alabama:				
Atmore, City of, Escambia County	010071	April 2, 1975, Emerg; June 24, 1977, Reg; March 6, 2020, Susp.	March 6, 2020	March 6, 2020.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Escambia County, Unincorporated Areas	010251	March 31, 1998, Emerg; September 28, 2007, Reg; March 6, 2020, Susp.	.....do*	Do.

*-do- =Ditto.
Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension.

Dated: February 18, 2020.

Eric Letvin,

Deputy Assistant Administrator for Mitigation, Federal Insurance and Mitigation Administration—FEMA Resilience, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2020–03600 Filed 2–26–20; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2018–0010; 4500030113]

RIN 1018–BD06

Endangered and Threatened Wildlife and Plants; Section 4(d) Rule for Louisiana Pinesnake

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), adopt a rule under section 4(d) of the Endangered Species Act for the Louisiana pinesnake (*Pituophis ruthveni*), a reptile that is listed under the statute as threatened. This rule will provide measures to protect the species, which is from Louisiana and Texas.

DATES: This rule is effective March 30, 2020.

ADDRESSES: This final rule is available on the internet at *http://www.regulations.gov* in docket number FWS–R4–ES–2018–0010 and at *https://www.fws.gov/lafayette/.* Comments and materials we received, as well as supporting documentation we used in preparing this rule, are available for public inspection at *http://www.regulations.gov* and will be available by appointment, during normal business hours at: U.S. Fish and Wildlife Service, Louisiana Ecological Services Office, 200 Dulles Drive, Lafayette, LA 70506; 337–291–3100.

FOR FURTHER INFORMATION CONTACT: Joseph Ranson, Field Supervisor, U.S. Fish and Wildlife Service, Louisiana Ecological Services Office, at the address above; telephone 337–291–3113. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Previous Federal Actions

On October 6, 2016, the Service, under the authority of the Endangered Species Act, as amended (''Act'' or ''ESA''; 16 U.S.C. 1531 *et seq.*), published in the **Federal Register** a proposed rule to add the Louisiana pinesnake *(Pituophis ruthveni),* a reptile from Louisiana and Texas, as a threatened species to the List of Endangered and Threatened Wildlife (81 FR 69454). This List is found in title 50 of the Code of Federal Regulations in part 17 (50 CFR 17.11(h)). The final listing rule published on April 6, 2018 (83 FR 14958), and on that same day, we proposed a rule under section 4(d) of the Act for the Louisiana pinesnake (83 FR 14836). Please refer to those rulemaking documents for a detailed description of previous Federal actions concerning this species.

Background

The primary habitat feature that contributes to the conservation of the Louisiana pinesnake is open-canopy forest situated on well-drained sandy soils with an abundant herbaceous plant community that provides forage for the Baird's pocket gopher *(Geomys breviceps),* which is the snake's primary known source of food. In addition, Baird's pocket gopher burrows are the primary known source of shelter for the Louisiana pinesnake. As discussed in the proposed listing rule, one of the primary threats to the Louisiana pinesnake is the continuing loss and degradation of the open pine forest habitat that supports the Baird's pocket gopher. In the types of sandy soil in which the Louisiana pinesnake and pocket gopher are found (Wagner et al. 2014, p. 152 ; Duran 2010, p. 11; Davis et al. 1938, p. 414), the pocket gopher creates burrows at an average depth of about 18 centimeters (cm) (7 inches (in)) (Wagner et al. 2015, p. 54).

One of the primary features of suitable pocket gopher habitat is a diverse herbaceous (non-woody) plant community with an adequate amount of forbs (non-grass herbaceous vegetation) that provide forage for the pocket gopher. Louisiana pinesnakes and pocket gophers are highly associated (Ealy et al. 2004, p. 389) and occur together in areas with herbaceous vegetation, a nonexistent or sparse midstory, and a low pine basal area (Rudolph and Burgdorf 1997, p. 117; Himes et al. 2006, pp. 110, 112; Wagner et al. 2017, p. 22). In a Louisiana forest system managed according to guidelines for red-cockaded woodpecker (*Picoides borealis*) habitat, pocket gopher selection of habitat increased with increasing forb cover and decreased with increasing midstory stem density and midstory pine basal area (Wagner et al. 2017, p. 11). Few (less than 25 percent) sites used by pocket gophers had less than 18 percent coverage by forbs alone (Wagner et al. 2017, p. 22). Use by pocket gophers is also inhibited by increased midstory stem density and midstory pine basal area even when herbaceous vegetation is present (Wagner et al. 2017, pp. 20, 22, 25). Pocket gophers use areas with higher densities of trees much less frequently than areas with fewer stems, presumably because of greater root mass, which reduces burrowing efficiency (Wagner et al. 2017, pp. 11, 22).

One of the main causes of the degradation of this habitat is the decline in or absence of fire. Fire was the primary source of historical disturbance and maintenance, and prescribed fire reduces midstory and understory hardwoods and promotes abundant herbaceous groundcover in the natural communities of the longleaf-dominant pine ecosystem where the Louisiana pinesnake most often occurs. In the absence of regularly recurring, unsuppressed fires, open pine forest habitat requires active management activities essentially the same as those required to produce and maintain red-cockaded woodpecker foraging habitat. Those activities, such as thinning, prescribed burning, reforestation and afforestation, midstory woody vegetation control, herbaceous vegetation (especially forbs) enhancement, and harvest (particularly in stands that require substantial

improvement) are necessary to maintain or restore forests to the conditions that are suitable (as described in the preceding paragraph) for pocket gophers and Louisiana pinesnakes.

Establishment and management of open pine forests beneficial to the Louisiana pinesnake has been occurring on some privately owned land in Louisiana and Texas. Additionally, throughout the range of the Louisiana pinesnake, Federal and State agencies have developed conservation efforts, which have provided a conservation benefit to the species. Increased efforts, however, are necessary on both public and private lands to address continued habitat loss, degradation, and fragmentation, one of the species' primary threats across its entire range, and it is the intent of this final rule to encourage these increased efforts.

In the proposed listing rule (81 FR 69454, October 6, 2016), we solicited public comments as to which prohibitions, and exceptions to those prohibitions, are necessary and advisable to provide for the conservation of the Louisiana pinesnake. During the public comment periods on the proposed listing rule (81 FR 69454, October 6, 2016; 82 FR 46748, October 6, 2017), we received comments expressing concern that when the species is listed under the Act, certain beneficial forest management activities on private land could be considered takings in violation of section 9(a)(1) of the Act or its implementing regulations, and would thus be regulated.

The Service intends to strongly encourage the continuation and increased implementation of forest management activities—thinning, prescribed fire, and mid- and understory woody vegetation control in particular—that promote open-canopy forest and herbaceous vegetation growth, which are beneficial to the Louisiana pinesnake. In recognition of efforts that provide for conservation and management of the Louisiana pinesnake and its habitat in a manner consistent with the purposes of the Act, as discussed in more detail below, we are now finalizing a rule under section 4(d) of the Act that prohibits take of the species except for take that results from actions providing for conservation and management of the Louisiana pinesnake. Information about section 4(d) of the Act is set forth below in Provisions of Section 4(d) of the Act.

Our goal is to strongly encourage continuation and increased implementation of these beneficial practices. Nevertheless, if activities (with exceptions noted in the 4(d) rule provisions) could cause subsurface ground disturbance that can directly harm or kill Louisiana pinesnakes inhabiting pocket gopher burrows, or inhibit the persistence of suitable pocket gopher and Louisiana pinesnake habitat, as described above, they would be subject to the section 9 take prohibitions in certain occupied habitat areas, specifically areas known as Louisiana pinesnake EOHAs (for estimated occupied habitat areas). These areas have recorded occurrences of Louisiana pinesnakes, and they are considered by the Service to be occupied by the species (see the proposed listing rule). This regulation would also apply to any EOHAs that are identified in the future, because activities in such areas could be detrimental to maintenance and development of suitable habitat conditions critical to this species and are more likely to affect the Louisiana pinesnake directly.

Summary of Comments and Recommendations

(1) Comment: Several commenters encouraged the Service not to restrict its broad discretion in designing the 4(d) rule through limiting language in the rule's preamble, because the Service has the discretion to regulate take independently of whether doing so will promote conservation. The commenters suggest that the Service's decision to allow incidental take of a threatened species should be flexible enough to maximize the agency's discretion to consider both the conservation of the Louisiana pinesnake and the overall public interest regarding the importance of maintaining land in forest use within the broader context of the multiple benefits that those forests provide. The commenters recommend that if the Service chooses to retain a ''conservation'' reference in the rule's preamble, the language should be revised to clarify whether incidental take authorized under the 4(d) rule will be allowed where it does not materially detract from the species' conservation.

Our response: Under section 4(d) of the Act, the Secretary may issue regulations that he deems necessary and advisable to provide for the conservation of threatened species. Also under section 4(d) (specifically, the second sentence), the Secretary may, with respect to any threatened species of fish or wildlife, prohibit by regulation any act that is prohibited under section 9(a)(1) of the Act for endangered wildlife, without necessarily making a finding that each prohibition or exception is necessary or advisable. We are not obligated to make a finding that the specific contours of the prohibitions under section 9(a)(1) that the Service adopts are necessary or advisable for the conservation of the Louisiana pinesnake. The Secretary is also not obligated to make a finding that adoption of a prohibition against incidental take under section 9(a)(1) that contains exceptions, or that applies to only some categories of incidental take, is in the overall public interest. The Secretary can invoke the general provisions under section 9(a)(1) or in 50 CFR 17.21, or set prohibitions less or more restrictive than the general provisions under section 9(a)(1) or 50 CFR 17.21.

For this final 4(d) rule, the Secretary has used his discretion to apply the general prohibitions in 50 CFR 17.21, with exceptions identified in the 4(d) rule itself, because these provisions provide for the conservation of the Louisiana pinesnake. The exceptions to the prohibitions that we have included in this final 4(d) rule consider the overall public interest in the importance of maintaining land in forest use as well. Exceptions from incidental take prohibitions for game animal food plots, maintenance of roads, and adherence to forestry best management practices (BMPs), for instance, do not directly address the threats to the Louisiana pinesnake, but they do promote the continuation of forest land use. On the other hand, we have determined that activities that do not provide any conservation benefit, but could result in incidental take of the Louisiana pinesnake, would materially detract from the species' conservation, and, therefore, those activities will be subject to the incidental take prohibitions in the final 4(d) rule.

(2) Comment: The Louisiana Department of Wildlife and Fisheries (LDWF) expressed concern that the cooperative agreement between the Service and LDWF, which allows any employee or agent of LDWF when acting in the course of his/her official duties to take a threatened species to carry out conservation programs, would no longer remain in effect due to the 4(d) rule. The commenter requested an exemption be made to allow the cooperative agreement to remain in effect in order for LDWF to provide conservation programs for the Louisiana pinesnake.

Our response: We received this comment as well as others below asking for exemptions from prohibitions. Throughout this 4(d) rule, we will refer to these as ''exceptions'' to the prohibitions and not exemptions. In this final 4(d) rule, we have chosen to apply to the Louisiana pinesnake the prohibitions and provisions of 50 CFR 17.21, 17.31(b), and 17.32, with the exception of specific activities and

conditions. In doing so, the provisions of 50 CFR 17.31(b) remain applicable, which is the authority for the cooperative agreement referenced in the comment. Accordingly, no special exemption is necessary for State agencies such as the LDWF or Texas Parks and Wildlife to retain that authority. Thus, employees or agents of LDWF and Texas Parks and Wildlife, when acting in the course of their official duties, may take the Louisiana pinesnake when the species is covered by an approved cooperative agreement for conservation programs in accordance with the cooperative agreement.

(3) Comment: Several commenters stated that Louisiana and neighboring States have adopted published BMPs for the sustainable management of forest resources and protection of soils and that the BMPs are an integral part of forest certification programs. Several BMPs, including construction and maintenance of turnouts, water bars along roads, and wing ditches from the road into the forest to drain water off roads, are designed to prevent soil erosion and sediment delivery to streams. Such BMPs are prudent on highly erodible soils and minimize future road maintenance problems. Those commenters recommended that foresters implementing BMPs be specifically exempted from the prohibitions in the 4(d) rule because the overall impact on Louisiana pinesnake habitat is minor in comparison to the BMPs' importance to environmental quality. Several commenters stated that adherence to Louisiana BMPs, and logging decks to load trucks and skid trails, should be exempted. Some commenters also stated that practices used to manage vegetative competition that are temporary in nature and help open the forest canopy allow the development of more herbaceous ground cover that enhances habitat for pocket gophers and the Louisiana pinesnake. The commenters also stated that leaving small debris piles at final harvest provide temporary refugia to rodents and other small wildlife that may be prey for the Louisiana pinesnake. Those commenters suggest adding language to reference critical support activities for implementing forest management.

Our response: The Service does not intend to prevent through the 4(d) rule the implementation of protective measures that minimize impacts to fish and wildlife. The BMPs recommended by Louisiana and Texas Forestry are generally used to avoid or minimize environmental impacts, especially to streams, wetlands, and highly erodible land, while conducting forestry activities. While most BMPs are not designed to directly protect or benefit the Louisiana pinesnake, we agree that conservation measures with small footprints, such as water bars, wing ditches, etc., for existing roads that prevent sediment delivery to streams are an important part of protection for fish and wildlife. Some BMPs, especially the following recommendations, would lessen impact to the Louisiana pinesnake: Use the smallest number, width, and length of skid trails; use no more landings, log decks, and sets than necessary; seed and fertilize bare areas that would erode before natural vegetation is established; hand-plant steep erodible sites; avoid intensive mechanical preparation on steep slopes; and minimize moving soil into windrows and piles. The Service encouraged the use of forestry BMPs in the proposed 4(d) rule, and we have revised the provisions of the final 4(d) rule to include their implementation, as well as the use of skidding logs and loading decks, in the list of activities excepted from incidental take prohibitions.

(4) Comment: Several commenters stated that regular forestry and associated activities should be exempted by the 4(d) rule, including periodic thinning; fertilization; herbicide treatment and prescribed burning to control woody competition; wildfire control activities; supplemental planting; bedding; thinning; ATV use; hunting; recreation; mechanical site preparation; one-pass shearing; shear and pile; mulching; ripping; roller chopping; and creation, use, and maintenance of trail and forest roads. Several commenters stated that many of these forestry practices are beneficial to the Louisiana pinesnake and cause only minimal disturbance to its habitat, and that grasses and herbaceous vegetation quickly reestablish following treatments. They said some forestry activities would increase sunlight on the forest floor and increase herbaceous cover while maintaining a forested condition and help establishment of the targeted forest stand conditions. Two commenters stated that some intensive mechanical practices are needed for conversion and restoration to longleaf pine, especially in areas that are heavily infested with species such as yaupon (*Ilex vomitoria*), and that limiting options to control yaupon is an obstacle to creating habitat conditions for pocket gophers and the Louisiana pinesnake.

Our response: The Service agrees that some forestry activities that help to control native shrub and invading species and restore historical longleaf pine forest would be beneficial to the Louisiana pinesnake and should not be subject to the prohibitions in the 4(d) rule. Some of the activities that commenters requested not be subject to the prohibitions in the 4(d) rule were excepted from the proposed prohibitions and continue to be excepted in the final 4(d) rule—including: Wildfire control, firebreak establishment, clearcut harvesting, prescribed burning, herbicide application, thinning, and disking for firebreak establishment. We have revised the list of activities excepted from prohibitions in the final 4(d) rule to also include machine-planting, skidding logs and use of loading decks, maintenance of existing roads, State BMPs, and food plot establishment. We also added exceptions for some activities that are generally prohibited within Louisiana pinesnake EOHAs under specific circumstances (see Summary of Changes from the Proposed Rule).

(5) Comment: Several commenters stated that many landowners allow recreational hunting on their forested lands and establishment of food plots for wild game requires tilling the soil greater than 4 inches in depth. Food plots are often 1 to 3 acres in size and can be shaped to avoid visible pocket gopher mounds. Several commenters stated that food plots are beneficial because they increase vegetative cover for pocket gophers, the Louisiana pinesnake, and other wildlife.

Our response: Pocket gophers appear to forage on several different species of grasses and forbs. While we know that forbs are important to pocket gophers, we do not know which specific herbaceous plant species are preferred by them. Native plants would likely be the best choice, but herbaceous species typically planted in food plots may also be used by pocket gophers. We have revised the 4(d) rule provisions to except food plots under certain circumstances.

(6) Comment: One commenter stated that conversion of loblolly pine stands to longleaf pine stands is being done by willing landowners and that landowners may choose not to convert pine stands from loblolly to longleaf if they believe that silvicultural choices are not available, including the choice to change pine species later in time. The commenter indicated that longleaf restoration cannot occur on private lands without incentives and asked that the Service avoid creating disincentives through regulations or restricting a landowner's timber type through rulemaking. Another commenter specifically questioned whether landowners would be required to

maintain pine forests within the Louisiana pinesnake's range, or if non-pine species could be used in reforestation as long as they still provide for open-canopy conditions with a diverse herbaceous understory.

Our response: While the Service encourages longleaf pine restoration within the historical range of longleaf pine, the proposed 4(d) rule did not include language that restricted a landowner's choice of tree species to plant and grow. The historical habitat of the Louisiana pinesnake was dominated by longleaf pine but also included shortleaf and loblolly pines. Some hardwoods also inhabit the well-drained sandy soils where the Louisiana pinesnake is found, but the vast majority of trees planted commercially or for restoration in that range are pine species. We encourage landowners to maintain forests with trees native to their area. In the final 4(d) rule, we revised the exception regarding ''maintenance of open pine canopy conditions'' to ''maintenance of open-canopy pine-dominated forest stands.''

(7) Comment: Because suitable habitat for the Baird's pocket gopher and the Louisiana pinesnake is unlikely to occur on sites without preferred or suitable soils, several commenters recommended that the 4(d) rule should clearly state that incidental take from forestry activities will not be considered a violation of section 9 of the Act if take occurs on sites without preferred or suitable soils, regardless of whether those sites are inside or outside of EOHAs. The commenters request that language be added to paragraphs 3(i) and (ii) to clarify such an exemption.

Our response: The 4(d) rule exceptions to incidental take prohibitions for forestry activities conducted outside of EOHAs apply to all land, including those with preferred or suitable soils. To clarify this provision, we have removed the conditional requirement of ''resulting in the establishment and maintenance of open-canopy pine-dominated forest stands that are interconnected with at least some other open-canopy stands'' for lands other than those with preferred or suitable soils. The additional conditions required to be met for land within EOHAs and where Baird's pocket gopher are present apply only to land meeting certain criteria, one of which is that it contains preferable or suitable soils.

(8) Comment: One commenter recommended revising the phrase in paragraph (3)(i)(A) ''open canopy conditions *through* time across the landscape'' to state ''open canopy conditions *over* time across the landscape.''

Our response: In recognition that, during periods of establishment of open canopy pine-dominated forest stands, there may be time prior to thinning where the canopy is closed, we have changed ''through'' to ''over'' time across the landscape.

(9) Comment: Several commenters stated various objections to the following language in the proposed 4(d) rule: ''Activities do not inhibit the persistence of suitable pocket gopher and Louisiana pinesnake habitat.'' Commenters believe that this language requires clarification, introduces unnecessary uncertainty into the rule, appears to be subjective and dependent upon individual interpretation, and is an unnecessary qualification on silvicultural practices.

Our response: We describe in detail the components of suitable pocket gopher habitat in the preamble. We also describe suitable pocket gopher habitat in paragraph (i)(3)(v)(B)*(2)* of this final 4(d) rule. We do not detail all activities that could inhibit the persistence of the habitat, but instead rely on landowners' unique knowledge of their property and management practices to determine how best to curtail activities that would prevent them from being covered by the take exceptions of the 4(d) rule. Paragraph (i)(3)(v)(B)*(2)* is necessary because not all silvicultural management practices further the persistence of suitable habitat for pocket gophers and the Louisiana pinesnake.

(10) Comment: One commenter suggested that, while pipeline construction and installation activities disturb the soil greater than 4 inches in depth, long-term maintenance of pipeline rights-of-way provide habitat for the Baird's pocket gopher and, therefore, can provide habitat for the Louisiana pinesnake. That commenter recommended including pipeline rights-of-way in the 4(d) rule.

Our response: Though we have no information showing that pipeline rights-of-way are inhabited by the Louisiana pinesnake, rights-of-way often host herbaceous vegetation, and pocket gopher mounds have been sighted within them. However, the nature and amount of potential impact to the Louisiana pinesnake of a major construction project such as pipeline installation could vary based on the exact location of the project and the extent of the resulting disturbance. Because of the potential variability of impacts to the species for projects of this type, a general exception is not provided in the final 4(d) rule. Landowners wishing to install pipelines on their properties should contact the Service for further guidance to avoid potential violations of section 9 of the Act.

(11) Comment: One commenter discussed the historical records of pocket gophers as a nuisance species that causes immense damage to agricultural and forestry crops both inside and outside of the Louisiana pinesnake's range and on erodible soils other than sandy soils. That commenter suggested that there was a need for a rule to control pocket gophers in unsustainable habitats or within forest stands, especially longleaf pine stands age 5 years and younger, without the need to consult with the Service.

Our response: The Service notes the 1974 U.S. Forest Service Environmental Statement (marked as ''Draft''), referenced by the commenter, which discusses the poisoning of pocket gophers. The Service is also aware of anecdotal reports of seedling damage presumably caused by pocket gophers. The Service is not aware of documented instances of widespread damages to tree seedlings due to pocket gophers in the range of the Louisiana pinesnake in recent decades. The habitat needs for pocket gophers and Louisiana pinesnakes are very similar, although the pocket gopher has a much larger range than the Louisiana pinesnake, and pocket gopher density can be locally variable. Baird's pocket gophers are the primary prey and microhabitat provider for the Louisiana pinesnake, which is nearly always found in or near pocket gopher burrows. Reduction or elimination of Baird's pocket gophers in the range of the Louisiana pinesnake could significantly reduce food and shelter for the already threatened species, potentially reducing its abundance. Furthermore, using poison to control pocket gophers, as described in the 1974 Environmental Statement, could have even greater negative effects on the Louisiana pinesnake if the species consumed the poisoned pocket gophers. Because of the potential significant negative impacts to the species via population control of pocket gophers, and the apparent lack of widespread damage events, a general 4(d) exception for control of pocket gophers would not be prudent. If landowners decide that pocket gophers have become a pest that affects the human environment or causes economic loss, they may consult with the Service to determine the best course of action for their specific situation. Nothing in this rule would limit pocket gopher control methods outside the historical range of the Louisiana pinesnake.

(12) Comment: One commenter recommended that the Service prohibit the use of erosion control netting, and other plastic netting known to entangle snakes, in areas where Louisiana pinesnake may occur.

Our response: The Service has recognized the detrimental effect of erosion control netting, especially long-lasting polypropylene mesh, on snakes, and in the final listing rule we determined that the use of erosion control netting was currently a potential threat to the Louisiana pinesnake. On the other hand, while other snake species have been killed by the netting, the Service is unaware of any records of the Louisiana pinesnake being entangled or killed. Because the potential threat of erosion control netting to the Louisiana pinesnake is greatest in the areas occupied by the species, we have added activities that do not involve ''the use of plastic mesh in erosion control and stabilization devices, mats, blankets, or channel protection'' to the list of additional conditions for the areas specified within the EOHAs.

(13) Comment: One commenter stated that the 4(d) rule should not exempt intensive, short-rotation pine plantations.

Our response: The 4(d) rule does not specifically except ''intensive, short-rotation pine plantations'' from the prohibitions against take. The Service has determined through its final listing rule and the 4(d) rule what type of habitat is suitable for the Louisiana pinesnake. We have developed the 4(d) rule provisions to protect habitat for the species regardless of the terminology commonly used to describe certain management scenarios. ''Intensive, short-rotation pine plantations'' does not necessarily describe habitat conditions. Some management activities that may be considered intensive, such as mechanical site preparation that significantly disturbs the soil, are excepted under certain conditions even within the EOHAs. Some ''intensive'' management may be necessary to restore degraded habitat. Additionally, stand rotation length is not specifically addressed in the 4(d) rule because that metric does not necessarily dictate canopy cover and the potential effects on herbaceous vegetation abundance, which is an important factor of habitat suitability for the pocket gopher and thus the Louisiana pinesnake.

(14) Comment: Several commenters recommended that the Service not attempt to limit the planting density of longleaf pine. The commenters explained that higher density planting generates pine straw fuel to carry fire, and many establishment projects do not have adequate warm-season grasses to carry fire for the first 4 to 5 years. Without the pine straw to fuel prescribed burns, establishment stands quickly revert back to yaupon and sweetgum species. Young longleaf with the appropriate density can create enough pine straw to carry a burn in years 2 through 5. Planting an adequate number of seedlings is also needed to ensure a high survival success and low mortality rates due to drought, feral hogs, competition with invasive species, and from prescribed burning. Another commenter stated that the 4(d) rule should exempt thinning to 40–60 square feet per acre basal area.

Our response: As discussed in the 4(d) rule preamble, low tree density is beneficial to the pocket gopher. The proposed 4(d) rule provisions did not specifically address planting density of longleaf pine or any other tree species and do not except or require a specific tree basal area. To attain an open-canopy forest condition, some consideration of planting density and basal area would be required. Both the proposed and final 4(d) rules do not restrict individuals from determining how to create open-canopy conditions and herbaceous vegetation cover.

(15) Comment: One commenter recommended that the term ''below-ground shearing'' be removed or replaced with a less confusing term. The commenter expressed that normal shearing operations, which are critical to preparing sites for reforestation (especially longleaf), are conducted above the soil level and have minimal soil disturbance.

Our response: In recognition that normal shearing operations are conducted above ground, but may cause subsurface disturbance when not properly performed, we have changed ''below-ground shearing'' to ''shearing that penetrates the soil surface.''

(16) Comment: Two commenters stated their support for the creation of a safe harbor agreement program for the Louisiana pinesnake similar to the one established for the endangered red-cockaded woodpecker.

Our response: The Service plans to develop and implement one or more safe harbor agreements to increase conservation opportunities for the Louisiana pinesnake in Louisiana and Texas.

(17) Comment: One commenter recommended that a 4(d) rule exemption from take prohibitions should apply to private landowners enrolled in a Working Lands for Wildlife agreement with the National Resources Conservation Service (NRCS), and one commenter recommended that the 4(d) rule should consider excluding from the prohibitions conservation practices found in the Louisiana pinesnake biological opinion/conference opinion for the NRCS's Working Lands for Wildlife program to allow for consistency and continuity across NRCS programs.

Our response: Participants in NRCS's Working Lands for Wildlife program are allowed incidental take according to the approved biological opinion for that program, and thus do not need an exception in the 4(d) rule for the program activities considered in the biological opinion. The exceptions in the 4(d) rule are not an exhaustive list of all NRCS conservation practices considered in the biological opinion. The conservation practices, their expected results, participant responsibilities, and the consideration of incidental take were carefully discussed during close collaboration between Service and NRCS biologists. Excepting all NRCS Working Lands for Wildlife conservation practices from the take prohibitions in the 4(d) rule is not necessary and would not be prudent. The Service encourages interested parties to contact the Service or NRCS about the possibility of enrolling in the Working Lands for Wildlife program. Additionally, it should be noted that the conservation practices in the Working Lands for Wildlife program and the forestry activities that the 4(d) provisions except from the stay prohibitions overlap significantly. Conservation activities that are not specifically excepted in the 4(d) rule could possibly be exempted from the section 9 prohibitions of the ESA through a section 7 consultation with issuance of an incidental take statement.

(18) Comment: One commenter recommended that the 4(d) rule should include a detailed description and listing of the preferred soil series and specific soil mapping units (in consultation with NRCS) for the Louisiana pinesnake and Baird's pocket gopher.

Our response: Soil maps at the scale that could be included in the **Federal Register** would not be useful. Maps delineating the preferred and suitable soils for the Louisiana pinesnake as described by Wagner et al. 2014 are publicly available at *https://gcpolcc.databasin.org/datasets/a2a0ace6964942b98f0514b84dfa9fb8.* NRCS soil survey maps of hydrologic group Categories A (preferred) and B (suitable), are available publicly on the NRCS soil mapping website: *https://websoilsurvey.sc.egov.usda.gov/App/HomePage.htm,* or by contacting NRCS

or the U.S. Fish and Wildlife Service, Louisiana Ecological Services Office, 200 Dulles Drive, Lafayette, LA 70506; 337–291–3101; 337–291–3139.

(19) Comment: One commenter requested that captive-bred Louisiana pinesnake be exempted from take prohibitions in the 4(d) rule to allow unfettered continuation of captive breeding, pet ownership, and trade.

Our response: Louisiana pinesnakes acquired before May 7, 2018, the effective date of the final listing rule for this species, may be legally held and bred in captivity as long as laws regarding this activity within the State in which they are held are not violated. This would include snakes acquired pre-listing by pet owners, researchers, and zoological institutions. Future sale of captive-bred Louisiana pinesnakes borne from pre-listing-acquired parents within the State of their origin would be regulated by applicable laws of that State. If individuals wish to purchase captive-bred snakes outside the snake's State of origin, they would first have to acquire a section 10(a)(1)(A) interstate commerce permit from the Service (website: *http://www.fws.gov/forms/3-200-55.pdf*). Information about the purpose for purchasing a Louisiana pinesnake is required because using federally threatened species as pets is not consistent with the purposes of the Act, which is intended to support the conservation of species and recovery of wild populations. However, an animal with threatened-species status may be legally kept in captivity if it is captive-bred and used for educational or breeding purposes consistent with this intent. Through the permit process, we are able to track and monitor the trade in captive-bred listed species. For this reason, excepting this activity from the take prohibition in the 4(d) rule would not be appropriate, as it would not meet the standard of providing for the conservation of the species.

(20) Comment: One commenter stated that the 4(d) rule should incentivize management of open-canopy forest in order to get people to participate in conservation of the species.

Our response: This 4(d) rule offers incentives for conservation by providing exceptions from the incidental take prohibitions. We encourage any landowners that may have a listed species on their properties, and who think they may conduct activities that negatively affect that species, to work with the Service to find ways to avoid impacts. The Service's Partners for Fish and Wildlife Program and various programs administered by the NRCS may provide financial assistance to eligible landowners who implement management activities that benefit the habitat for a listed species, including the Louisiana pinesnake. Private landowners may contact their local Service field office to obtain information about these programs and permits.

Summary of Changes From the Proposed Rule

After reviewing the information provided during the public comment period, we have made the following changes to the rule language in this final rule:

- With respect to comments requesting either the exemption of specific forestry-related activities or further explanation of our intended exempted activities, we added maintenance of existing forest roads, skidding logs and use of loading decks, and adherence to BMPs recommended by State forestry agencies to the list of excepted activities. These activities were implicitly included in the proposed rule as excepted forestry activities especially as they relate to harvesting, and we had already recommended in the proposed rule that landowners follow BMPs of certification programs or from State agencies.
- With respect to comments that roller chopping and ripping are sometimes necessary to control midstory shrub species such as yaupon holly (*Ilex vomitoria*) that inhibit pine seedling growth, and to prepare former pastures for planting, we added language indicating that limited take due to use of those techniques is not prohibited.
- With respect to comments that food plot establishment requires relatively little area and can avoid gopher mound complexes, and that the vegetation commonly used are herbaceous plants that could be used as forage by pocket gophers, we added limited size food plot establishment to the list of excepted activities.
- With respect to comments requesting further explanation of exempted activities, we specified that hand- and machine-planting were forestry activities conducted in areas outside of the EOHAs that were excepted when we used the terms ''planting'' and ''replanting.'' We also added language to the additional conditions for areas meeting the criteria that would indicate that the take prohibition would not apply to machine-planting under specific circumstances.
- With respect to comments that stated that the 4-inch limit of subsurface disturbance could prohibit machine- and hand-planting and other forestry activities, even for forest restoration efforts, we removed the 4-inch limitation for subsurface disturbance in the additional conditions of the exceptions for activities within EOHAs.
- With respect to comments that stated that exemptions should be more broad in areas that do not contain preferable or suitable soils, and comments that we should clarify the phrase ''and that result in the establishment and maintenance of open canopy conditions through time across the landscape,'' we changed the language pertaining to activities that, when conducted in areas within the range of the Louisiana pinesnake, on preferred or suitable soils, result in the establishment and maintenance of open-canopy pine-dominated forest stands ''over'' time across the landscape.
- The Louisiana pinesnake is highly associated with pocket gophers and their burrows. Research shows that Louisiana pinesnakes are most often found in pocket gopher burrow systems, and, therefore, in areas where Louisiana pinesnakes are known to occur, these burrows, indicated by dirt mounds, are in need of greater protections. Accordingly, we added, ''where Baird's pocket gopher mounds are present or'' after ''Within any known EOHAs'' and before ''on lands with suitable or preferable soils'' in the paragraph preceding the additional conditions for lands within EOHAs.
- With respect to a comment about the entanglement hazard of erosion control netting and its potential effects on the Louisiana pinesnake, which we had identified as a potential threat in the final listing rule, we added, ''Those activities do not involve the use of plastic mesh in erosion control and stabilization devices, mats, blankets, or channel protection'' to the list of additional conditions for lands within the EOHAs.

Provisions of Section 4(d) of the Act

Section 4(d) of the Act contains two sentences. The first sentence states that the ''Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation'' of species listed as threatened. The U.S. Supreme Court has noted that very similar statutory language like ''necessary and advisable'' demonstrates a large degree of deference to the agency (see *Webster* v. *Doe,* 486 U.S. 592 (1988)). Conservation is defined in the Act to mean ''the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the Act] are no longer necessary.'' Additionally, the second

sentence of section 4(d) of the Act states that the Secretary ''may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or 9(a)(2), in the case of plants.'' Thus, regulations promulgated under section 4(d) of the Act provide the Secretary with wide latitude of discretion to select appropriate provisions tailored to the specific conservation needs of the threatened species. The statute grants particularly broad discretion to the Service when adopting the prohibitions under section 9.

The courts have recognized the extent of the Secretary's discretion under this standard to develop rules that are appropriate for the conservation of a species. For example, courts have upheld rules developed under section 4(d) as a valid exercise of agency authority where they prohibited take of threatened wildlife, or include a limited taking prohibition (see *Alsea Valley Alliance* v. *Lautenbacher,* 2007 U.S. Dist. Lexis 60203 (D. Or. 2007); *Washington Environmental Council* v. *National Marine Fisheries Service,* 2002 U.S. Dist. Lexis 5432 (W.D. Wash. 2002)). Courts have also approved 4(d) rules that do not address all of the threats a species faces (see *State of Louisiana* v. *Verity,* 853 F.2d 322 (5th Cir. 1988)). As noted in the legislative history when the Act was initially enacted, ''once an animal is on the threatened list, the Secretary has an almost infinite number of options available to him with regard to the permitted activities for those species. He may, for example, permit taking, but not importation of such species, or he may choose to forbid both taking and importation but allow the transportation of such species'' (H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973).

Exercising its authority under section 4(d) of the Act, the Service has developed a final rule for the Louisiana pinesnake that is designed to address the species' specific threats and conservation needs. Although the statute does not require the Service to make a ''necessary and advisable'' finding with respect to the adoption of specific prohibitions under section 9, we find that this final 4(d) rule as a whole satisfies the requirement in section 4(d) of the Act to issue regulations deemed necessary and advisable to provide for the conservation of the Louisiana pinesnake. As discussed above, the Service has concluded that the Louisiana pinesnake is in danger of becoming an endangered species within the foreseeable future primarily due to the continuing loss and degradation of the open pine forest habitat that supports the Baird's pocket gopher. The provisions of this final 4(d) rule would promote conservation of the Louisiana pinesnake by encouraging management of the landscape in ways that meet land management considerations while meeting the conservation needs of the Louisiana pinesnake. The provisions of this final 4(d) rule are one of many tools that the Service will use to promote the conservation of the Louisiana pinesnake.

Final 4(d) Rule for the Louisiana Pinesnake

This final 4(d) rule would provide for the conservation of the Louisiana pinesnake by prohibiting the following activities, except as otherwise authorized or permitted: Importing or exporting; take; possession and other acts with unlawfully taken specimens; delivering, receiving, transporting, or shipping in interstate or foreign commerce in the course of commercial activity; and selling or offering for sale in interstate or foreign commerce. We also include several standard exceptions to these prohibitions, which are set forth under Final Regulation Promulgation, below.

Under the Act, ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Some of these provisions have been further defined in regulation at 50 CFR 17.3. Take can result knowingly or otherwise, by direct and indirect impacts, intentionally or incidentally. Regulating intentional and incidental take under this final 4(d) rule would help preserve the species' remaining populations; enable beneficial management actions to occur; and decrease synergistic, negative effects from other stressors.

Under this final 4(d) rule, the following exceptions from prohibitions will apply to the Louisiana pinesnake:

Outside of any known EOHAs, the following activities will not be subject to the section 9 prohibitions:

Activities that maintain existing forest lands in forest land use, and that when conducted in areas within the range of the Louisiana pinesnake, on preferred or suitable soils, result in the establishment and maintenance of open-canopy pine-dominated forest stands over time across the landscape. These activities include:

(a) Tree thinning, harvest (including clearcutting), planting and replanting pines (by hand or by machine).

(b) Prescribed burning, including all firebreak establishment and maintenance actions, as well as actions taken to control wildfires.

(c) Herbicide application that is generally targeted for invasive plant species control and midstory and understory woody vegetation control, but is also used for site preparation when applied in a manner that minimizes long-term impact to noninvasive herbaceous vegetation. These provisions include only herbicide applications conducted in a manner consistent with Federal and applicable State laws, including Environmental Protection Agency label restrictions and herbicide application guidelines as prescribed by manufacturers.

(d) Skidding logs and use of loading decks that avoid gopher mound complexes.

(e) Maintenance of existing substandard (dirt, unsurfaced) forest roads and trails used for access to timber being managed.

(f) Implementation of mandated and State-recommended forestry BMPs, including but not limited to, those necessary to protect riparian (*e.g.,* streamside management zone) and other habitats from erosional sediment deposition, prevent washout of forest roads, and impacts to vegetation.

(g) Food plot establishment for game animals, when it does not destroy existing native herbaceous vegetation, avoids gopher mound complexes, and does not exceed 1 acre in size.

Although these management activities may result in some minimal level of harm or temporary disturbance to the Louisiana pinesnake, overall these activities benefit the pinesnake by contributing to conservation and recovery. With adherence to the limitations described in the preceding paragraph, these activities will have a net beneficial effect on the species by encouraging active forest management that creates and maintains the herbaceous plant conditions needed to support the persistence of Baird's pocket gopher populations, which is essential to the long-term viability and conservation of the Louisiana pinesnake.

Applying the prohibitions will minimize threats that could cause further declines in the status of the species. Additionally, the species needs active conservation to improve the quality of its habitat. By excepting from prohibitions incidental take resulting from certain activities, these provisions can encourage cooperation by landowners and other affected parties in implementing conservation measures. This cooperation will allow for use of the land while at the same time ensuring the preservation of suitable

habitat and minimizing impacts on the species.

When practicable and to the extent possible, the Service encourages managers to conduct such activities in a manner to maintain suitable Louisiana pinesnake habitat in large tracts; minimize ground and subsurface disturbance; and promote a diverse, abundant herbaceous groundcover. Prescribed fire is an important tool to effectively manage open-canopy pine habitats to establish and maintain suitable conditions for the Louisiana pinesnake, and the Service strongly encourages its use over other methods (mechanical or chemical) wherever practicable. The Service also encourages managers, when practicable and to the extent possible, to (1) enroll their lands into third-party forest certification programs such as the Sustainable Forest Initiative, Forest Stewardship Council, and American Tree Farm System; and (2) conduct any activities under such programs using BMPs as described and implemented through the respective programs, or by others such as State forestry agencies, the U.S. Department of Agriculture (the Forest Service's Forest Stewardship Program or the Natural Resources Conservation Service's Conservation Practices Manual), or the U.S. Fish and Wildlife Service's Partners for Fish and Wildlife Program.

As noted above, the management activities discussed above are excepted from the incidental take prohibition outside of known EOHAs. Within any known EOHAs, where Baird's pocket gopher mounds are present or on lands with suitable or preferable soils, that are forested, undeveloped, or non-farmed (*i.e.,* not cultivated on an annual basis) and adjacent to forested lands, the management activities discussed above would also be excepted from the incidental take prohibitions, but only if the following additional conditions are met:

(h) Those activities do not cause subsurface disturbance, including but not limited to subsurface disturbance caused by: Wind-rowing, stumping, disking (except during firebreak creation or maintenance), root-raking, drum chopping (except for single pass with the lightest possible weighted drums and only when the soil is not wet, when used to control hardwoods and woody shrub species detrimental to establishment of pine-forested land), shearing that penetrates the soil surface, ripping (except when restoring pine forest in compacted soil areas such as former pastures), bedding, new road construction, and commercial or residential development. Machine-planting, using the shallowest depth possible, would be allowed in areas where pocket gophers are not present and only for planting pine tree species. In former pastures or highly degraded areas with no herbaceous vegetation and poor planting conditions, subsurface disturbance shall be allowed only for activities that contribute to reforestation that is consistent with the conservation of the species.

(i) Those activities do not inhibit the persistence of suitable pocket gopher and Louisiana pinesnake habitat (described previously in the Background section).

(j) Those activities do not involve the use of plastic mesh in erosion control and stabilization devices, mats, blankets, or channel protection.

These additional conditions on when the prohibitions would not apply within known EOHAs are reasonable because the actual likelihood of encountering individuals of the species is higher within the EOHAs.

We may issue permits to carry out otherwise prohibited activities, including those described above, involving threatened wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.32. With regard to threatened wildlife, a permit may be issued for the following purposes: Scientific purposes, to enhance propagation or survival, for economic hardship, for zoological exhibition, for educational purposes, for incidental taking, or for special purposes consistent with the purposes of the Act. There are also certain statutory exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

The Service recognizes the special and unique relationship with our State natural resource agency partners in contributing to conservation of listed species. State agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, and candidate species of wildlife and plants. State agencies, because of their authorities and their close working relationships with local governments and landowners, are in a unique position to assist the Services in implementing all aspects of the Act. In this regard, section 6 of the Act provides that the Services shall cooperate to the maximum extent practicable with the States in carrying out programs authorized by the Act. Therefore, any qualified employee or agent of a State conservation agency that is a party to a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by his or her agency for such purposes, will be able to conduct activities designed to conserve Louisiana pinesnake that may result in otherwise prohibited take without additional authorization.

Nothing in this final 4(d) rule would change in any way the recovery planning provisions of section 4(f) of the Act, the consultation requirements under section 7 of the Act, or the ability of the Service to enter into partnerships for the management and protection of the Louisiana pinesnake. However, interagency cooperation may be further streamlined through planned programmatic consultations for the species between Federal agencies and the Service.

Anyone undertaking activities that are not covered by the provisions, including the additional conditions, and that may result in take would need to ensure, in consultation with the Service, that those activities are not likely to jeopardize the continued existence of the species where the entity is a Federal agency or there is a Federal nexus, or consider applying for a permit before proceeding with the activity (if there is no Federal nexus). A map of the currently known EOHAs is found in the proposed listing rule (81 FR 69461, October 6, 2016). The Service intends to update maps identifying the locations of Louisiana pinesnake EOHAs and make them available to the public in the docket on *www.regulations.gov* as new information becomes available. Alternatively, you may contact the Louisiana Ecological Services Field Office (see **ADDRESSES**).

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition of a species through listing it results in public awareness, and leads Federal, State, Tribal, and local agencies, private organizations, and individuals to undertake conservation. The Act encourages cooperation with the States and other countries and calls for recovery actions to be carried out for listed species. Information about the protection required by Federal agencies, and the prohibitions against certain activities, and recovery planning and implementation and interagency consultation, are discussed in the final listing rule.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to endangered wildlife. The prohibitions of section 9(a)(1) of the Act, codified at

50 CFR 17.21, make it illegal for any person subject to the jurisdiction of the United States to take (which includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these) endangered wildlife within the United States or on the high seas. In addition, it is unlawful to import; export; deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of commercial activity; or sell or offer for sale in interstate or foreign commerce any endangered species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. The Act authorizes the Secretary to apply any of the prohibitions of section 9(a)(1) of the Act to threatened wildlife. This rulemaking applies the prohibitions under section 9(a)(1) to the threatened Louisiana pinesnake, with specified exceptions.

As described in the final listing rule, it is our policy to identify, to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a listing on proposed and ongoing activities within the range of the listed species. Since the Louisiana pinesnake is a threatened species and this final rule applies the protections outlined in section 9(a)(1) of the Act to the Louisiana pinesnake, we are identifying those activities that would or would not constitute a violation of either section 9(a)(1) or this final 4(d) rule. Based on the best available information, the following activities may potentially result in a violation of section 9 of the Act or this final rule; this list is not comprehensive:

(1) Unauthorized collecting, handling, possessing, selling, delivering, carrying, or transporting of the Louisiana pinesnake, including interstate transportation across State lines and import or export across international boundaries, except for properly documented antique specimens at least 100 years old, as defined by section 10(h)(1) of the Act.

(2) Introduction of nonnative animal species that compete with or prey upon the Louisiana pinesnake.

(3) Introduction of invasive plant species that contribute to the degradation of the natural habitat of the Louisiana pinesnake.

(4) Unauthorized destruction or modification of suitable occupied Louisiana pinesnake habitat that results in damage to or alteration of desirable herbaceous (non-woody) vegetation or the destruction of Baird's pocket gopher burrow systems used as refugia by the Louisiana pinesnake, or that impairs in other ways the species' essential behaviors such as breeding, feeding, or sheltering.

(5) Unauthorized use of insecticides and rodenticides that could impact small mammal prey populations, through either unintended or direct impacts within habitat occupied by Louisiana pinesnakes.

(6) Unauthorized actions that would result in the destruction of eggs or cause mortality or injury to hatchling, juvenile, or adult Louisiana pinesnakes.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Louisiana Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

Required Determinations

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We completed an environmental assessment of this action under the authority of the National Environmental Policy Act of 1969. We notified the public of the availability of the draft environmental assessment on the internet at *https://www.fws.gov/lafayette/*. We have carefully considered all comments received and addressed them in this rule. The environmental assessment is available in the docket for this rulemaking action at *http://www.regulations.gov*.

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. There are no tribal lands located within the range of the Louisiana pinesnake.

References Cited

A list of the references cited in this final rule may be found in the docket in *www.regulations.gov.*

Authors

The primary authors of this final rule are the staff members of the Louisiana Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Final Regulation Promulgation

Accordingly, for the reasons just described, we hereby amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. Amend § 17.11 in paragraph (h) by revising the entry for ''Pinesnake, Louisiana'' 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, Louisiana	*Pituophis ruthveni*	Wherever found	T	83 FR 14958, April 6, 2018; 50 CFR 17.42(i).[4d]

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
*	*	*	*	* *

■ 3. Amend § 17.42 by adding paragraph (i) to read as follows:

§ 17.42 Special rules—reptiles.

* * * * *

(i) Louisiana pinesnake (*Pituophuis ruthveni*)—(1) *Definitions.* The following definitions apply only to terms used in this paragraph (i) for activities affecting the Louisiana pinesnake.

(i) *Estimated occupied habitat area (EOHA).* Areas of land where occurrences of Louisiana pinesnakes have been recorded and that are considered by the Service to be occupied by the species. For current information regarding the EOHAs, contact your local Service Ecological Services office. Field office contact information may be obtained from the Service regional offices, the addresses of which are listed in 50 CFR 2.2.

(ii) *Suitable or preferable soils.* Those soils in Louisiana and Texas that generally have high sand content and a low water table and that have been shown to be selected by Louisiana pinesnakes (Natural Resources Conservation Service soil survey hydrologic group, Categories A and B).

(2) *Prohibitions.* The following prohibitions that apply to endangered wildlife also apply to the Louisiana pinesnake. Except as provided at paragraph (i)(3) of this section and § 17.4, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or cause to be committed, any of the following acts in regard to this species:

(i) Import or export, as set forth for endangered wildlife at § 17.21(b).

(ii) Take, as set forth for endangered wildlife at § 17.21(c)(1).

(iii) Possession and other acts with unlawfully taken specimens, as set forth for endangered wildlife at § 17.21(d)(1).

(iv) Interstate or foreign commerce in the course of commercial activity, as set forth for endangered wildlife at § 17.21(e).

(v) Sale or offer for sale, as set forth for endangered wildlife at § 17.21(f).

(3) *Exceptions from the prohibitions.* In regard to this species, you may:

(i) Conduct activities as authorized by a permit issued under § 17.32.

(ii) Take, as set forth for endangered wildlife at § 17.21(c)(2) through (c)(4).

(iii) Take, as set forth at § 17.31(b).

(iv) Possess and engage in other acts with unlawfully taken Louisiana pinesnakes, as set forth for endangered wildlife at § 17.21(d)(2).

(v) Take incidental to an otherwise lawful activity caused by:

(A) *Outside any known EOHAs*—Activities that maintain existing forest lands in forest land use and that, when conducted in areas within the range of the Louisiana pinesnake, on preferred or suitable soils, result in the establishment and maintenance of open-canopy pine-dominated forest stands over time across the landscape. These activities include:

(*1*) Tree thinning, tree harvest (including clearcutting), and planting and replanting pines (by hand or by machine).

(*2*) Prescribed burning, including all firebreak establishment and maintenance actions, as well as actions taken to control wildfires.

(*3*) Herbicide application that is generally targeted for invasive plant species control and midstory and understory woody vegetation control, but is also used for site preparation when applied in a manner that minimizes long-term impact to noninvasive herbaceous vegetation. These provisions include only herbicide applications conducted in a manner consistent with Federal and applicable State laws, including Environmental Protection Agency label restrictions and herbicide application guidelines as prescribed by manufacturers.

(*4*) Skidding logs and use of loading decks that avoid mound complexes of Baird's pocket gophers *(Geomys breviceps).*

(*5*) Maintenance of existing substandard (dirt, unsurfaced) forest roads and trails used for access to timber being managed.

(*6*) Implementation of mandated and State-recommended forestry best management practices, including, but not limited to, those necessary to protect riparian (*e.g.,* streamside management zone) and other habitats from erosional sediment deposition, and prevent washout of forest roads and impacts to vegetation.

(*7*) Food plot establishment for game animals, when it does not destroy existing native herbaceous vegetation, avoids Baird's pocket gopher mound complexes, and does not exceed 1 acre in size.

(B) *Within any known EOHAs* where Baird's pocket gopher mounds are present or on lands that have suitable or preferable soils and that are forested, undeveloped, or non-farmed (*i.e.,* not cultivated on an annual basis) and adjacent to forested lands—Activities described in paragraphs (i)(3)(v)(A)(*1*) through (*7*) of this section provided that those activities do not:

(*1*) Cause subsurface disturbance, including, but not limited to, windrowing, stumping, disking (except during firebreak creation or maintenance), root-raking, drum chopping (except for single pass with the lightest possible weighted drums and only when the soil is not wet, when used to control hardwoods and woody shrub species detrimental to establishment of pine-forested land), shearing that penetrates the soil surface, ripping (except when restoring pine forest in compacted soil areas such as former pastures), bedding, new road construction, and commercial or residential development. Machine-planting, using the shallowest depth possible, would be allowed in areas where pocket gophers are not present and only for planting pine tree species. In former pastures or highly degraded areas with no herbaceous vegetation and poor planting conditions, subsurface disturbance will be allowed only for activities that contribute to reforestation that is consistent with the conservation of the species.

(*2*) Inhibit the persistence of suitable Baird's pocket gopher and Louisiana pinesnake habitat, which consists of open-canopy forest situated on well-drained sandy soils with an abundant herbaceous plant community, a nonexistent or sparse midstory, and a low pine basal area.

(*3*) Involve the use of plastic mesh in erosion control and stabilization devices, mats, blankets, or channel protection.

Dated: January 30, 2020.

Aurelia Skipwith,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2020–03545 Filed 2–26–20; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 200220–0060]

RIN 0648–BI33

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery of the South Atlantic Region; Regulatory Amendment 26

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

ACTION: Final rule.

SUMMARY: NMFS implements management measures described in Vision Blueprint Recreational Regulatory Amendment 26 (Regulatory Amendment 26) to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (Snapper-Grouper FMP), as prepared and submitted by the South Atlantic Fishery Management Council (Council). For the recreational sector, this final rule removes the minimum size limits for queen snapper, silk snapper, and blackfin snapper, reduces the minimum size limit for gray triggerfish in the exclusive economic zone (EEZ) off the east coast of Florida, and modifies the 20-fish snapper-grouper aggregate bag limit. The purpose of this final rule is to minimize regulatory discards to the extent practicable, improve regulatory compliance among fishers, and increase consistency among regulations.

DATES: This final rule is effective on March 30, 2020.

ADDRESSES: Electronic copies of Regulatory Amendment 26 may be obtained from *www.regulations.gov* or the NOAA Fisheries website at *https://www.fisheries.noaa.gov/action/regulatory-amendment-26-vision-blueprint-recreational-measures.* Regulatory Amendment 26 includes an environmental assessment, a regulatory impact review, and a Regulatory Flexibility Act (RFA) analysis.

FOR FURTHER INFORMATION CONTACT: Mary Vara, NMFS Southeast Regional Office, telephone: 727–824–5305, or email: *mary.vara@noaa.gov.*

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery in the South Atlantic region is managed under the Snapper-Grouper FMP and includes queen snapper, silk snapper, blackfin snapper, and gray triggerfish, along with other snapper-grouper species. The Snapper-Grouper FMP was prepared by the Council and is implemented by NMFS through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

On October 25, 2019, NMFS published a proposed rule for Regulatory Amendment 26 in the **Federal Register** and requested public comment (84 FR 57378). Regulatory Amendment 26 and the proposed rule outline the rationale for the actions contained in this final rule. A summary of the management measures described in Regulatory Amendment 26 and implemented by this final rule is provided below.

Management Measures Contained in This Final Rule

For the recreational sector, this final rule removes the minimum size limits for silk snapper, queen snapper, and blackfin snapper, reduces the minimum size limit for gray triggerfish in the EEZ off the east coast of Florida, and modifies the snapper-grouper aggregate bag limit for the 20-fish aggregate.

Minimum Size Limit for Queen Snapper, Silk Snapper, and Blackfin Snapper

Queen snapper, silk snapper, and blackfin snapper are part of the deep-water complex. Prior to this final rule, the recreational minimum size limit for queen snapper, silk snapper, and blackfin snapper was 12 inches (30.5 cm) total length (TL), although the remaining species in the deep-water complex do not have a specified minimum size limit requirement. Because these species have a high discard mortality as a result of the effects of barotrauma from being harvested in deep water, the Council determined that removing the commercial minimum size limit for queen snapper, silk snapper, and blackfin snapper would reduce discards and discard mortality for these species. Therefore, this final rule removes the recreational minimum size limit for queen snapper, silk snapper, and blackfin snapper.

Minimum Size Limit for Gray Triggerfish

This final rule reduces the recreational minimum size limit from 14 inches (35.6 cm) fork length (FL) to 12 inches (30.5 cm) FL for gray triggerfish in the EEZ off the east coast of Florida. In 2015, the 12 inch (30.5 cm) FL minimum size limit was implemented for gray triggerfish in the EEZ off North Carolina, South Carolina, and Georgia, and a minimum size limit of 14 inches (35.6 cm) FL was implemented in the EEZ off the east coast of Florida (80 FR 30947: June 1, 2015). However, after the minimum size limit went into effect on July 1, 2015, stakeholders in Florida expressed concern to the Florida Fish and Wildlife Conservation Commission (FWC) regarding increasing discards of gray triggerfish in south Florida where the average size of gray triggerfish is less than that off northeast Florida. In response to that concern, the FWC reduced the recreational minimum size limit of gray triggerfish in state waters to 12 inches (30.5 cm) FL in 2015 (incorrectly stated in the preamble of the proposed rule as 2017), and requested that the Council develop consistent size limit regulations in Federal waters for gray triggerfish. Therefore, reducing the recreational minimum size limit to 12 inches (30.5 cm) FL in the EEZ off the east coast of Florida will make these state and Federal regulations for gray triggerfish consistent throughout the Council's jurisdiction.

20-Fish Snapper-Grouper Aggregate Bag Limit

This final rule modifies the 20-fish snapper-grouper aggregate bag limit by specifying that no more than 10 fish can be of any one species within the 20-fish aggregate. There are 14 snapper-grouper species included in the 20-fish aggregate bag limit for the recreational sector. Recreational fishers in the South Atlantic EEZ may retain 20 total fish per person per day for the following species: whitebone porgy, jolthead porgy, knobbed porgy, saucereye porgy, scup, gray triggerfish, bar jack, almaco jack, banded rudderfish, lesser amberjack, white grunt, margate, sailor's choice, and Atlantic spadefish. These species do not have individual recreational bag limits. The Council determined that modifying the 20-fish aggregate bag limit in this way would allow recreational anglers to catch the same number of fish overall as within the current limit, while limiting the number of any one species within the 20-fish aggregate to 10 fish. Because of stakeholder concerns over the status of the South Atlantic gray triggerfish stock and large catches of Atlantic spadefish in recent years, the Council chose to be proactive and limit the harvest of these two species, as well as the remainder of the species in the 20-fish aggregate. In addition, the state of Florida currently limits harvest of gray triggerfish to 10 fish, per person, per day in state waters off its east coast.

Therefore, this action to revise the snapper-grouper 20-fish aggregate bag limit also simplifies the regulatory

environment by creating consistent regulations for recreational fishing for and retention of gray triggerfish in state and Federal waters off the east coast of Florida. In both cases (the size limits for gray triggerfish, and the bag limits applicable to gray triggerfish), the changes in this final rule align the state and Federal regulations for gray triggerfish off the east coast of Florida for the benefit of fishers and law enforcement.

Comments and Responses

NMFS received eight comments from individuals during the public comment period on the proposed rule for Regulatory Amendment 26. Five of the comments offered were in general support of the actions in the proposed rule. NMFS acknowledges the comments in favor of all or part of the actions in the proposed rule and agrees with them. Three comments that were beyond the scope of the proposed rule are not responded to in this final rule. Three comments opposed an action contained in Regulatory Amendment 26 and the proposed rule; these comments are grouped into two categories and summarized below, along with NMFS' responses.

Comment 1: The recreational minimum size limit should not be removed for blackfin, queen, or silk snapper. This action will negatively impact the fish population by allowing harvest of juvenile fish. These species are struggling to recover from overfishing and they are rarely caught above the minimum size limit. Instead, there should be larger size restrictions.

Response: NMFS disagrees that the minimum size limit for these species should not be removed. These three deep-water snapper species are the only deep-water snapper-grouper species for which there is a minimum size limit in Federal waters of the South Atlantic. The minimum size limit was put in place early in the management of these species before estimates of discard mortality were available and before the designation of the various species complexes. Snapper-grouper species that inhabit deep-water are typically associated with very high discard mortality when caught and brought to the vessel due to the effects from barotrauma (the expansion of gas in a fish's swim bladder, which causes bloating and prevents the fish from regulating its buoyancy). These deep-water species include blueline tilefish, golden tilefish, snowy grouper, wreckfish, and fish in the in the Deep-water Complex (yellowedge grouper, silk snapper, misty grouper, queen snapper, sand tilefish, and blackfin snapper). Because most of these fish that are discarded will subsequently die, the Council determined that removing the minimum size limit requirements for queen snapper, silk snapper, and blackfin snapper will minimize discard mortality in the snapper-grouper fishery.

Comment 2: The minimum size limit for gray triggerfish should either remain at 14 inches (35.6 cm) FL or should be increased. Adults can grow up to 28 inches (71.1 cm) FL, so reducing the minimum size limit to 12 inches (30.5 cm) FL will allow juvenile fish and young adults to be caught, which is harmful to the population. Stock status is a concern, as we are not catching adult-sized gray triggerfish.

Response: NMFS disagrees that reducing the minimum size limit will be harmful to the gray triggerfish population. NMFS acknowledges that this action would allow the removal of smaller fish, which could reduce the number of times a fish spawns. However, the most recent stock assessment (SEDAR 41, 2016) shows that the species is not undergoing overfishing and that gray triggerfish have opportunities to spawn before reaching the revised minimum size limit.

In addition, from 1995 to 2015, the minimum size limit for gray triggerfish in the EEZ off Florida was 12 inches (30.5 cm) FL. That minimum size limit was modified in 2015 through the implementation of Amendment 29 to the Snapper-Grouper FMP to 12 inches (30.5 cm) FL in the EEZ off North Carolina, South Carolina, and Georgia, and to 14 inches (35.6 cm) FL in the EEZ off the east coast of Florida (80 FR 30947; June 1, 2015). The 2015 modification to the minimum size limit in Amendment 29 was a precautionary action taken by the Council and NMFS to respond to concerns about the status of the gray triggerfish stock in the South Atlantic, to align the east coast of Florida regulations with those in the Gulf of Mexico, and to achieve consistency between state and Federal regulations off the east coast of Florida.

However, after the revised minimum size limit went into effect on July 1, 2015, stakeholders in Florida voiced concern to the FWC regarding increasing discards of gray triggerfish in south Florida where the average size of gray triggerfish is less than that off northeast Florida. In response, the FWC reduced the recreational minimum size limit of gray triggerfish to 12 inches (30.5 cm) FL later in 2015, and requested that the Council implement consistent gray triggerfish minimum size limit regulations.

The Council chose to reduce the minimum size limit to 12 inches (30.5 cm) FL to be consistent with the current Florida state regulation and the regulations in place in the EEZ off the rest of the South Atlantic states. Because annual catch limits and accountability measures are in place to prevent overfishing, NMFS has determined that the action will not jeopardize the sustainability of the stock, and that will reduce discards and promote a more consistent regulatory environment for stakeholders and enforcement agencies.

Classification

The Regional Administrator for the NMFS Southeast Region has determined that this final rule is consistent with the Regulatory Amendment 26, the FMP, the Magnuson-Stevens Act, and other applicable law.

This final rule has been determined to be not significant for purposes of Executive Order (E.O.) 12866. This rule is not an E.O. 13771 regulatory action because this rule is not significant under E.O. 12866.

The Magnuson-Stevens Act provides the statutory basis for this final rule. No duplicative, overlapping, or conflicting Federal rules have been identified. In addition, no new reporting, record-keeping, or other compliance requirements are introduced by this final rule.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) during the proposed rule stage that this rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The factual basis for this determination was published in the proposed rule and is not repeated here. No comments from the public or SBA's Chief Counsel for Advocacy were received regarding the certification, and NMFS has not received any new information that would affect its determination. As a result, a final regulatory flexibility analysis is not required and none has been prepared.

List of Subjects in 50 CFR Part 622

Bag limits, Deep-water, Fisheries, Fishing, Florida, Fork Length, Grouper, Size limits, Snapper, South Atlantic.

Dated: February 20, 2020.

Samuel D. Rauch III,

Deputy Assistant Administrator, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR part 622 is amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF OF MEXICO, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

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

■ 2. In § 622.185, revise paragraphs (a)(3) and (c)(2) to read as follows:

§ 622.185 Size limits.

* * * * *

(a) * * *

(3) *Cubera, gray, and yellowtail snappers*—12 inches (30.5 cm), TL.

* * * * *

(c) * * *

(2) *Gray triggerfish*—12 inches (30.5 cm), FL.

* * * * *

■ 3. In § 622.187, revise paragraph (b)(8) to read as follows:

§ 622.187 Bag and possession limits.

* * * * *

(8) *South Atlantic snapper-grouper (whitebone porgy, jolthead porgy, knobbed porgy, saucereye porgy, scup, almaco jack, banded rudderfish, lesser amberjack, white grunt, margate, sailor's choice, Atlantic spadefish, gray triggerfish, bar jack), combined*—20. However, excluded from this 20-fish bag limit are tomtate, South Atlantic snapper-grouper ecosystem component species (specified in table 4 of appendix A to part 622), and those specified in paragraphs (b)(1) through (7) and paragraphs (b)(9) and (10) of this section. Within the 20-fish bag limit, no more than 10 fish can be of any one of these single snapper-grouper species.

* * * * *

[FR Doc. 2020–03833 Filed 2–26–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 200221–0061]

RTID 0648–XX019

Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fisheries; 2020 Specifications

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

ACTION: Final rule.

SUMMARY: Through this rule, NMFS maintains previously approved *Illex* squid, longfin squid, and butterfish specifications for the 2020 fishing year and maintains the 2019 Atlantic mackerel acceptable biological catch for 2020 based on updated scientific advice. This action is required to promote the sustainable utilization and conservation of the Atlantic mackerel, squid, and butterfish resources.

DATES: Effective February 27, 2020.

ADDRESSES: Copies of supporting documents used by the Mid-Atlantic Fishery Management Council, including the Environmental Assessment (EA), the Supplemental Information Report (SIR), the Regulatory Impact Review (RIR), and the Regulatory Flexibility Act (RFA) analysis are available from: Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, 800 North State Street, Suite 201, Dover, DE 19901, telephone (302) 674–2331. The EA/SIR/RIR/RFA analysis is also accessible via the internet at *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2019-0137.*

FOR FURTHER INFORMATION CONTACT: Alyson Pitts, Fishery Management Specialist, (978) 281–9352.

SUPPLEMENTARY INFORMATION:

Background

The regulations implementing the Atlantic Mackerel, Squid, and Butterfish Fishery Management Plan (FMP) require the Mid-Atlantic Fishery Management Council's Atlantic Mackerel, Squid, and Butterfish Monitoring Committee to develop specification recommendations for each species based upon the acceptable biological catch (ABC) advice of the Council's Scientific and Statistical Committee (SSC). The FMP regulations also require the specification of annual catch limits (ACL) and accountability measure (AM) provisions for butterfish. Both squid species are exempt from the ACL/AM requirements because they have a life cycle of less than one year. In addition, the regulations require the specification of domestic annual harvest (DAH), the butterfish mortality cap in the longfin squid fishery, and initial optimum yield (IOY) for both squid species.

On December 17, 2019 (84 FR 68871), we published a proposed rule in the **Federal Register** seeking public comment on revising the previously approved 2020 Atlantic mackerel specifications to maintain the 2019 specifications with a modification to the recreational catch deduction and change the river herring and shad catch cap in the Atlantic mackerel fishery. This rule also proposed maintaining the previously approved *Illex* squid, longfin squid, and butterfish specifications. The proposed rule for this action included additional background on specifications and the details of how the Council derived its recommended specifications for Atlantic mackerel, *Illex* squid, longfin squid and butterfish. Those details are not repeated here. For additional information, please refer to the proposed rule for this action.

On August 2, 2019 (84 FR 37778), we published a final rule in the **Federal Register** implementing *Illex* squid, longfin squid, and butterfish specifications for 2019. The Atlantic mackerel specifications for 2019–2021 were developed in May 2018 as part of the final rule for Framework Adjustment 13 (84 FR 58053; October 30, 2019). The Council's SSC met in May 2019 to reevaluate the 2020 specifications based upon the latest information. At that meeting, the SSC concluded that no adjustments to the *Illex* squid, longfin squid, and butterfish specifications were warranted. However, the the SSC recommended to change to the Atlantic mackerel ABC, update the recreational catch, and modify the river herring and shad catch cap.

Until new specifications are implemented, the existing 2019 Atlantic mackerel, *Illex* squid, longfin squid, and butterfish specifications will continue pursuant to 50 CFR 648.22(d)(1).

2020 Atlantic Mackerel Specifications

The original 2020 Atlantic mackerel ABC recommended by the SSC for Framework 13 was based on projections that recognized a strong 2015 year class in the assessment results. At its May 2019 meeting, the SSC considered preliminary results from the 2019 Canadian Atlantic mackerel assessment, which indicated lower than expected recruitment. As a result, the SSC recommended maintaining the more conservative 2019 ABC. Based on the recommendations of the Council's SSC and the Atlantic Mackerel, Squid, and Butterfish Monitoring Committee, the Council recommended and this action implements the revised 2020 mackerel specifications outlined in Table 1. These specifciations are nearly identical to those set in 2019, with the exception of a higher recreational catch deduction based on an updated recreational catch accounting methodology. There is an Atlantic mackerel stock assessment update scheduled for 2020 that will inform future ABC specifications.

TABLE 1—2019 ATLANTIC MACKEREL SPECIFICATIONS COMPARED TO 2020 SPECIFICATIONS

[mt]

Specification	2019	2020
OFL	31,764	NA
ABC	29,184	29,184
Canadian Deduction	10,000	10,000
U.S. ABC	19,184	19,184
Recreational Allocation	1,209	1,270
Commerical Allocation	17,975	17,914
Management Uncertainty Buffer (3 percent)	539	537
Commercial Annual Catch Target	17,436	17,377
DAH	17,371	17,312

River Herring and Shad Catch Cap in the Atlantic Mackerel Fishery

Consistent with maintaining the Atlantic mackerel ABC in 2020 as in 2019, this action maintains the 2019 river herring and shad catch cap (129 mt) for 2020. This action also eliminates the 89-mt trigger provision that was implemented in Framework 13. If the 89-mt trigger were reached, a 20,000-lb (9,071.84-kg) possession limit for limited access permit holders would become effective. Eliminating the initial 89-mt trigger allows for additional landings by the Atlantic mackerel fishery, without compromising the 129-mt catch cap, which serves as an incentive to avoid river herring and shad.

Longfin Squid Specifications

This action maintains the existing longfin squid ABC of 23,400 mt for 2020, as implemented on March 1, 2018 (83 FR 8764). The background for this ABC is discussed in the proposed rule to implement the 2018–2020 squid and butterfish specifications (82 FR 58583; December 13, 2017) and is not repeated here.

TABLE 2—2020 LONGFIN SQUID SPECIFICATIONS IN METRIC TONS

[mt]

OFL	Unknown
ABC	23,400
IOY	22,932
DAH/DAP	22,932

TABLE 3—2020 LONGFIN QUOTA TRIMESTER ALLOCATIONS

Trimester	Percent	Metric tons
I (Jan–Apr)	43	9,861
II (May–Aug)	17	3,898
III (Sep–Dec)	40	9,173

2020 Butterfish Specifications

This action also maintains the previously approved 2020 butterfish specifications outlined in Table 4, as initially published on March 1, 2018 (83 FR 8764). The background for these specifications is discussed in the proposed rule to implement 2019 squid and butterfish specifications (82 FR 58583; December 13, 2017) and is not repeated here. These specifications maintain the existing butterfish mortality cap in the longfin squid fishery (3,884 mt) and the existing allocation of the butterfish mortality cap among longfin squid trimesters (Table 5).

TABLE 4—2020 BUTTERFISH SPECIFICATIONS IN METRIC TONS

[mt]

OFL	39,592
ACL = ABC	32,063
Commercial ACT (ABC – management uncertainty buffers for each year)	28,857
DAH (ACT minus butterfish cap and discards)	23,752
Directed Fishery closure limit (DAH – 1,000 mt incidental landings buffer)	22,752
Butterfish Cap (in the longfin squid fishery)	3,884

TABLE 5—TRIMESTER ALLOCATION OF BUTTERFISH MORTALITY CAP ON THE LONGFIN SQUID FISHERY FOR 2020

Trimester	Percent	Metric tons
I (Jan–Apr)	43	1,670
II (May–Aug)	17	660
III (Sep–Dec)	40	1,554

TABLE 5—TRIMESTER ALLOCATION OF BUTTERFISH MORTALITY CAP ON THE LONGFIN SQUID FISHERY FOR 2020—Continued

Trimester	Percent	Metric tons
Total	100	3,844

2020 Illex Squid Specifications

This action maintains the previously approved 2019 *Illex* squid specifications for 2020, outlined in Table 6, as published on August 2, 2019 (84 FR 37778). The background for these specifications is discussed in the proposed rule to implement the 2019 *Illex* squid, longfin squid, and butterfish specifications (May 1, 2019, 84 FR 18471). The Council will set specifications for 2021 and beyond in 2020.

TABLE 6—2020 ILLEX SQUID SPECIFICATIONS IN METRIC TONS

[mt]

OFL	Unknown
ABC	26,000
IOY	24,825
DAH/DAP	24,825

Comments and Responses

We received five relevant comments on the proposed rule from three members of the public and two commercial fishing industry members. Two comments from the general public were supportive of this action due to the precautionary measures taken to conserve the Atlantic mackerel stock. One comment from a member of the public suggested we cut quotas by 50 percent but provided no rationale. Both members of the commercial fishing industry were supportive of eliminating the 89-mt river herring and shad catch cap trigger provision in order to maximize fishing opportunity in the Atlantic mackerel fishery. However, they both recommended we keep the higher catch cap originally set for 2020 (*i.e.,* 152 mt) to avoid another closure. We agree that removing the 89-mt trigger provision increases the opportunity to fish for Atlantic mackerel; however, the 129-mt river herring and shad catch cap was set in relation to the 2020 ABC and is based on the best scientific information available.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with the Atlantic Mackerel, Squid, and Butterfish FMP, other provisions of the Magnuson-Stevens Act, and other applicable law.

There is good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effective date. The start of the fishing year began on January 1, 2020, and is currently operating under a higher mackerel ABC than what will be implemented under this rule. There is a need to implement this action in a timely manner to ensure this more conservative ABC is not exceeded and to avoid public confusion. These specifications could not have been put into place sooner to allow for a 30-day delayed effectiveness because the information and data necessary for the Council to develop this action was not available in time for it to be forwarded to NMFS and implemented by January 1, 2020, the beginning of the fishing year.

Additionally, because this rule relieves a restriction by removing the initial 89-mt river herring and shad catch cap trigger provision, it is not subject to the 30-day delayed effectiveness provision of the APA pursuant to 5 U.S.C. 553(d)(1). If implementation of this action is delayed, the 89-mt river herring and shad catch cap trigger may be reached early in the fishing year for the third consecutive year, resulting in a greatly reduced possession limit that effectively closes the directed fishery. This would prevent the economic benefits from this rule from being realized. Therefore, it is in the public interest to implement this final action as soon as possible.

This final rule is exempt from review under Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification and no other information has been obtained that suggests any other conclusion. As a result, a regulatory flexibility analysis was not required and none was prepared.

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

Dated: February 21, 2020.

Samuel D. Rauch III,

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

[FR Doc. 2020–03867 Filed 2–26–20; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 85, No. 39
Thursday, February 27, 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 AGRICULTURE

Agricultural Marketing Service

7 CFR Part 932

[AMS–SC–19–0081; SC–19–932–2]

Olives Grown in California; Proposed Amendments to the Marketing Order No. 932 and Referendum Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and referendum order.

SUMMARY: This rulemaking proposes amendments to Marketing Order No. 932, which regulates the handling of olives grown in California. The proposed amendments would change the California Olive Committee's (Committee) quorum requirements. In addition, USDA is proposing a clarifying change stating that alternate members acting as members to form a quorum would also be eligible to cast votes.

DATES: The referendum will be conducted from March 9 through March 20, 2020. The representative period for the referendum is August 1 through July 31, 2019.

FOR FURTHER INFORMATION CONTACT: Melissa Schmaedick, Senior Marketing Specialist, or Andrew Hatch, Chief, Rulemaking Services Branch, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, Stop 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: *Melissa.Schmaedick@usda.gov* or *Andrew.Hatch@usda.gov.*

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

SUPPLEMENTARY INFORMATION: This proposal, pursuant to 5 U.S.C. 553, proposes amendments to regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This proposal is issued under Marketing Order No. 932, as amended (7 CFR part 932), regulating the handling of olives grown in California. Part 932 (referred to as the ''Order'') is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.'' Section 608c(17) of the Act and the applicable procedural requirements governing the formulation of marketing agreements and orders (7 CFR part 900) authorize amendment of the Order through this informal rulemaking action.

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

This proposal has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed rule is not intended to have retroactive effect. This proposed rule would not preclude, preempt, or supersede any State program covering olives grown in California.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed no later than 20 days after the date of entry of the ruling.

Section 1504 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) (Pub. L. 110–246) amended section 608c(17) of the Act, which in turn required the addition of supplemental procedural requirements to 7 CFR part 900 (73 FR 49307; August 21, 2008). The amendment of section 608c(17) of the Act and additional supplemental procedural requirements authorize the use of informal rulemaking (5 U.S.C. 553) to amend Federal fruit, vegetable, and nut marketing agreements and orders. USDA may use informal rulemaking to amend marketing orders based on the nature and complexity of the proposed amendments, the potential regulatory and economic impacts on affected entities, and any other relevant matters.

AMS has considered these factors and has determined that the amendments proposed are not unduly complex and the nature of the proposed amendments is appropriate for utilizing the informal rulemaking process to amend the Order. A discussion of the potential regulatory and economic impacts on affected entities is discussed later in the ''Final Regulatory Flexibility Analysis'' section of this proposed rule.

The Committee unanimously recommended the amendments following deliberations at a public meeting held on July 29, 2019. The proposed action would amend the Order by changing the Committee's quorum requirements. USDA is proposing an additional clarifying change to the Order's quorum requirements by stating that alternate members acting as members to form a quorum would also be eligible to cast votes. In addition to these proposals, USDA proposes to make any additional changes to the Order as may be necessary to conform to any amendment that may result from this rulemaking action.

A proposed rule soliciting comments on the proposed amendments was issued on November 1, 2019 and published in the **Federal Register** on November 6, 2019 (84 FR 59736). No comments were received. AMS will

conduct a grower referendum to determine support for the proposed amendments. If appropriate, a final rule will then be issued to effectuate the amendments favored by growers in the referendum.

The Committee's proposed amendments would amend the Order by removing the requirement of having five producer members and five handler members in attendance to form a quorum and clarify that alternate members acting as members could satisfy the quorum requirement. USDA is proposing a clarifying change to the Order's quorum requirements by stating that alternate members acting as members to form a quorum would also be eligible to cast votes.

Proposal—Quorum Requirement

Section 932.25 establishes the Committee, with 16 members (eight producer members and eight handler members) and further allows the Committee to be increased by a public member (who is not to be a producer or handler of olives nor an officer, employee or director of any producer or handler of olives) for a potential total of 17 members. In addition, this section requires that each member has an alternate who meets the same qualifications as the member. The Committee currently operates with 17 members and 17 alternate members.

Section 932.30 further states that each alternate member shall act in the place and stead of such member (a) during such member's absence, and (b) in the event of such member's removal, resignation, disqualification or death, until a successor for such member's unexpired term has been selected and has qualified.

Section 932.36 establishes the Committee's quorum requirements. Current requirements state that a quorum must consist of at least 10 members of whom at least five must be producer members and at least five must be handler members and, if the Committee is increased by the addition of a public member, a quorum must consist of at least 11 members of which at least five must be producer members and at least five must be handler members. Given that the Committee currently has a public member, a quorum of 11 members of which five must be producers and five must be handlers is required.

This proposed action would amend § 932.36 by removing the requirement of having five producer members and five handler members in attendance to form a quorum. The proposed modified language would define a quorum as consisting of at least 10 members and, if the committee is increased by the addition of a public member, a quorum would consist of at least 11 members.

The proposed modification would also clarify that alternate members acting as members could satisfy the quorum requirement. The Committee's recommended amendment, that would modify the second sentence of the current § 932.36, adds a phrase recognizing that alternate members who are serving in place of an absent member should be counted as full Committee members in the context of constituting a quorum. This proposed phrase reiterates the authority of alternate members as specified in § 932.30.

For clarity and consistency, USDA proposes adding the same phrase to the first sentence of § 932.36. The proposed revision to the sentence would read as follows: ''Decisions of the committee shall be by majority vote of the members, including alternates acting as members, present and voting, and a quorum must be present: . . .'' This proposed additional revision would clarify that alternate members acting as members could not only fulfill quorum requirements, but they would also be able to vote as members on matters of Committee business in the absence of their member.

Since promulgation of the Order in 1965, the California olive industry has seen reductions of 64 percent (from 2500 to 900) and 93 percent (from 28 to two) in the number of California olive producers and handlers, respectively. Industry consolidation has resulted in increased difficulties in filling Committee member seats as well as fulfilling quorum requirements at meetings.

Given the current quorum requirement of a minimum of five producers and five handlers in attendance, the absence of just one individual may result in the lack of a quorum. Without a quorum, the Committee is unable to vote on business decisions or make regulatory recommendations to USDA. Meetings without a quorum are also costly as attendees must travel to attend the meeting, thus incurring travel costs in addition to time lost operating their businesses.

Adjusting the current quorum requirement as proposed would lower the risk of not reaching a quorum during scheduled meetings due to the absence of the required number of producer or handler members. This change would streamline the Committee's operations and increase its effectiveness by allowing the Committee to conduct business as long as the minimum number of members are in attendance. It would also reduce the risk of members incurring costs from traveling to meetings at which business cannot be conducted due to lack of a quorum.

For the reasons stated above, it is proposed that § 932.36, Quorum requirement, be amended by removing the requirement of having five producer members and five handler members in attendance to form a quorum and clarify that alternate members acting as members could satisfy the quorum requirement. It is also proposed that § 932.36 be further amended by USDA's proposed clarifying change. This proposed addition has been incorporated into the amendatory text of this document.

Final Regulatory Flexibility Analysis

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

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

There are approximately 900 producers of olives in the production area and two handlers subject to regulation under the Order. The Small Business Administration (SBA) defines small agricultural producers as those having annual receipts of less than $1,000,000, and small agricultural service firms as those whose annual receipts are less than $30,000,000 (13 CFR 121.201).

According to the National Agricultural Statistics Service (NASS) data, as of June 2019 the average price to producers for the 2018 crop year was $766.00 per ton, and total assessable volume for the 2018 crop year was 17,953 tons. Based on production, the total number of California olive producers, and price paid to those producers, the average annual producer revenue is less than $1,000,000 ($766.00 times 17,953 tons equals $13,751,998 divided by 900 producers equals an average annual producer revenue of $15,280.00). Therefore, most olive producers may be classified as small entities. Both handlers may be classified as large entities under the SBA's

definitions because their annual receipts are greater than $30,000,000.

The proposed change would revise the quorum requirement for Committee meetings by removing the requirement of having five producer members and five handler members in attendance to form a quorum. The proposed modified language would define a quorum as consisting of at least 10 members and, if the Committee is increased by the addition of a public member, a quorum would consist of at least 11 members.

The Committee unanimously recommended the proposed amendment at a public meeting on July 29, 2019. If this proposed amendment is approved in a referendum, there would be no direct financial effects on producers or handlers as it is primarily administrative in nature. The proposed amendment would increase the efficiency of the Committee's operations and allow it to respond more quickly to the industry's needs.

The number of producers and handlers operating in the industry has decreased significantly since the marketing order was established in 1965, dropping from 2,500 to 900 (64 percent) and from 28 to two (93 percent), respectively. Industry consolidation has made it difficult to find enough members to fill positions on the Committee. Moreover, fulfilling quorum requirements at meetings has also become increasingly challenging.

Changing the quorum requirement from the current 11-member requirement, of which five must be producers and five must be handlers, to simply the attendance of 11 members would increase meeting efficiency by making the quorum requirement more easily fulfilled. This proposed change would also reduce costs to members, Committee staff, and USDA employees who travel to meetings where a quorum is not established. If implemented, the proposed amendment is not expected to result in any increases in economic costs or burden to industry members, USDA staff or consumers.

Alternatives to this proposed amendment, including making no changes at this time, were considered by the Committee. One alternative included lowering the required number of producer or handler members in attendance. However, given that there are only two handlers in operation within the industry, this option was still considered too restrictive by the Committee. Therefore, the alternatives were not considered viable by the Committee.

AMS believes the proposed amendment is justified and necessary to ensure the Committee's ability to locally administer the program. Modifying the quorum requirement as proposed in this rule would ensure a more efficient and orderly flow of business.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581–0178 Vegetable and Specialty Crops. No changes in those requirements because of this action would be necessary. Should any changes become necessary, USDA would submit them to OMB for approval. This proposed rule would impose no additional reporting or recordkeeping requirements on either California olive handler.

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. In addition, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

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

The Committee publicizes all of its meetings throughout the California olive production area and encourages interested parties to participate in its deliberations. Like all Committee meetings, the July 29, 2019, meeting was public, and all entities, both large and small, were encouraged to express their views on the proposed amendment.

A proposed rule concerning this action was published in the **Federal Register** on November 6, 2019 (84 FR 59736). Copies of the proposed rule were sent via email to all Committee members and California olive handlers. The rule was also made available through the internet by USDA and the Office of the Federal Register. A 30-day comment period ending December 6, 2019, allowed interested persons to respond to the proposal. No comments were received; therefore, no changes were made to the proposed amendments.

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

Findings and Conclusions

The findings and conclusions and general findings and determinations included in the proposed rule set forth in the November 6, 2019, issue of the **Federal Register** are hereby approved and adopted.

Marketing Order

Annexed hereto and made a part hereof is the document entitled ''Order Amending the Order Regulating the Handling of Olives Grown in California.'' This document has been decided upon as the detailed and appropriate means of effectuating the foregoing findings and conclusions. It is hereby ordered that this entire rule be published in the **Federal Register**.

Referendum Order

It is hereby directed that a grower referendum be conducted in accordance with the procedure for the conduct of referenda (7 CFR part 900.400–407) to determine whether the annexed order amending the Order regulating the handling of olives grown in California is approved by growers who have engaged in the production of olives within the production area during the representative period. The representative period for the conduct of such referendum is hereby determined to be August 1 through July 31, 2019.

The agents of the Secretary to conduct such referendum are designated to be Kathie Notoro and Terry Vawter, California Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (559) 487–5901, Fax: (559) 487–5906, or Email: *Kathie.Notoro@usda.gov* or *Terry.Vawter@usda.gov,* respectively.

List of Subjects in 7 CFR Part 932

Olives, Marketing agreements, Reporting and recordkeeping requirements.

Dated: February 21, 2020.

Bruce Summers,

Administrator, Agricultural Marketing Service.

Order Amending the Order Regulating the Handling of Olives Grown in California [1]

Findings and Determinations

The findings hereinafter set forth are supplementary to the findings and

[1] This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to

determinations which were previously made in connection with the issuance of the marketing order; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

1. The Order, as amended, and as hereby proposed to be further amended, and all of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

2. The Order, as amended, and as hereby proposed to be further amended, regulates the handling of olives grown in California in the same manner as, and are applicable only to, persons in the respective classes of commercial and industrial activity specified in the Order;

3. The Order, as amended, and as hereby proposed to be further amended, is limited in application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

4. The Order, as amended, and as hereby proposed to be further amended, prescribe, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of olives produced in the production area; and

5. All handling of olives produced in the production area as defined in the Order is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

Order Relative to Handling

It is therefore ordered, that on and after the effective date hereof, all handling of olives grown in California shall be in conformity to, and in compliance with, the terms and conditions of the said order as hereby proposed to be amended as follows:

The provisions of the proposed marketing order amending the Order contained in the proposed rule issued by the Administrator on November 1, 2019, and published in the **Federal Register** (84 FR 59736) on November 6, 2019, will be and are the terms and provisions of this order amending the Order and are set forth in full herein.

formulate marketing agreements and marketing orders have been met.

PART 932—OLIVES GROWN IN CALIFORNIA

■ 1. The authority citation for 7 CFR part 932 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Revise § 932.36 to read as follows:

§ 932.36 Procedure.

Decisions of the committee shall be by majority vote of the members, including alternates acting as members, present and voting, and a quorum must be present: *Provided,* That decisions requiring a recommendation to the Secretary on matters pertaining to grade and size regulations shall require at least 10 affirmative votes, at least 5 of which must be from producer members and at least 5 of which must be from handler members and, if the committee is increased by the addition of a public member, at least 11 affirmative votes shall be required, at least 5 of which must be from producer members and at least 5 of which must be from handler members. A quorum shall consist of at least 10 members, including alternates acting as members, and, if the committee is increased by the addition of a public member, a quorum shall consist of at least 11 members, including alternates acting as members. Except in case of an emergency, a minimum of 5 days advance notice shall be given with respect to any meeting of the committee. In case of an emergency, to be determined within the discretion of the chairman of the committee, as much advance notice of a meeting as is practicable in the circumstances shall be given. The committee may vote by mail or telegram upon due notice to all members, but any proposition to be so voted upon first shall be explained accurately, fully, and identically by mail or telegram to all members. When voted on by such method, at least 14 affirmative votes, of which seven shall be producer member votes and seven shall be handler member votes, shall be required for adoption and, if the committee is increased by the addition of a public member, votes by mail or telegram shall require at least 15 affirmative votes, of which at least 7 shall be producer member votes and at least 7 shall be handler member votes. The committee may recommend for the Secretary's approval changes in the number of affirmative votes required for adoption of any proposition voted upon by means of a mail or telegram ballot: *Provided,* That the number of affirmative votes required for adoption shall not be less than 10, and in any case an equal number of producer member and handler member votes shall be required for adoption and, if the committee is increased by the addition of a public member, the number of affirmative votes required for adoption shall be increased by 1.

[FR Doc. 2020–03893 Filed 2–26–20; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2017–1123; Product Identifier 2017–SW–013–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters Deutschland GmbH Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Supplemental notice of proposed rulemaking (SNPRM); reopening of comment period.

SUMMARY: The FAA is revising an earlier proposal for Airbus Helicopters Deutschland GmbH (Airbus Helicopters) Model MBB–BK 117 C–2 and Model MBB–BK 117 D–2 helicopters. This action revises the notice of proposed rulemaking (NPRM) by changing one of the required actions. The FAA is proposing this airworthiness directive (AD) to address the unsafe condition on these products. Since these actions impose an additional burden over that proposed in the NPRM, the FAA is reopening the comment period to allow the public the chance to comment on these proposed changes.

DATES: The comment period for the NPRM published in the **Federal Register** on December 5, 2017 (82 FR 57390), is reopened. The FAA must receive comments on this SNPRM 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–2017–1123; 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 proposed AD, the European Aviation Safety Agency (EASA) AD, 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 proposed rule, contact Airbus Helicopters, 2701 N Forum Drive, Grand Prairie, TX 75052; telephone 972–641–0000 or 800–232–0323; fax 972–641–3775; or at *https://www.airbus.com/helicopters/services/technical-support.html.* 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.

FOR FURTHER INFORMATION CONTACT: Matt Fuller, Senior Aviation Safety Engineer, Safety Management Section, Rotorcraft Standards Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *matthew.fuller@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

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 might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, 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 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 proposed rulemaking. Before acting on this proposal, the FAA will consider all comments received on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The FAA may change this proposal in light of the comments received.

Discussion

The FAA issued an NPRM to amend 14 CFR part 39 to remove AD 2017–02–07, Amendment 39–18786 (82 FR 10267, February 10, 2017) (''AD 2017–02–07'') and add a new AD. AD 2017–02–07 applies to Airbus Helicopters Model MBB–BK 117 C–2 helicopters, serial numbers up to and including 9750, and Model MBB–BK 117 D–2 helicopters, serial numbers up to and including 20110, with a hydraulic module plate assembly part number B291M0003103 with a single locking attachment point installed. AD 2017–02–07 requires a repetitive inspection and a one-time torque of the hydraulic module plate assembly attachment points (attachment points). The actions in AD 2017–02–07 are intended to prevent failure of an attachment point, loss of the hydraulic module plate, and subsequent loss of control of the helicopter.

The NPRM published in the **Federal Register** on December 5, 2017 (82 FR 57390). The NPRM proposed to retain the initial inspection and torque requirements of AD 2017–02–07 and require replacing the single locking attachment mechanisms with double locking attachment mechanisms. The NPRM was prompted by EASA AD No. 2017–0047, dated March 13, 2017, issued by EASA, which is the Technical Agent for the Member States of the European Union, to correct an unsafe condition on Airbus Helicopters Deutschland GmbH (formerly Eurocopter Deutschland GmbH) Model MBB–BK117 C–2, MBB–BK117 C–2e, MBB–BK117 D–2 and MBB–BK117 D–2m helicopters. EASA advises that the hydraulic plate assembly on certain MBB–BK117 models has four attachment points on the fuselage secured by a single locking mechanism. According to EASA, a design reassessment revealed stiffness of the hydraulic plate may be insufficient to withstand the in-service loads in the event one of the four single locking attachment points fails. The EASA AD requires a repetitive inspection and one-time torque tightening of the attachment points until replacement of the single locking attachment hardware with double locking attachment hardware.

Actions Since the NPRM Was Issued

Since the NPRM was issued, Airbus Helicopters revised its service information by adding a requirement to reposition the aft grounding straps and inspect the clamping effect of the aft attachment points when the double locking attachment hardware is installed. The revised service information also has an alternative clamp effect inspection for helicopters that have previously installed the double locking attachment hardware. These additional actions address the unsafe condition by ensuring the correct torque is applied and the bolts do not loosen. The FAA is proposing this SNPRM to include these additional actions.

Further, the FAA has corrected an error in the NPRM proposing to apply a torque of 9 to 10 Nm to the left-hand and right-hand nuts of each attachment point. This torque adjustment is only necessary for each forward (not aft) attachment point.

Lastly, the website address for Airbus Helicopters has also changed. This website address has been updated throughout this SNPRM.

Comments

The FAA gave the public the opportunity to comment on the original NPRM (82 FR 57390, December 5, 2017). The FAA received no comments on that NPRM or on the determination of the cost to the public.

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 of the unsafe condition described in its AD. The FAA is proposing this SNPRM after evaluating all information provided by EASA and determining the unsafe condition exists and is likely to exist or develop on other helicopters of these same type designs. Certain changes described above expand the scope of the original NPRM. As a result, the FAA has determined that it is necessary to reopen the comment period to provide additional opportunity for the public to comment on this SNPRM.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Airbus Helicopters Alert Service Bulletin (ASB) No. ASB MBB–BK117 C–2–29A–003 for Model MBB–BK 117 C–2 helicopters and ASB No. ASB MBB–BK117 D–2–29A–001 for Model MBB–BK 117 D–2 helicopters, both Revision 3 and dated December 19, 2017. Until the attachment points are modified with double locking attachment mechanisms, this service information specifies a repetitive visual inspection for condition and correct installation of the attachment points and replacing the affected parts if there is a crack. This service information also

specifies a tightening torque check of the forward attachment points after the initial inspection and replacing the affected parts if torque cannot be applied. This service information specifies procedures to replace the single locking attachment hardware with double locking attachment hardware.

For certain helicopters with a hydraulic module plate assembly with the double locking attachment hardware installed, this revision of the service information contains procedures to inspect the clamping effect of the aft attachment points and torque tightening the screw joints (bolts). If a bolt can be turned while applying this torque, the service information specifies instructions to replace the split pin, washer, and self-locking castellated nut, check the bolt for wear and replace it if necessary, change the position of the aft grounding strap, check the electrical bonding, and apply PU-Lacquer to the grounding connection.

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

Other Related Service Information

The FAA also reviewed Airbus Helicopters ASB No. ASB MBB–BK117 C–2–29A–003 for Model MBB–BK 117 C–2 helicopters and ASB No. ASB MBB–BK117 D–2–29A–001 for Model MBB–BK 117 D–2 helicopters, both Revision 1 and dated October 14, 2016, and both Revision 2 and dated February 1, 2017. Revisions 1 and 2 of this service information contain the same visual inspection and torque tightening check procedures as Revision 3. Revision 2 of this service information adds the procedures to replace the single locking attachment hardware with double locking attachment hardware and contains the same forward locking attachment hardware replacement procedures as Revision 3.

Proposed Requirements of the SNPRM

For helicopters with a hydraulic module plate assembly with the single locking attachment hardware installed, this proposed AD would require, within 100 hours time-in-service (TIS), performing a visual inspection of each attachment point of the hydraulic module plate assembly for a crack and proper installation, and applying torque to the nuts of each forward attachment point. Within 300 hours TIS, this proposed AD would require replacing each single locking attachment point mechanism with a double locking attachment point mechanism.

For helicopters with a hydraulic module plate assembly with double locking attachment hardware installed in accordance with Airbus Helicopters ASB No. ASB MBB–BK117 C–2–29A–003 or ASB No. ASB MBB–BK117 D–2–29A–001, both Revision 2 and dated February 1, 2017, this proposed AD would require, within 300 hours TIS, inspecting the clamping effect of the aft joints and torque tightening the bolts. If a bolt can be turned while applying torque, this proposed AD would require removing the split pin and self-locking castellated nut from service, inspecting the bolt for wear and replacing it if necessary, repositioning the aft grounding strap to the opposite side of the attachment point, replacing the washer, installing a new self-locking castellated nut, inspecting the electrical bonding, installing a new split pin, and applying lacquer to the grounding connection.

Differences Between This SNPRM and the EASA AD

The EASA AD specifies performing the visual inspection of each attachment point at intervals not exceeding 400 flight hours. This proposed AD would not require a repetitive inspection. This proposed AD would require the replacement of each single locking attachment point mechanism with a double locking attachment point mechanism within 300 hours TIS instead, which would make subsequent inspections unnecessary. Since EASA has not revised or superseded its AD to incorporate Revision 3 of the service information, the EASA AD does not require inspecting the clamping effect of the aft joints, torque tightening the bolts, and corrective action if necessary for helicopters with a hydraulic module plate assembly with double locking attachment hardware installed in accordance with Airbus Helicopters ASB No. ASB MBB–BK117 C–2–29A–003 or ASB No. ASB MBB–BK117 D–2–29A–001, both Revision 2 and dated February 1, 2017.

Costs of Compliance

The FAA estimates that this proposed AD affects 167 helicopters of U.S. Registry. The FAA estimates that operators may incur the following costs in order to comply with this AD. The FAA estimates the cost of labor at $85 per work-hour.

Visually inspecting the four attachment points would take about 0.75 work-hour for an estimated cost of $64 per helicopter and $10,688 for the U.S. fleet. Inspecting the torque of the four attachment points would take about 0.25 work-hour for an estimated cost of $21 per helicopter and $3,507 for the U.S. fleet. Replacing any of the attachment point parts would take a minimal amount of time and parts would cost about $48 per attachment point. Installing four double locking attachment point mechanisms would take a minimal amount of time and parts would cost about $400 per helicopter and $66,800 for the U.S. fleet.

For certain double locking attachment hardware aft joints, inspecting the clamping effect and applying torque would take about 1 work-hour for an estimated cost of $85 per helicopter. If required, inspecting and replacing parts, repositioning the aft grounding strap, inspecting the electrical bonding, and applying lacquer to the grounding connection would take about 0.5 work-hour and parts would cost about $15 for an estimated cost of $58 per helicopter.

According to Airbus Helicopters' service information, 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 by Airbus Helicopters. Accordingly, the FAA has included all costs 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, 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 removing airworthiness directive (AD) 2017–02–07, Amendment 39–18786 (82 FR 10267, February 10, 2017), and adding the following new AD:

Airbus Helicopters Deutschland GmbH: Docket No. FAA–2017–1123; Product Identifier 2017–SW–013–AD.

(a) Applicability

This AD applies to Airbus Helicopters Deutschland GmbH Model MBB–BK 117 C–2 helicopters, serial numbers up to and including 9750, and Airbus Helicopters Deutschland GmbH Model MBB–BK 117 D–2 helicopters, serial numbers up to and including 20110, certificated in any category, with a hydraulic module plate assembly part number B291M0003103 with a single locking attachment point installed or with a double locking attachment point installed before the effective date of this AD in accordance with Airbus Helicopters Alert Service Bulletin (ASB) No. ASB MBB–BK117 C–2–29A–003 (ASB MBB–BK117 C–2–29A–003 Rev 2) or ASB No. ASB MBB–BK117 D–2–29A–001 (ASB MBB–BK117 D–2–29A–001 Rev 2), both Revision 2 and dated February 1, 2017, as applicable to your model helicopter.

(b) Unsafe Condition

This AD defines the unsafe condition as failure of a hydraulic module plate assembly attachment point (attachment point). This condition could result in loss of the hydraulic module plate and subsequent loss of control of the helicopter.

(c) Affected ADs

This AD replaces 2017–02–07, Amendment 39–18786 (82 FR 10267, February 10, 2017).

(d) Comments Due Date

The FAA must receive comments by April 27, 2020.

(e) 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.

(f) Required Actions

Comply with either paragraphs (f)(1) and (2) of this AD, or paragraph (f)(3) of this AD, as applicable to your helicopter.

(1) For helicopters with a hydraulic module plate assembly with a single locking attachment hardware installed, within 100 hours time-in-service (TIS):

(i) Visually inspect the split pins, castellated nuts, plugs, nuts, and hexagon bolts of each attachment point for a crack and for proper installation by following the Accomplishment Instructions, paragraphs 3.B.1.3.a. through 3.B.1.3.d., of Airbus Helicopters ASB No. ASB MBB–BK117 C–2–29A–003 (ASB MBB–BK117 C–2–29A–003 Rev 3) or Airbus Helicopters ASB No. ASB MBB–BK117 D–2–29A–001 (ASB MBB–BK117 D–2–29A–001 Rev 3), both Revision 3 and dated December 19, 2017, as applicable to your model helicopter. Replace any part that has a crack before further flight. If the split pins, castellated nuts, or hexagon bolts are not as depicted in Figures 1 and 2 of ASB MBB–BK117 C–2–29A–003 Rev 3 or ASB MBB–BK117 D–2–29A–001 Rev 3, before further flight, properly install them.

(ii) Apply a torque of 9 to 10 Nm to the left-hand (LH) and right-hand (RH) nuts of each forward attachment point. If a torque of 9 to 10 Nm cannot be applied, replace the affected nut before further flight.

(2) For helicopters with a hydraulic module plate assembly with a single locking attachment hardware installed, within 300 hours TIS:

(i) Replace each forward single locking attachment hardware with double locking attachment hardware by following the Accomplishment Instructions, paragraphs 3.B.3.3. through 3.B.3.6. on page 11 of ASB MBB–BK117 C–2–29A–003 Rev 3 or ASB MBB–BK117 D–2–29A–001 Rev 3, as applicable to your model helicopter, except you are not required to discard old parts.

(ii) Replace each aft single locking attachment hardware with double locking attachment hardware and reposition the LH and RH aft grounding straps by following the Accomplishment Instructions, paragraphs 3.B.3.1. through 3.B.3.7. on page 13 of ASB MBB–BK117 C–2–29A–003 Rev 3 or ASB MBB–BK117 D–2–29A–001 Rev 3, as applicable to your model helicopter, except you are not required to discard old parts.

(3) If you have replaced the attachment hardware with double locking attachment hardware before the effective date of this AD in accordance with ASB MBB–BK117 C–2–29A–003 Rev 2 or ASB MBB–BK117 D–2–29A–001 Rev 2, as applicable to your model helicopter: Within 300 hours TIS, inspect the clamping effect of the LH and RH aft screw joints (bolts) of the hydraulic module plate by following the Accomplishment Instructions, paragraph 3.B.5., of ASB MBB–BK117 C–2–29A–003 Rev 3 or ASB MBB–BK117 D–2–29A–001 Rev 3, as applicable to your model helicopter, except you are not required to discard old parts.

Note 1 to paragraph (f)(3) of this AD: Airbus Helicopters refers to bolts as ''screw joints.''

(g) Credit for Previous Actions

Actions accomplished before the effective date of this AD in accordance with the procedures specified in the following are considered acceptable for compliance with the corresponding actions in paragraph (f)(1) of this AD:

(1) AD 2017–02–07, Amendment 39–18786 (82 FR 10267, February 10, 2017).

(2) Airbus Helicopters ASB No. ASB MBB–BK117 C–2–29A–003, Revision 1, dated October 14, 2016.

(3) Airbus Helicopters ASB No. ASB MBB–BK117 C–2–29A–003, Revision 2, dated February 1, 2017.

(4) Airbus Helicopters ASB No. ASB MBB–BK117 D–2–29A–001, Revision 1, dated October 14, 2016.

(5) Airbus Helicopters ASB No. ASB MBB–BK117 D–2–29A–001, Revision 2, dated February 1, 2017.

(h) Alternative Methods of Compliance (AMOCs)

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

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, the FAA suggests 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.

(i) Additional Information

(1) Airbus Helicopters ASB No. ASB MBB–BK117 C–2–29A–003 and ASB No. ASB MBB–BK117 D–2–29A–001, both Revision 1 and dated October 14, 2016, and both Revision 2 and dated February 1, 2017, which are not incorporated by reference, contain additional information about the subject of this AD. For service information identified in this AD, contact Airbus Helicopters, 2701 N Forum Drive, Grand Prairie, TX 75052; telephone 972–641–0000 or 800–232–0323; fax 972–641–3775; or at *https://www.airbus.com/helicopters/services/technical-support.html.* You may view a copy of the service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177.

(2) The subject of this AD is addressed in European Aviation Safety Agency (EASA) AD No. 2017–0047, dated March 13, 2017. You may view the EASA AD on the internet at *https://www.regulations.gov* in Docket No. FAA–2017–1123.

(j) Subject

Joint Aircraft Service Component (JASC) Code: 2900, Hydraulic Power System.

Issued in Fort Worth, Texas, on February 14, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–03932 Filed 2–26–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0103; Product Identifier 2019–NM–149–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2012–21–08, which applies to certain The Boeing Company Model 737–600, –700, –700C, –800, and –900 series airplanes. AD 2012–21–08 requires inspecting for part numbers of the operational program software (OPS) of the flight control computers (FCCs) and installing and testing an updated version of the FCC OPS. Since the FAA issued AD 2012–21–08, the FAA has determined that there is a new unsafe condition which must be addressed by an updated version of the FCC OPS. This proposed AD would retain the requirement to inspect for part numbers of the OPS of the FCCs, and add a new requirement to update the version of the FCC OPS if necessary. This proposed AD would also expand the applicability to include The Boeing Company Model 737–900ER series airplanes. 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:* 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–2020–0103.

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–2020–0103; 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: David Sumner, Aerospace Engineer, Systems and Equipment Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3538; email: *david.sumner@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–2020–0103; Product Identifier 2019–NM–149–AD'' at the beginning of your comments. The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. The FAA will consider all comments received by the closing date and may amend this NPRM because of those comments.

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

Discussion

The FAA issued AD 2012–21–08, Amendment 39–17224 (77 FR 64711, October 23, 2012) (''AD 2012–21–08''), for certain The Boeing Company Model 737–600, –700, –700C, –800, and –900 series airplanes. AD 2012–21–08 requires inspecting for part numbers of the OPS of the FCCs and installing and testing an updated version of the FCC OPS. AD 2012–21–08 resulted from reports of undetected erroneous output from a single radio altimeter channel, which resulted in premature autothrottle retard during approach. The FAA issued AD 2012–21–08 to address this condition, which, if not detected and corrected, could result in the loss of automatic speed control, and consequent loss of control of the airplane.

Actions Since AD 2012–21–08 Was Issued

Since the FAA issued AD 2012–21–08, the FAA has received reports that during autopilot coupled Instrument Landing System (ILS) approaches, the airplane did not capture or track the glideslope correctly. This caused airplanes to continue descending below the glideslope without any fault indication from the autopilot system. The problems were reported with the autopilot engaged while attempting to capture the glideslope from above, with a high descent rate greater than 2,000 feet per minute and late arming of approach mode. The high descent rate is maintained by the autopilot and can result in the airplane descending below the glideslope beam, which requires the flight crew to correct the problem manually. Boeing has developed an upgrade to the FCC OPS for certain affected airplanes equipped with Rockwell Collins FCCs that corrects the glideslope capture problem. The FAA is proposing this AD to address this condition, which can result in controlled flight into terrain on airplanes that do not have the upgraded FCC OPS installed.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Boeing Alert Requirements Bulletin 737–22A1322 RB, dated November 21, 2018. The service information describes procedures for installing and testing an updated version of the FCC OPS.

This proposed AD would also require Boeing Alert Service Bulletin 737–

22A1211, dated April 13, 2010, and Boeing Alert Service Bulletin 737–22A1224, dated May 18, 2012, which the Director of the Federal Register approved for incorporation by reference as of November 27, 2012 (77 FR 64711, October 23, 2012).

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

FAA's Determination

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

Proposed AD Requirements

This proposed AD would retain certain requirements of AD 2012–21–08. This proposed AD would expand the applicability of AD 2012–21–08 to include The Boeing Company Model 737–900ER series airplanes. This proposed AD would also require accomplishment of the actions specified in the Accomplishment Instructions of Boeing Alert Requirements Bulletin 737–22A1322 RB, dated November 21, 2018, described previously, except as discussed under ''Differences Between this Proposed AD and the Service Information,'' and except for any differences identified as exceptions in the regulatory text of this proposed AD.

For information on the procedures and compliance times, see this service information at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0103.

Explanation of Requirements Bulletin

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

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

Differences Between This Proposed AD and the Service Information

The effectivity of Boeing Alert Requirements Bulletin 737–22A1322 RB, dated November 21, 2018, is limited to The Boeing Company Model 737–600, –700, –700C, –800, –900, and 900ER series airplanes, line numbers 1270, 1272, and 1278 through 7153 inclusive in one group. Because the affected software versions are rotable among the airplanes affected by this proposed AD, the FAA has determined that these parts could later be installed on airplanes that were initially delivered with acceptable software versions, thereby subjecting those airplanes to the unsafe condition. Therefore, the applicability of this proposed AD includes all The Boeing Company Model 737–600, –700, –700C, –800, –900, and 900ER series airplanes. The FAA has confirmed with Boeing that the Accomplishment Instructions in Boeing Alert Requirements Bulletin 737–22A1322 RB, dated November 21, 2018, are applicable to the expanded group of airplanes.

Boeing Alert Requirements Bulletin 737–22A1322 RB, dated November 21, 2018, specifies that certain airplane line numbers must accomplish an update of the FCC OPS. However, this AD requires that only airplanes equipped with Rockwell Collins FCCs installed with FCC OPS version P8.0 or P9.0 must accomplish an update of the FCC OPS in accordance with the Accomplishment Instructions of Boeing Alert Requirements Bulletin 737–22A1322 RB, dated November 21, 2018.

Costs of Compliance

The FAA estimates that this proposed AD affects 520 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection and installation (retained actions from AD 2012–21–08).	3 work-hours × $85 per hour = $255 per inspection.	$0	$255	$52,785 (based on 207 affected airplanes).
Part number inspection (new proposed action).	1 work-hour × $85 per hour = $85	0	85	$44,200.

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

ESTIMATED COSTS OF ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Install upgraded software	1 work-hour × $85 per hour = $85	$0	$85

According to the manufacturer, all of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected individuals. The FAA does not control warranty coverage for affected individuals. As a result, the FAA has included all costs in our 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 has determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2012–21–08, Amendment 39–17224 (77 FR 64711, October 23, 2012), and adding the following new AD:

The Boeing Company Airplanes: Docket No. FAA–2020–0103; Product Identifier 2019–NM–149–AD.

(a) Comments Due Date

The FAA must receive comments on this AD action by April 13, 2020.

(b) Affected ADs

This AD replaces AD 2012–21–08, Amendment 39–17224 (77 FR 64711, October 23, 2012).

(c) Applicability

This AD applies to all The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 22, Auto flight.

(e) Unsafe Condition

This AD was prompted by reports that during autopilot coupled instrument landing (ILS) approaches, the airplane did not capture or track the glideslope correctly. The FAA is issuing this AD to address this condition, which could allow the airplane to descend below the glideslope beam and result in controlled flight into terrain.

(f) Compliance

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

(g) Retained Part Numbers Inspection, With Revised Paragraph References and Removed Terminating Action

This paragraph restates the requirements of paragraph (h) of AD 2012–21–08, with revised paragraph references and removed terminating action. For The Boeing Company Model 737–600, –700, –700C, –800, and –900 series airplanes, certificated in any category; delivered with the Rockwell Collins Enhanced Digital Flight Control System (EDFCS), as identified in the variable number table in Section 1.A.1., Effectivity, of Boeing Alert Service Bulletin 737–22A1211, dated April 13, 2010, and not defined by the ''Group 1'' description in Section 1.A. of Boeing Alert Service Bulletin 737–22A1211, dated April 13, 2010: Within 3 months after November 27, 2012 (the effective date of AD 2012–21–08), inspect to determine the part number of the operational program software (OPS) of the flight control computers (FCCs), in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737–22A1211, dated April 13, 2010, and install the software as required by paragraph (g)(1) of this AD, or verify that the software is installed as specified by paragraph (g)(2) of this AD, as applicable.

(1) For any OPS having a part number identified in table 1 of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–22A1211, dated April 13, 2010: Before further flight, do the actions specified in paragraph (g)(1)(i) or (ii), as applicable.

(i) Install software identified in table 2 of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–22A1211, dated April 13, 2010, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737–22A1211, dated April 13, 2010.

(ii) Install software identified in table 2 of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–22A1224, dated May 18, 2012.

(2) For any OPS having a part number identified in table 2 of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–22A1211, dated April 13, 2010; or in table 2 of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–22A1224, dated May 18, 2012: No further action is required by this paragraph.

(h) Retained Optional Software Installation, With Revised Paragraph References

This paragraph restates the requirements of paragraph (i) of AD 2012–21–08, with revised paragraph references. Installing a version of the FCC OPS approved after May 18, 2012 (the issue date of Boeing Alert Service Bulletin 737–22A1224) terminates the requirements of paragraph (g) of this AD, provided that the conditions specified in paragraphs (h)(1) and (2) of this AD are met.

(1) The version of the FCC OPS must be approved by the Manager, Seattle ACO Branch, FAA; the Manager, Boeing Aviation Safety Oversight Office (BASOO), FAA; or The Boeing Company Organization Designation Authorization (ODA). If approved by the ODA, the approval must include the ODA-authorized signature.

(2) The installation must be done in accordance with a method approved by the Manager, Seattle ACO, FAA; the Manager, BASOO, FAA; or The Boeing Company ODA. If approved by the ODA, the approval must include the ODA-authorized signature.

(i) New Requirement of This AD: Inspection

For all airplanes: Within 12 months after the effective date of this AD, inspect to determine the FCC OPS vendor and version installed on FCC A and FCC B. A review of airplane maintenance records is acceptable in lieu of this inspection if the FCC OPS vendor and version can be conclusively determined from that review.

(j) New Requirement of This AD: Software Installation

(1) For airplanes equipped with Rockwell Collins FCCs with FCC OPS version P8.0 or P9.0 software: Within 12 months after the effective date of this AD, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Alert Requirements Bulletin 737–22A1322 RB, dated November 21, 2018.

Note 1 to paragraph (j)(1): Guidance for accomplishing the actions required by paragraph (j)(1) of this AD can be found in Boeing Alert Service Bulletin 737–22A1322, dated November 21, 2018, which is referred to in Boeing Alert Requirements Bulletin 737–22A1322 RB, dated November 21, 2018.

(2) For airplanes not equipped with Rockwell Collins FCCs with FCC OPS version P8.0 or P9.0 software: No further action is required by this paragraph.

(k) New Requirement of This AD: Parts Installation Prohibition

For all airplanes: As of the effective date of this AD, no person may install Rockwell Collins FCC OPS software version P1.0, P2.0, P3.0, P8.0, or P9.0, on any airplane.

(l) 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 (m)(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 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.

(m) Related Information

(1) For more information about this AD, contact David Sumner, Aerospace Engineer, Systems and Equipment Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3538; email: *david.sumner@faa.gov.*

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

Issued on February 18, 2020.

Gaetano A. Sciortino,

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

[FR Doc. 2020–03904 Filed 2–26–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF EDUCATION

34 CFR Chapter II

[Docket ID ED–2019–OESE–0142]

Proposed Priorities, Requirements, Definitions, and Selection Criteria—Indian Education Discretionary Grants Programs—Native American Language (NAL@ED) Program

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Proposed priorities, requirements, definitions, and selection criteria.

SUMMARY: The Assistant Secretary for Elementary and Secondary Education proposes priorities, requirements, definitions, and selection criteria for the Native American Language (NAL@ED) program, Catalog of Federal Domestic Assistance (CFDA) number 84.415B. We may use one or more of these priorities, requirements, definitions, and selection criteria for competitions in fiscal year (FY) 2020 and later years. We take this action to support the development, improvement, expansion, or maintenance of programs that support elementary or secondary schools in using Native American and Alaska Native languages as the primary language of instruction.

DATES: We must receive your comments on or before March 30, 2020.

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments submitted by fax or by email or those submitted after the comment period. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

- *Federal eRulemaking Portal:* Go to *www.regulations.gov* to submit your comments electronically. Information on using *Regulations.gov*, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under ''Help.''
- *Postal Mail, Commercial Delivery, or Hand Delivery:* If you mail or deliver your comments, address them to Tanya Tullos, U.S. Department of Education, 400 Maryland Avenue SW, Room 3W234, Washington, DC 20202–5970.

Privacy Note: The Department's policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at *www.regulations.gov.*

Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Angela Hernandez-Marshall, U.S. Department of Education, 400 Maryland Avenue SW, Room 3W113, Washington, DC 20202. Telephone: (202) 205–1909. Email: *angela.hernandez-marshall@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Invitation to Comment: We invite you to submit comments regarding the proposed priorities, requirements, definitions, and selection criteria. To ensure that your comments have maximum effect in developing the notice of final priorities, requirements, definitions, and selection criteria, we urge you to identify clearly the proposed priority, requirement, definition, or selection criterion that each comment addresses.

We invite you to assist us in complying with the specific requirements of Executive Orders 12866, 13563, and 13771 and their overall requirement of reducing regulatory burden that might result from these proposed priorities, requirements, definitions, and selection criteria. Please let us know of any further ways we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of this program.

During and after the comment period, you may inspect all public comments about the proposed priorities, requirements, definitions, and selection criteria by accessing *Regulations.gov.* You may also inspect the comments in person at 400 Maryland Avenue SW, Washington, DC, between the hours of 9:30 a.m. and 4:00 p.m., Eastern Time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record: On request, we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for the proposed priorities, requirements, definitions, and selection criteria. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Purpose of Program: The purposes of this program are to (1) support schools that use Native American and Alaska Native languages as the primary language of instruction; (2) maintain, protect, and promote the rights and freedom of Native Americans and Alaska Natives to use, practice, maintain, and revitalize their languages, as envisioned in the Native American Languages Act of 1990 (25 U.S.C. 2901 *et seq.*); and (3) support the Nation's First Peoples' efforts to maintain and revitalize their languages and cultures,

and to improve educational opportunities and student outcomes within Native American and Alaska Native communities.

Program Authority: Section 6133 of the Elementary and Secondary Education Act of 1965, as amended (ESEA) (20 U.S.C. 7453).

Background: The NAL@ED program was first authorized in late 2015 by the Every Student Succeeds Act, which also reauthorized the ESEA. For the first NAL@ED competition, held in FY 2017, we waived notice-and-comment rulemaking, as permitted under section 437(d)(1) of the General Education Provisions Act, to establish priorities, definitions, and requirements consistent with the statute, after holding Tribal consultations in order to gather feedback about how the new program should be implemented. We published the notice inviting applications (NIA) for the FY 2017 competition on May 4, 2017 (82 FR 20869). We propose in this document to retain some of the definitions and requirements from the FY 2017 competition. Note that the terms ''Native American'' and ''Native American language'' are defined in the statute to include Alaska Native people and languages. Thus, in this document when we use the term ''Native American'' it includes Alaska Natives.

Under section 6133(b)(2) of the ESEA, any of the following entities that has a plan to develop and maintain, or to improve and expand, programs that support the entity's use of a Native American or Alaska Native language as the primary language of instruction in elementary schools or secondary schools, or both, is eligible for grants under the NAL@ED program:

(a) An Indian Tribe.

(b) A Tribal College or University (TCU).

(c) A Tribal education agency.

(d) A local educational agency (LEA), including a public charter school that is an LEA under State law.

(e) A school operated by the Bureau of Indian Education (BIE).

(f) An Alaska Native Regional Corporation (as described in section 3(g) of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(g))).

(g) A private, Tribal, or Alaska Native nonprofit organization.

(h) A non-Tribal for-profit organization.

In this document, the Assistant Secretary proposes four priorities as well as definitions, requirements, and selection criteria for this program to clarify new and existing requirements and to govern future grant competitions. The proposed definitions and one of the proposed priorities in this document are the same as those used in the FY 2017 competition, but three of the four proposed priorities, the proposed requirements, and all but three proposed selection factors in this document are new. Additionally, one statutory requirement calls on the Department to ensure that a diversity in languages exists among funded applicants. The Explanatory Statement to the Department of Education Appropriations Act, 2020, further emphasized Congress's interest in ensuring this program supports the most extensive possible geographical distribution and language diversity. To adhere to the statutory requirement and respond to the Explanatory Statement, the Department will take steps to minimize the dominance of one language represented among funded awards, and we are specifically asking for public input on how best to implement this requirement.

We note that there are some statutory definitions that will govern future NAL@ED competitions. For ease of reference and so that the public is able to understand the definitions that will govern the competition and program, we have included those that are most relevant to NAL@ED applicants and grantees in this notice of proposed priorities, requirements, definitions, and selection criteria (NPP), but we are not seeking public comment on those provisions.

Tribal Consultation: Prior to developing these proposed priorities, requirements, definitions, and selection criteria, the Department held a Tribal consultation on April 4, 2019, in Traverse City, Michigan. The consultation was also accessible online through a webinar. The Department announced this Tribal consultation through its external stakeholder listserv that includes Tribal leaders, Tribal educational agencies, Tribal organizations, Office of Indian Education discretionary and formula grantees, and national organizations representing Tribal communities.

The Department sought feedback from Tribal officials on the program broadly and on a series of topics. First, the Department sought feedback on potential priorities that would govern future NAL@ED competitions, including priorities for different types of applicants such as: Applicants proposing new Native American language programs, applicants proposing to expand existing programs, applicants representing State-funded programs, and applicants representing Tribally-funded programs. Noting that these different types of applicants would have different levels of capacity to implement Native American language programs, participants expressed support for establishing separate priorities for new programs versus existing programs. However, almost no participants expressed support for establishing separate priorities for State-funded versus Tribally-funded schools, and one participant commented that some Tribally-funded schools also operate under State-funded structures and may not be categorized as one or the other, potentially creating confusion.

The Department also solicited feedback from Tribal officials on several potential requirements that apply to NAL@ED. First, the Department sought feedback on how to implement the statutory requirement in section 6133(d) of the ESEA to ensure a diversity in languages among grantees. Several participants commented that diversity of languages should be considered based on language dialect, and not on language family alone, given the vast number of Tribes that may be part of any one language family. The Department also asked for input on how to ensure that applicants had sufficient levels of cooperation among their proposed partners. Noting the importance of a strong partnership to a successful project, nearly all participants expressed support for requiring a memorandum of agreement that describes explicit roles and responsibilities of each partner. The Department also sought feedback on whether NAL@ED grantees should be required to administer Native American language proficiency assessments, as well as whether grantees should be encouraged to develop Native American language content assessments.

Proposed Priorities

Background: We propose Proposed Priority 1, develop and maintain new Native American language programs, and Proposed Priority 2, expand and improve existing programs, due to their alignment with the legislative purpose to support both types of programs, and because during Tribal consultation, Tribal leaders and their designees expressed strong support for funding opportunities for both existing programs and new programs. A program would be considered a new program if it has been in place for not more than three years prior to the time of application, since a program in place for less than three years would likely require more than just expansion and improvement, but also development activities. Consistent with the Explanatory Statement to the Department of Education Appropriations Act, 2020, the Department will give the same

consideration to applicants that propose to provide partial immersion schools and programs as to full immersion, as the local Tribes, schools, and other applicants know best what type of program will most effectively assist their youth to succeed.

Proposed Priority 3, supporting project sustainability through the use of title VI formula grant funds, was used in the FY 2017 competition. Tribal leaders supported this priority, and we believe it would increase the likelihood that grantees leverage other Department funding streams that share the same legislative intent of promoting Native language and culture.

Finally, Proposed Priority 4, preference for Indian applicants, expands on section 6143 of the ESEA, which calls for preference for certain Indian entities, by including BIE schools among the entities granted a preference. In addition, Proposed Priority 4 uses the term ''Tribal College or University (TCU),'' as defined in the ESEA, rather than ''Indian institution of higher education.'' As a result, Proposed Priority 4 would provide a more expansive ''Indian preference'' and ensure greater consistency with the program's statutory list of eligible entities.

Proposed Priority 1—Develop and Maintain New Native American Language Programs

To meet this priority, an applicant must propose to develop and maintain a Native American language instructional program that—

(a) Will support Native American language education and development for Native American students, as well as provide professional development for teachers and, as appropriate, staff and administrators, to strengthen the overall language and academic goals of the school that will be served by the project;

(b) Will take place in a school; and

(c) Does not augment or replace a program of identical scope that was active within the last three years at the school(s) to be served.

Proposed Priority 2—Expand and Improve Existing Native American Language Programs

To meet this priority, an applicant must propose to improve and expand a Native American language instructional program that—

(a) Will improve and expand Native American language education and development for Native American students, as well as provide professional development for teachers and, as appropriate, staff and administrators, to strengthen the overall language and academic goals of the school that will be served by the project;

(b) Will continue to take place in a school; and

(c) Is currently offered at the school(s) to be served.

Proposed Priority 3—Support Project Sustainability With Title VI Indian Formula Grant Funds

To meet this priority, an applicant or a partner must receive, or be eligible to receive, a formula grant under title VI of the ESEA, and must commit to use all or part of that formula grant to help sustain this project after the conclusion of the grant period. To meet this priority, an applicant must include in its application—

(a) A statement that indicates the school year in which the entity will begin using title VI formula grant funds to help support this project;

(b) The percentage of the title VI grant that will be used for the project, which must be a substantial percentage of the recipient's title VI grant; and

(c) The timeline for obtaining parent committee input and approval of this action, if necessary.

Proposed Priority 4—Preference for Indian Applicants

To meet this priority, an application must be submitted by an Indian, Indian organization, Bureau of Indian Education (BIE) school or Tribal College or University (TCU) that is eligible to participate in the NAL@ED program. A consortium of eligible entities that meets the requirements of 34 CFR 75.127 through 75.129 and includes an Indian Tribe, Indian organization, TCU, or BIE-funded school will also be considered eligible to meet this priority. In order to be considered a consortium application, the application must include the consortium agreement, signed by all parties.

Types of Priorities

When inviting applications for a competition using one or more priorities, we designate the type of each priority as absolute, competitive preference, or invitational through a notice in the **Federal Register**. The effect of each type of priority follows:

Absolute priority: Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

Competitive preference priority: Under a competitive preference priority, we give competitive preference to an application by (1) awarding additional points, depending on the extent to which the application meets the priority (34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

Invitational priority: Under an invitational priority, we are particularly interested in applications that meet the priority. However, we do not give an application that meets the priority a preference over other applications (34 CFR 75.105(c)(1)).

Proposed Application Requirements

Background: We propose general application requirements (General Requirements) that are based on statutory language, but that have been modified to require that applicants provide the information needed to establish that they meet the eligibility requirements. The proposed General Requirements are similar to requirements used in the FY 2017 competition. We also propose an application requirement that involve a memorandum of agreement. During Tribal consultation, Tribal leaders and their designees expressed strong support for requiring a memorandum of agreement in cases where an applicant proposes to work with a partner. The Department also believes that an application requirement for a memorandum of agreement is needed in response to significant implementation challenges that current non-LEA grantees have encountered related to assessment data collection and professional development activities as a result of not having a formal agreement with the partner LEA. We propose to require that the memorandum of agreement be signed and dated no earlier than four months prior to the submission of a NAL@ED grant application to ensure that the participating partners have established the agreement, as well as clear roles and responsibilities, based on the scope of work being proposed in the application, and not based on a pre-existing agreement that was intended to address goals and objectives outside the scope of the project.

Third, we propose an application requirement that LEAs consult with Indian Tribes or Tribal Organizations. For applicants that are LEAs that are subject to section 8538 of the ESEA, we propose to codify the statutory requirement that they have consulted with local Tribes prior to applying. Consistent with the statutory requirement, this proposed application requirement would help ensure meaningful engagement with and contributions from the Tribe(s).

Finally, we propose to require that an applicant provide information in its

application to describe how it will use Title VI Indian Education formula grant funds to sustain the project. This would promote project stability and assist applicants in long-term planning.

The Assistant Secretary proposes the following application requirements for this program. We may apply one or more of these requirements in any year in which this program is in effect.

Proposed Application Requirement 1—General Requirements

An applicant must include the following information in its application:

(a) Students to be served. The number of students to be served by the project and the grade level(s) of targeted students in the proposed project.

(b) Pre- and post-assessments. Whether a pre- and post-assessment of Native American language proficiency is available and, if not, whether grant funds will be used for developing such assessment.

(c) Program description. A description of how the eligible entity will support Native American language education and development, and provide professional development for staff, in order to strengthen the overall language and academic goals of the school(s) that will be served by the project; ensure the implementation of rigorous academic content that prepares all students for college and career; and ensure that students progress toward meeting high-level fluency goals in the Native American language.

Proposed Application Requirement 2—Memorandum of Agreement

Any applicant that proposes to work with a partner to carry out the proposed project must include a signed and dated memorandum of agreement that describes the roles and responsibilities of each partner to participate in the grant, including—

(a) A description of how each partner will implement the project according to the timelines described in the grant application;

(b) The roles and responsibilities of each partner related to ensuring the data necessary to report on the Government Performance and Results Act (GPRA) indicators; and

(c) The roles and responsibilities of each partner related to ensuring that Native American language instructors can be recruited, retained, and trained, as appropriate, in a timely manner.

This memorandum of agreement must be signed no earlier than four months prior to the date of submission of the application.

Proposed Application Requirement 3—LEA Consultation With Indian Tribes and Tribal Organizations

If an applicant is an affected LEA that is subject to ESEA section 8538, then the LEA is required to consult with appropriate officials from Tribe(s) or tribal organizations approved by the Tribes located in the area served by the LEA prior to its submission of an application, on the contents of the application as required under ESEA section 8538. Affected LEAs are those that have 50 percent or more of its student enrollment made up of Native American students; or received an Indian education formula grant under Title VI of the ESEA in the previous fiscal year that exceeds $40,000. (ESEA sec. 8538) The consultation must provide for the opportunity for officials from Indian Tribes or tribal organizations to meaningfully and substantively contribute to the application.

Proposed Application Requirement 4—Project Sustainability Leveraging Title VI Indian Education Formula Grant Funds

An applicant or a partner must certify that it receives, or is eligible to receive, a formula grant under title VI of the ESEA, and must commit to use all or part of that formula grant to help sustain this project after the conclusion of the grant period. An applicant must include in its application—

(a) A statement that indicates the school year in which the entity will begin using title VI formula grant funds to help support this project;

(b) The percentage of the title VI grant that will be used for the project, which must be a substantial percentage of the recipient's title VI grant; and

(c) The timeline for obtaining parent committee input and approval of this action, if necessary.

Proposed Program Requirements

Background: We are proposing three program requirements, the first of which applies to grantees and requires Native American language assessments. The second and third apply to the Department and relate to a diversity of languages and geographical distribution.

Proposed Program Requirement 1—Native American Language Proficiency Assessment

Background: We propose that grantees under the NAL@ED program be required to administer pre- and post-assessments of Native American language proficiency to students participating in their projects. Participants in the Tribal consultation expressed concern about making an assessment—either a Native American language proficiency assessment or a Native American language content assessment—a focus of the NAL@ED program. We agree that such a requirement should not be the focus of this program, but we believe that an assessment of Native American language proficiency is important to being able to gauge the success of the NAL@ED program as a whole, as well as the success of individual grantees. Additionally, we believe that it is important for grantees to be able to assess the performance of their participating students. We note that all current grantees administer either oral or written assessments, or both. Assessments that would be required under this proposed requirement could take a variety of forms, including oral, written, or project-based, and be either formative or summative assessments. Accepting a wide variety of assessments is intended to minimize the burden of measuring students' progress toward high-level fluency goals. For example, current projects that support Native language programming for Pre-K–3 and Grades 6–8, respectively, incur assessment refinement and development costs that range from $0 to $30,000.

Proposed Program Requirement: Grantees must administer pre- and post-assessments of Native American language proficiency to participating students. This Native American language assessment may be any relevant tool that measures student Native American language proficiency, such as oral, written or project-based assessments, and formative or summative assessments.

Proposed Program Requirement 2—Diversity of Languages

Background: Section 6133(d) of the ESEA requires the Department to ensure that a diversity in languages exists among funded applicants to the maximum extent feasible. In the Explanatory Statement Congress provided with the Department of Education Appropriations Act, 2020, Congress stated that these funds should ''support the most extensive possible geographical distribution and language diversity.'' We are proposing to interpret the statutory requirement on diversity of languages by funding, in any year in which we make new awards, different projects with unique Native American languages. In the event that two or more projects that propose instruction in the same Native American language—that is, of the same dialect and in the same region—are scored and determined to be within funding range, the Department will award a grant to the project that

receives the highest number of points, assuming such project is high-quality. The Department would then fund the next project focused on a different language, skipping other applicants whose projects would duplicate the highest scoring application serving an already funded language.

''Native American language'' means the historical, traditional languages spoken by Native Americans. (ESEA sec. 8101(34)). To interpret the requirement to ensure a diversity of languages, the Department must first determine how to distinguish Native American languages from one another.

The Department did not receive suggestions during Tribal consultation on a reference, or broadly accepted classification system, for distinguishing Native American languages from one another. Therefore, we are seeking comment from the public on whether to use region-specific and dialect-specific differences among Native American languages for the purposes of determining diversity. This would be consistent with, for example, the list of 191 Native American languages in the United States that are listed in UNESCO's Atlas of the World's Languages in Danger (*http://www.unesco.org/languages-atlas/index.php*). We are seeking comment on whether a list such as the UNESCO's Atlas of the World's Languages in Danger would be a useful tool for the Department to use when distinguishing among languages. These proposed distinctions would address a major concern raised by Tribal leaders during Tribal consultation about how we would consider the same language that is spoken in different regions and may or may not have the same dialect.

With regard to applying this type of distinction during a grant competition, in the NIA the Department would strongly recommend that all prospective applicants submit a letter of intent to apply and include the language, region, and community to be served by the proposed project, and whether it was proposing a new or existing program. We would then make public a list of the potential applicants and the requested information. This would allow prospective applicants to be aware of others who may be proposing a project in the same language.

Proposed Requirement—Diversity of Languages: To ensure a diversity of languages as required by statute, the Department will not fund more than one project in any competition year that proposes to use the same Native American language, assuming there are enough high-quality applications. In the event of a lack of high-quality applications in one competition year, the Department may choose to fund more than one project with the same Native American language.

Proposed Program Requirement 3—Geographic Distribution

Background: In the Explanatory Statement Congress provided with the Department of Education Appropriations Act, 2020, Congress stated that these funds should ''support the most extensive possible geographical distribution and language diversity.'' We are proposing a program requirement to reflect this intent. In the event that all projects with the highest ratings propose to serve students in the same State, the Department will award a grant to the project that receives the highest number of points and proposes to serve students in a different State, assuming such project is high-quality. Accordingly, the Department may fund an application out of rank order.

Proposed Requirement—Geographic Distribution: To ensure geographic diversity, assuming there are enough high-quality applications, the Department will not exclusively fund projects that all propose to serve students in the same State in any competition year. In the event of a lack of high-quality applications in one competition year, the Department may choose to fund only applications that propose to provide services in one State.

Statutory Program Requirement: The following program requirement is directly from statute and we have indicated in parentheses the specific statutory citation for this requirement.

ISDEAA Statutory Hiring Preference:

(a) Awards that are primarily for the benefit of Indians are subject to the provisions of section 7(b) of the Indian Self-Determination and Education Assistance Act (ISDEAA) (Pub. L. 93–638). That section requires that, to the greatest extent feasible, a grantee—

(1) Give to Indians preferences and opportunities for training and employment in connection with the administration of the grant; and

(2) Give to Indian organizations and to Indian-owned economic enterprises, as defined in section 3 of the Indian Financing Act of 1974 (25 U.S.C. 1452(e)), preference in the award of contracts in connection with the administration of the grant. (25 U.S.C. 5307(b))

(b) For purposes of the ISDEAA statutory hiring preference only, an Indian is a member of any federally recognized Indian Tribe.

Proposed Definitions

Background: The Assistant Secretary proposes the following definitions for this program. These proposed definitions, intended to clarify eligibility and program requirements for the program, were used in the FY 2017 competition, with the exception of *Indian organization,* which is the same definition used in the Indian Professional Development Program (34 CFR 263.3). We may apply one or more of these definitions in any year in which this program is in effect.

Indian organization (or Tribal organization) means an organization that—

(1) Is legally established—

(i) By Tribal or inter-Tribal charter or in accordance with State or Tribal law; and

(ii) With appropriate constitution, bylaws, or articles of incorporation;

(2) Includes in its purposes the promotion of the education of Indians;

(3) Is controlled by a governing board, the majority of which is Indian;

(4) If located on an Indian reservation, operates with the sanction of or by charter from the governing body of that reservation;

(5) Is neither an organization or subdivision of, nor under the direct control of, any institution of higher education; and

(6) Is not an agency of State or local government.

Tribe means either a federally recognized Tribe or a State-recognized Tribe.

Statutory Definitions: The following definitions are directly from statutes governing the NAL@ED program. We have indicated in parentheses the specific statutory citation for each of these definitions.

Native American means: (1) ''Indian'' as defined in section 6151(3) of the ESEA (20 U.S.C. 7491(3)), which includes individuals who are Alaska Natives and members of federally recognized or State recognized Tribes; (2) Native Hawaiian; or (3) Native American Pacific Islander. (ESEA secs. 6151(3) and 8101(34))

Native American language means the historical, traditional languages spoken by Native Americans. (ESEA sec. 8101(34))

Tribal college or university means an institution that—

(1) Qualifies for funding under the Tribally Controlled Colleges and Universities Assistance Act of 1978 (25 U.S.C. 1801, *et seq.*) or the Navajo Community College Act (25 U.S.C. 640a note); or

(2) Is cited in section 532 of the Equity in Educational Land-Grant Status

Act of 1994 (7 U.S.C. 301 note). (ESEA sec. 6133 and section 316 of the Higher Education Act of 1965 (20 U.S.C. 1059c))

Proposed Selection Criteria

We propose the following selection criteria for evaluating an application under this program. Most of the selection criteria also appeared in the FY 2017 NIA. The first proposed factor under Quality of Project Design has been revised to clarify that language fluency should be grade-level appropriate, as opposed to ''high-fluency,'' which implies a level of fluency that may not be a realistic goal for an elementary grade level program to carry out within a three-year period. The second proposed factor addresses the role of family engagement. Evidence-based research in language acquisition finds that conducting family-oriented activities, whether at home or in school, increases the likelihood that the student will develop language proficiency. Current grantees have also identified family engagement as a benefit, particularly since many current NAL@ED projects serve students in Kindergarten to Grade 2. The third proposed factor addresses the quality of the plan to develop and administer pre- and post-assessments of Native American language proficiency for participating students.

Under Quality of Project Services, the first proposed factor addresses grade-level appropriate instruction in the Native American language. The subsequent factors under Quality of Project Services are similar as those that appeared in the FY 2017 NIA. The next selection criterion, Quality of Project Personnel, is based partially on EDGAR selection criterion in 34 CFR 75.210(e) and appeared in the FY 2017 NIA but is and slightly modifies here to omit the specific qualifications for key project personnel and project consultants and contractors. Instead, we focus on evaluating an application's use of its teachers and their experience as we believe this is critical to a successful project. For the final selection criterion, Adequacy of Resources, which appeared in the 2017 NIA, we use identical language of the first factor and omit the last two, as we believe it is most important to focus on experience in operating Native American language programs. We may apply one or more of these criteria in any year in which this program is in effect. In the NIA, we will announce the maximum possible points assigned to each criterion.

(a) Quality of the project design. The Secretary considers the quality of the design of the proposed project. In determining the quality of the design of the proposed project, the Secretary considers one or more of the following factors:

(1) The extent to which the project design will ensure that students progress toward grade-level and developmentally appropriate fluency in the Native American language.

(2) The extent to which the proposed project will incorporate parent engagement and participation in Native American language instruction.

(3) The quality of the approach to developing and administering pre- and post-assessments of student Native American language proficiency, including consultation with individuals with assessment expertise, as needed.

(b) Quality of project services. The Secretary considers the quality of the services to be provided by the proposed project. In determining the quality of the services to be provided by the proposed project, the Secretary considers one or more of the following factors:

(1) The quality of the plan for supporting grade-level and developmentally appropriate instruction in a Native American language by providing instruction of or through the Native American language.

(2) The extent to which the project will provide professional development for teachers and, as appropriate, staff and administrators to strengthen the overall language proficiency and academic goals of the school(s) that will be served by the project, including cultural competence training for all staff in the school(s).

(3) The extent to which the percentage of the school day that instruction will be provided in the Native American language is ambitious and is reasonable for the grade level and population served.

(c) Quality of project personnel. The Secretary considers the quality of the personnel who will carry out the proposed project. In determining the quality of project personnel, the Secretary considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

In addition, the Secretary considers the extent to which teachers of the Native American language who are identified as staff for this project have teaching experience and are fluent in the Native American language.

(d) Adequacy of resources. The Secretary considers the adequacy of resources for the proposed project. In determining the adequacy of resources for the proposed project, the Secretary considers the extent to which the applicant or a partner has experience in operating a Native American language program.

Final Priorities, Requirements, Definitions, and Selection Criteria: We will announce the final priorities, requirements, definitions, and selection criteria in a document in the **Federal Register**. We will determine the final priorities, requirements, definitions, and selection criteria after considering responses to this document and other information available to the Department. This document does not preclude us from proposing additional priorities, requirements, definitions, and selection criteria subject to meeting applicable rulemaking requirements.

Note: This document does *not* solicit applications. In any year in which we choose to use any of the final priorities, requirements, definitions, and selection criteria, we invite applications through a notice in the **Federal Register**.

Executive Orders 12866, 13563, and 13771

Regulatory Impact Analysis

Under Executive Order 12866, it must be determined whether this regulatory action is ''significant'' and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities in a material way (also referred to as an ''economically significant'' rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This proposed regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

Under Executive Order 13771, for each new regulation that the Department proposes for notice and comment or otherwise promulgates that

is a significant regulatory action under Executive Order 12866 and that imposes total costs greater than zero, it must identify two deregulatory actions. For FY 2020, any new incremental costs associated with a new regulation must be fully offset by the elimination of existing costs through deregulatory actions. The proposed priorities, requirements, definitions, and selection criteria are not a significant regulatory action. Therefore, the requirements of Executive Order 13771 do not apply.

We have also reviewed these proposed priorities, requirements, definitions, and selection criteria under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

We are issuing these proposed priorities, requirements, definitions, and selection criteria only on a reasoned determination that their benefits would justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that would maximize net benefits. Based on the analysis that follows, the Department believes that these proposed priorities, requirements, definitions, and selection criteria are consistent with the principles in Executive Order 13563.

We have also determined that this regulatory action would not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions.

In accordance with both Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs associated with this regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering the Department's programs and activities.

Discussion of Costs and Benefits: We have determined that these proposed priorities, requirements, definitions, and selection criteria would impose minimal costs on eligible applicants. Program participation is voluntary, and the costs imposed on applicants by these proposed priorities, requirements, definitions, and selection criteria would be limited to paperwork burden related to preparing an application. The potential benefits of implementing the programs—for example, establishing partnerships among parties with mutual interests in developing Native language programs, and planning concrete strategies for supporting Native language revitalization—would outweigh any costs incurred by applicants, and the costs of carrying out activities associated with the application would be paid for with program funds. For these reasons, we have determined that the costs of implementation would not be excessively burdensome for eligible applicants, including small entities.

Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum ''Plain Language in Government Writing'' require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed priorities, requirements, definitions, and selection criteria easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections?
- Could the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

To send any comments that concern how the Department could make these proposed regulations easier to understand, see the instructions in the **ADDRESSES** section.

Regulatory Flexibility Act Certification

The Secretary certifies that this proposed regulatory action would not have a substantial economic impact on a substantial number of small entities. The U.S. Small Business Administration Size Standards define proprietary institutions as small businesses if they are independently owned and operated, are not dominant in their field of operation, and have total annual revenue below $7,000,000. Nonprofit institutions are defined as small entities if they are independently owned and operated and not dominant in their field of operation. Public institutions are defined as small organizations if they are operated by a government overseeing a population below 50,000.

Although some of the Alaska Native Organizations, LEAs, and other entities that receive NAL@ED program funds qualify as small entities under this definition, the proposed definitions and requirements would not have a significant economic impact on these small entities. The Department believes that the costs imposed on an applicant by the proposed priorities, requirements, definitions, and selection criteria would be limited to the costs related to providing the documentation outlined in the proposed definitions and requirements when preparing an application and that those costs would not be significant. Participation in the NAL@ED program is voluntary. We invite comments from small entities as to whether they believe the proposed priorities, requirements, definitions, and selection criteria would have a significant economic impact on them and, if so, we request evidence to support that belief.

Paperwork Reduction Act of 1995

The proposed priorities, requirements, and selection criteria contain information collection requirements that are approved by OMB under OMB control number 1894–0006. Therefore, we will discontinue the FY 2017 information collection approved by OMB under OMB control number 1810–0731 that is set to expire April 30, 2021.

Intergovernmental Review: This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Federalism

Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. ''Federalism implications'' means 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. These proposed regulations may have federalism implications. We encourage State and local elected officials to review and provide comments on these proposed regulations.

Assessment of Educational Impact

In accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e–4, the Secretary particularly requests comments on whether these proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

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 Adobe 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.

Dated: February 20, 2020.

Frank T. Brogan,

Assistant Secretary for Elementary and Secondary Education.

[FR Doc. 2020–03762 Filed 2–26–20; 8:45 am]

BILLING CODE 4000–01–P

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

36 CFR Part 1192

[Docket No. ATBCB–2020–0002]

RIN 3014–AA42

Americans With Disabilities Act Accessibility Guidelines for Transportation Vehicles; Rail Vehicles

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Notice of hearing.

SUMMARY: Notice is hereby given that the Architectural and Transportation Barriers Compliance Board (Access Board) will hold a public hearing to gather information and hear public comment on its recently published advance notice of proposed rulemaking concerning updates to our existing guidelines for rail vehicles covered by the Americans With Disabilities Act.

DATES: The hearing will be held on March 10, 2020, from 2:00 p.m. to 4:00 p.m.

ADDRESSES: The hearing will be held in the Access Board Conference Room, 1331 F Street NW, Suite 800, Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Technical information: Juliet Shoultz, (202) 272–0045, Email: *shoultz@access-board.gov.* Legal information: Wendy Marshall, (202) 272–0043, Email: *marshall@access-board.gov.*

SUPPLEMENTARY INFORMATION: On February 14, 2020, the Access Board published an advance notice of proposed rulemaking in the **Federal Register** to begin the process of updating our accessibility guidelines for rail vehicles. (85 FR 8516) (''Rail ANPRM''). The period for submission of written comments in response to the Rail ANPRM closes on May 14, 2020.

To gather additional information and hear public comment on the Rail ANPRM, the Access Board will hold a hearing in Washington, DC on March 10, 2020 from 2:00 p.m. to 4 p.m. to hear testimony from interested members of the public. Persons interested in speaking are encouraged to pre-register by contacting Rose Marie Bunales at (202) 272–0006 or *bunales@access-board.gov* by March 6. Testimony may be provided in person or by telephone. Individuals who pre-register will be scheduled to speak first. Oral comments may be limited by the time available, depending on the number of persons who register. Call-in information for speakers and a communication access real-time translation (CART) web streaming link will be posted on the Access Board's website at *https://www.access-board.gov/news/1984-rail-anprm.*

Board members may question speakers during the hearing to the extent deemed appropriate. All comments received will be posted without change to the rulemaking docket for the Rail ANPRM (ATBCB–2020–0002) at *http://www.regulations.gov,* including any personal information provided.

The hearing will be accessible to persons with disabilities. An assistive listening system, communication access real-time translation, and sign language interpreters will be provided. Persons attending the hearing are requested to refrain from using perfume, cologne, and other fragrances for the comfort of other participants (see *http://www.access-board.gov/the-board/policies/fragrance-free-environment* for more information).

David M. Capozzi,

Executive Director.

[FR Doc. 2020–03906 Filed 2–26–20; 8:45 am]

BILLING CODE 8150–01–P

Notices

Federal Register
Vol. 85, No. 39
Thursday, February 27, 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

Agricultural Marketing Service

[Doc. No. AMS–SC–20–0011; SC20–033–1]

Vegetable and Specialty Crop Marketing Orders; Notice of Request for Extension and Revision of a Currently Approved Information Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Agricultural Marketing Service's (AMS) intention to request an extension and revision to the approved forms and information collection for marketing orders covering various vegetables and specialty crops.

DATES: Comments on this notice are due by April 27, 2020 to be assured of consideration.

ADDRESSES: Interested persons are invited to submit written comments concerning this notice. Comments must be sent to the Docket Clerk, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; or internet: *www.regulations.gov.* Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *www.regulations.gov.* All comments submitted in response to this notice will be included in the record and will be made available to the public. Please be advised that the identity of individuals or entities submitting the comments will be made public on the internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Andrew Hatch, Chief, Rulemaking Services Branch, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Room 1406–S, Washington, DC, 20250–0237; Telephone: (202) 720–6862; Fax: (202) 720–8938; or Email: *andrew.hatch@usda.gov.*

Small businesses may request information on this notice by contacting Richard Lower, Assistant to the Director, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Room 1406–S, Washington, DC 20250–0237; Telephone (202) 720–2491; Fax: (202) 720–8938; or Email: *Richard.Lower@usda.gov*.

SUPPLEMENTARY INFORMATION:

Title: Vegetable and Specialty Crop Marketing Orders.

OMB Number: 0581–0178.

Expiration Date of Approval: May 31, 2020.

Type of Request: Extension and Revision of a currently approved information collection.

Abstract: Marketing order programs provide an opportunity for producers of fresh fruits, vegetables and specialty crops, in specified production areas, to work together to solve marketing problems that cannot be solved individually. This notice covers the following marketing order citations: 7 CFR parts 932 (California olives), 945 (Idaho/Oregon potatoes), 946 (Washington potatoes), 948 (Colorado potatoes), 955 (Vidalia onions), 956 (Walla Walla onions), 958 (Idaho/Oregon onions), 959 (South Texas onions), 966 (Florida tomatoes), 981 (California almonds), 982 (Oregon/Washington hazelnuts), 984 (California walnuts), 985 (Northwest spearmint oil), 987 (California dates), 989 (California raisins), 993 (California dried prunes), and 999 (Specialty Crop Import Regulations).

Marketing Order 953 (North Carolina/Virginia potatoes) has been terminated since the last three-year renewal period of this information collection package. Currently, handling requirements for Marketing Order 993 for California dried prunes are suspended at the industry's request, meaning its information collection requirements are not active. The California dried prune industry maintains the committee, which works in partnership with State programs. In addition, the import regulation for California dried prunes, as contained in 7 CFR 999.200—Regulation governing the importation of prunes—is indefinitely suspended, effective January 17, 2009 (**Federal Register**, Vol. 74 No. 11).

Marketing order requirements help ensure adequate supplies of high quality product and adequate returns to producers. Marketing orders are authorized under the Agricultural Marketing Agreement Act of 1937 (Act), as amended (7 U.S.C. 601–674). The Secretary of Agriculture is authorized to oversee the marketing order operations and issue regulations recommended by a committee of representatives from each commodity industry.

The information collection requirements in this request are essential to carry out the intent of the Act, to provide the respondents the type of service they request, and to administer the marketing orders. Under the Act, marketing orders may authorize: Production and marketing research, including paid advertising; volume regulation; reserves, including pools and producer allotments; container requirements; and quality control. Assessments are levied on handlers regulated under the marketing orders. Section 8e of the Act requires imports of 14 commodities to meet certain standards. Included among these commodities are some covered in this forms package: Olives, potatoes, onions, tomatoes, walnuts, dates, dried prunes, and raisins.

USDA requires several forms to be filed to enable the administration of each marketing order. These include forms covering the selection process for industry members to serve on a marketing order's committee or board and ballots used in referenda to amend or continue marketing orders.

Under Federal marketing orders, producers and handlers are nominated by their peers to serve as representatives on a committee or board which administers each program. Nominees must provide information on their qualifications to serve on the committee or board. Qualified nominees are then appointed by the Secretary. Amendments to marketing orders made through Formal rulemaking must be approved in referenda conducted by

USDA and the Secretary. For the purposes of this action, ballots are considered information collections and are subject to the Paperwork Reduction Act. If a marketing order is amended, handlers are asked to sign an agreement indicating their willingness to abide by the provisions of the amended marketing order.

Some forms are required to be filed with the committee or board. The marketing orders authorize the respective committee or board, the agencies responsible for local administration of the marketing orders, to require handlers and producers to submit certain information. Much of the information is compiled in aggregate and provided to the respective industries to assist in marketing decisions. The committees and boards developed forms as a means for persons to file required information relating to supplies, shipments, and dispositions of their respective commodities, and other information needed to effectively carry out the purpose of the Act and their respective orders, and these forms are utilized accordingly.

The forms covered under this information collection require respondents to provide the minimum information necessary to effectively carry out the requirements of the marketing orders, and use of these forms is necessary to fulfill the intent of the Act as expressed in the marketing orders.

The information collected is used only by authorized employees of the committees and authorized representatives of the USDA, including AMS, Specialty Crops Program's regional and headquarters' staff. Authorized committee or board employees are the primary users of the information and AMS is the secondary user.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.32 hours per response.

Respondents: Producers, handlers, processors, dehydrators, cooperatives, manufacturers, importers, and public members.

Estimated Number of Respondents: 15,481.

Estimated Number of Responses: 79,213.

Estimated Number of Responses per Respondent: 5.12.

Estimated Total Annual Burden on Respondents: 25,438 hours.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments should reference OMB No. 0581–0178 OMB Vegetable and Specialty Crop Marketing Orders, and be sent to the USDA in care of the Docket Clerk at the address above. All comments received will be available for public inspection during regular business hours at the same address.

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

AMS is committed to 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.

A 60-day comment period is provided to allow interested persons to respond to the notice.

Dated: February 21, 2020.

Bruce Summers,

Administrator, Agricultural Marketing Service.

[FR Doc. 2020–03894 Filed 2–26–20; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

February 24, 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 and other forms of information technology.

Comments regarding this information collection received by March 30, 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 20503. Commentors 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) 720–8681.

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.

Forest Service

Title: Cooperative Wildland Fire Management and Stafford Act Response Agreements.

OMB Control Number: 0596–0242.

Summary of Collection: The primary authorities allowing for the agreements are the reciprocal Fire Protection Act, 42 U.S.C. 1856, and the Stafford Act, 42 U.S.C. 5121. The Forest Service (FS) is charged with the duty of providing fire protection for any property of the United States and is authorized to enter into a reciprocal agreement, with any fire organization maintaining fire protection facilities in the vicinity of such property, for mutual aid in furnishing fire protection for such property and for other property for which such organization normally provides fire protection.

Need and Use of the Information: To negotiate, develop, and administer Cooperative Wildland Fire Management and Stafford Act Response Agreements, the USDA FS, Department of Interior (DOI) Bureau of Land Management; Fish and Wildlife Service; National Park Service; and Bureau of Indian Affairs DOI must collect information from willing State, local, and Tribal governments from the pre-agreement to the closeout stage via telephone calls, emails, postal mail, and person-to-

person meetings. The scope of information collected includes the project type, project scope, financial plan, statement of work, and cooperator's business information. Without the ability to collect the information from cooperator's FS and DOI would not be able to conduct any of the activities authorized. Agencies to this request would not be able to develop projects, make payment, monitor projects, identify financial and accounting errors, agree to roles and responsibilities, etc.

Description of Respondents: State, local and Tribal Governments.

Number of Respondents: 320.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 47,040.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2020–03952 Filed 2–26–20; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

February 24, 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 30, 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.

Foreign Agricultural Service

Title: USDA Local and Regional Food Aid Procurement Program.

OMB Control Number: 0551–0046.

Summary of Collection: The U.S. Department of Agriculture's Foreign Agricultural Service (FAS) awards funds to recipients under the USDA Local and Regional Food Aid Procurement Program (USDA LRP Program). The Food, Conservation, and Energy Act of 2008 (the ''2008 Farm Bill''), as amended by the Agriculture Improvement Act of 2018 (the ''2018 Farm Bill''), provided that the Secretary of Agriculture will provide grants to, or enter into cooperative agreements with, eligible organizations to implement field-based projects that consist of local or regional procurements of eligible commodities in developing countries to provide development assistance and respond to food crisis and disasters, in the case of emergencies, in consultation with United States Agency for International Development's (USAID) Offices of Food for Peace. The USDA LRP Program aims to support development activities to strengthen the capacity of food-insecure developing countries and address the cause of chronic food insecurity.

Need and Use of the Information: FAS will collect information from the Participant to determine its ability to carry out a food aid program, to establish the terms under which procured commodities will be provided, to monitor the progress of procurement of commodities (including how transportation is procured), to monitor the progress of expenditure of funds, and to evaluate both the program's success and the Participant's effectiveness in meeting intended results.

Description of Respondents: Private voluntary organizations, cooperatives, and intergovernmental organizations.

Number of Respondents: 22.

Frequency of Responses: Recordkeeping; Reporting: Semi-annually; Annually.

Total Burden Hours: 29,172.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2020–04029 Filed 2–26–20; 8:45 am]

BILLING CODE 3410–10–P

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

Meetings

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Notice of meetings.

SUMMARY: The Architectural and Transportation Barriers Compliance Board (Access Board) plans to hold its regular committee and Board meetings in Washington, DC, Monday through Wednesday, March 9–11, 2020, at the times and location listed below.

DATES: The schedule of events is as follows:

Monday, March 9, 2020

10:30 a.m.–Noon Ad Hoc Committee on Frontier Issues
1:30 p.m.–2:00 p.m. Ad Hoc Committee on Design Guidance
2:00 p.m.–2:30 p.m. Budget Committee
2:30 p.m.–3:30 p.m. Planning and Evaluation Committee

Tuesday, March 10, 2020

10:00 a.m.–11:00 a.m. Discussion: National Council on Disability Report,'' Has the Promise Been Kept?—Federal Enforcement of Disability Rights Laws'' (Closed)
11:00 a.m.–Noon Technical Programs Committee
2:00 p.m.–4:00 p.m. Public Hearing on Rail Advance Notice of Proposed Rulemaking

Wednesday, March 11, 2020

1:30 p.m.–3:00 p.m. Board Meeting

ADDRESSES: Meetings will be held at the Access Board Conference Room, 1331 F Street NW, Suite 800, Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: For further information regarding the meetings, please contact David Capozzi, Executive Director, (202) 272–0010 (voice); (202) 272–0054 (TTY).

SUPPLEMENTARY INFORMATION: At the Board meeting scheduled on the afternoon of Wednesday, March 11, the Access Board will consider the following agenda items:

- Approval of January 15, 2020 draft meeting minutes (vote)
- Ad Hoc Committee Reports: Design Guidance; Frontier Issues
- Budget Committee
- Planning and Evaluation Committee
- Technical Programs Committee
- Election Assistance Commission Report
- Election of Officers
- Executive Director's Report
- Public Comment (final 15 minutes of the meeting)

Members of the public can provide comments either in-person or over the telephone during the final 15 minutes of the Board meeting on Wednesday, March 11, 2020. Any individual interested in providing comment is asked to pre-register by sending an email to *bunales@access-board.gov* with the subject line ''Access Board meeting—Public Comment'' with your name, organization, state, and topic of comment included in the body of your email. All emails to register for public comment must be received by Wednesday, March 4. Commenters will be provided with a call-in number and passcode before the meeting. Commenters will be called on in the order by which they are pre-registered. Due to time constraints, each commenter is limited to two minutes. Commenters on the telephone will be in a listen-only capacity until they are called on.

All meetings are accessible to persons with disabilities. An assistive listening system, Communication Access Realtime Translation (CART), and sign language interpreters will be available at the Board meeting and committee meetings.

Persons attending Board meetings are requested to refrain from using perfume, cologne, and other fragrances for the comfort of other participants (see *www.access-board.gov/the-board/policies/fragrance-free-environment* for more information).

You may view the Wednesday, March 11, 2020 meeting through a live webcast from 1:30 p.m. to 3:00 p.m. at: *www.access-board.gov/webcast.*

David M. Capozzi,

Executive Director.

[FR Doc. 2020–03907 Filed 2–26–20; 8:45 am]

BILLING CODE 8150–01–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the South Carolina Advisory Committee

AGENCY: U.S. Commission on Civil Rights.

ACTION: Notice of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights and the Federal Advisory Committee Act that the South Carolina Advisory Committee will hold a meeting on Thursday, March 5, 2020, the purpose of the meeting is to continue planning its civil rights project on subminimum wages for people with disabilities. The meeting will be held on Thursday, March 5, 2020 at 2:00 p.m. EST.

ADDRESSES: Nelson Mullins Law Firm, Meridian Building, 1320 Main Street, 17th Floor, Columbia, SC 29201.

FOR FURTHER INFORMATION CONTACT: Barbara Delaviez at *bdelaviez@usccr.gov* or 1–202–376–8473.

SUPPLEMENTARY INFORMATION: Members of the public can listen to the discussion. This meeting is available to the public through the following toll-free call-in number. An open comment period will be provided to allow members of the public to make a statement as time allows. The conference operator will ask callers to identify themselves, the organizations they are affiliated with (if any), and an email address prior to placing callers into the conference call. Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–977–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be mailed to the Regional Program Unit Office, U.S. Commission on Civil Rights, 230 S Dearborn, Suite 2120, Chicago, IL 60604. They may also be faxed to the Commission at (312) 353–8324 or emailed to Carolyn Allen at *callen@usccr.gov.* Persons who desire additional information may contact the Regional Program Unit Office at (312) 353–8311.

Records generated from this meeting may be inspected and reproduced at the Regional Program Unit, as they become available, both before and after the meeting. Records of the meeting will be available via *www.facadatabase.gov* under the Commission on Civil Rights, South Carolina Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Program Unit at the above email or street address.

Agenda

Welcome and Introductions
Project Planning—Subminimum Wages
Open for Public in Attendance
Adjournment

Dated: February 21, 2020.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2020–03902 Filed 2–26–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Census Bureau

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

Agency: U.S. Census Bureau.

Title: National Survey of Children's Health.

OMB Control Number: 0607–0990.

Form Number(s):

English survey forms include:

NSCH–S1 (English Screener),

NSCH–T1 (English Topical for 0- to 5-year-old children),

NSCH–T2 (English Topical for 6- to 11-year-old children),

NSCH–T3 (English Topical for 12- to 17-year-old children).

Spanish survey forms include:

NSCH–S–S1 (Spanish Screener),

NSCH–S–T1 (Spanish Topical for 0- to 5-year-old children),

NSCH–S–T2 (Spanish Topical for 6- to 11-year-old children), and

NSCH–S–T3 (Spanish Topical for 12- to 17-year-old children).

Type of Request: Regular submission.

Number of Respondents: 54,774 for the production screener only and 39,596 for the combined production screener and topical.

Average Hours per Response: 0.083 hours for the production screener only which covers households without children and those households that do not complete a topical questionnaire. For those households that do have an eligible child and complete both the production screener (0.083 hours) and topical (0.55 hours) questionnaire, their average totals 0.633 hours per response.

Burden Hours: 29,642.

Needs and Uses: The National Survey of Children's Health (NSCH) enables the Maternal and Child Health Bureau (MCHB) of the Health Resources and Services Administration (HRSA) of the U.S. Department of Health and Human Services (HHS) along with supplemental sponsoring agencies, states, and other data users to produce national and state-based estimates on the health and well-being of children, their families, and their communities as well as estimates of the prevalence and impact of children with special health care needs.

Data will be collected using one of two modes. The first mode is a web instrument (Centurion) survey that contains the screener and topical instruments. The web instrument first will take the respondent through the screener questions. If the household screens into the study, the respondent will be taken directly into one of the three age-based topical sets of questions. The second mode is a mailout/mail-back of a self-administered paper-and-pencil interviewing (PAPI) screener instrument followed by a separate mailout/mail-back of a PAPI age-based topical instrument.

The National Survey of Children's Health (NSCH) is a large-scale (sample size is 240,000 addresses) national survey with approximately 217,000 addresses included in the base production survey and approximately 23,000 addresses included as part of four separate state oversamples. The survey will consist of three additional mail package experiments. The first test will compare the traditional mail package materials (70% of the sample) against a newly redesigned suite of materials (30% of the sample) that were informed by two rounds of cognitive testing. This redesigned suite of materials is aimed at providing sampled addresses with a cohesive set of items within each survey invitation package. The proposed materials include key facts pertaining to survey data usage, relatable images for the target population, and colors that match the associated paper questionnaires. The second test will determine if envelope size has any impact on response rates. This test will be conducted during the first nonresponse follow-up mailing for the ''Low Paper'' treatment group and will compare a flat envelope (9″ × 11.5″) with an unfolded letter against a business standard size envelope (9.5″ × 4.125″) with a folded letter. The third test will evaluate the use of a USPS priority mail envelope in 50% of the initial topical mailings. Each test is aimed at evaluating strategies that could potentially increase response. In general, higher response can reduce follow-up costs and nonresponse bias.

As in prior cycles of the NSCH, there remain two key, non-experimental design elements. The first additional non-experimental design element is either a $2 or $5 screener cash incentive mailed to 90% (30% receiving $2 and 60% receiving $5) of sampled addresses; the remaining 10% (the control) will receive no incentive to monitor the effectiveness of the cash incentive. This incentive is designed to increase response and reduce nonresponse bias. The incentive amounts were chosen based on the results of the 2019 NSCH as well as funding availability. The second additional non-experimental design element is a data collection procedure based on the block group-level paper-only response probability used to identify households (30% of the sample) that would be more likely to respond by paper and send them a paper questionnaire from the initial mailing.

Affected Public: Parents, researchers, policymakers, and family advocates.

Frequency: The 2020 collection is the fifth administration of the NSCH. It is an annual survey, with a new sample drawn for each administration.

Respondent's Obligation: Voluntary.

Legal Authority: Census Authority: 13 U.S.C. Section 8(b).

HRSA MCHB Authority: Title 42 U.S.C. Section 701(a)(2).

USDA Authority: The Healthy, Hunger-Free Kids Act of 2010, Public Law 111–296. In particular, 42 U.S.C. 1769d(a) authorizes USDA to conduct research on the causes and consequences of childhood hunger included in 1769d(a)(4)(B), the geographic dispersion of childhood hunger and food insecurity.

CDC/NCBDDD Authority: Public Health Service Act, Section 301, 42 U.S.C. 241.

Confidentiality: The U.S. Census Bureau is required by law to protect your information. The Census Bureau is not permitted to publicly release your responses in a way that could identify you or your household. Federal law protects your privacy and keeps your answers confidential (Title 13, United States Code, Section 9). Per the Federal Cybersecurity Enhancement Act of 2015, your data are protected from cybersecurity risks through screening of the systems that transmit your data.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov* or fax to (202) 395–5806.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2020–04009 Filed 2–26–20; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–892]

Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel From the Republic of Korea: Rescission of Antidumping Duty Administrative Review; 2017–2019

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 cold-drawn mechanical tubing of carbon and alloy steel (CDMT) from the Republic of Korea (Korea) for the period of review (POR) November 22, 2017, through May 31, 2019, based on the timely withdrawal of the request for review.

DATES: Applicable February 27, 2020.

FOR FURTHER INFORMATION CONTACT: Nathan James, 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) 482–5305.

SUPPLEMENTARY INFORMATION:

Background

On June 3, 2019, Commerce published a notice of opportunity to request an administrative review of the AD order on CDMT from Korea for the POR November 22, 2017 through May 31, 2019.[1] ArcelorMittal Tubular Products LLC, Michigan Seamless Tube, LLC, PTC Alliance Corp., and Webco Industries, Inc. (collectively, the petitioners), timely filed a request for administrative review of Dong A Steel Co., Ltd., Husteel Co., Ltd., Nexteel Co., Ltd., Sang Shin Ind. Co., Ltd., Seah Steel Corporation, Sic Tube, Tgs Pipe Co., Ltd., Tpc Co., Ltd., and Yulchon Co.,

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 84 FR 25521 (June 3, 2019).

Ltd., in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.213(b).[2]

On July 29, 2019, pursuant to this request, and in accordance with 19 CFR 351.221(c)(1)(i), Commerce published a notice initiating an administrative review of the antidumping order on CDMT from Korea.[3] On October 8, 2019, the petitioners 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 petitioners withdrew their request 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 CDMT from Korea. 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 issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(d)(4).

Dated: February 24, 2020.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2020–04001 Filed 2–26–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–489–824]

Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From Turkey: Rescission of Antidumping Duty Administrative Review; 2018–2019

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) is rescinding the administrative review of the antidumping duty order on heavy walled rectangular welded carbon steel pipes and tubes (HWR pipes and tubes) from the Republic of Turkey (Turkey) for the period September 1, 2018, through August 31, 2019.

DATES: Applicable February 27, 2020.

FOR FURTHER INFORMATION CONTACT: William Horn or Alexis Cherry, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; Telephone: (202) 482–4868 or (202) 482–0607, respectively.

SUPPLEMENTARY INFORMATION:

Background

On September 3, 2019, Commerce published a notice of opportunity to request an administrative review of the antidumping duty order on HWR pipes and tubes from Turkey for the period September 1, 2018, through August 31, 2019.[1] On September 30, 2019, the petitioner[2] filed a timely request for review with respect to nine companies.[3] Based on this request, on November 12, 2019, in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.213(b), Commerce published in the **Federal Register** a notice of initiation of an administrative review covering the period September 1, 2018, through August 31, 2019.[4] On February 10, 2020, the petitioner submitted a timely request to withdraw its request for administrative review of the antidumping duty order on HWR pipes and tubes from Turkey for all nine companies.[5]

Rescission of Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if the parties that requested the review withdraw the request within 90 days of the date of publication of notice of initiation of the requested review. As noted above, the petitioner fully withdrew its review request by the 90-day deadline, and no other party requested an administrative review of the antidumping duty order. As such, Commerce is in receipt of a timely request for withdrawal of this administrative review with respect to all companies listed in the *Initiation Notices*. Accordingly, we are rescinding the administrative review of the antidumping duty order on HWR pipes and tubes from Turkey for the period September 1, 2018, through August 31, 2019, in its entirety.

[2] *See* Petitioners' Letter, ''Cold-Drawn Mechanical Tubing from the Republic of Korea—Domestic Industry's Request for First Administrative Review,'' dated July 1, 2019.

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 84 FR 36572 (July 29, 2019).

[4] *See* Petitioners' Letter, ''Cold-Drawn Mechanical Tubing from the Republic of Korea—Domestic Industry's Withdrawal of Request for First Administrative Review,'' dated October 8, 2019.

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 84 FR 45949 (September 3, 2019).

[2] The petitioner is Nucor Tubular Products, Inc. *See* Petitioner's Letter, ''Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Turkey: Amended Entry of Appearance,'' dated January 16, 2020.

[3] *See* Petitioner's Letter, ''Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Turkey: Request for Administrative Review,'' dated September 30, 2019.

[4] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 84 FR 61011 (November 12, 2019); *see also Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 84 FR 67712 (December 11, 2019) (collectively, *Initiation Notices*).

[5] *See* Petitioner's Letter, ''Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Turkey: Withdrawal of Request for Administrative Review'' dated February 10, 2020.

Assessment

Commerce will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries of HWR pipes and tubes from Turkey 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 publication of this notice in the **Federal Register**.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and/or countervailing 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 the antidumping and/or countervailing duties occurred and the subsequent assessment of doubled antidumping duties.

Notification Regarding Administrative Protective Order

This notice serves as a final reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. 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 the terms of an APO is a sanctionable violation.

This notice is issued and published in accordance with section 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213(d)(4).

Dated: February 21, 2020.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2020–04005 Filed 2–26–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–428–848, C–533–894, C–475–841, C–570–116]

Forged Steel Fluid End Blocks From the Federal Republic of Germany, India, Italy and the People's Republic of China: Postponement of Preliminary Determination in the Countervailing Duty Investigations

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable February 27, 2020.

FOR FURTHER INFORMATION CONTACT: Bob Palmer or Joseph Dowling at (202) 482–9068 or (202) 482–1646 (Germany), Aimee Phelan or William Langley at (202) 482–0697 or (202) 482–3861 (India), Nicholas Czajkowski or Ethan Talbott at (202) 482–1395 or (202) 482–1030 (Italy), Janae Martin or Jaron Moore at (202) 482–0238 or (202) 482–3640 (China), AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On January 8, 2020, the Department of Commerce (Commerce) initiated countervailing duty (CVD) investigations of imports of forged steel fluid end blocks from the Federal Republic of Germany, India, Italy, and the People's Republic of China.[1] Currently, the preliminary determinations are due no later than March 13, 2020.

Postponement of Preliminary Determination

Section 703(b)(1) of the Tariff Act of 1930, as amended (the Act), requires Commerce to issue the preliminary determination in a CVD investigation within 65 days after the date on which Commerce initiated the investigation. However, section 703(c)(1) of the Act permits Commerce to postpone the preliminary determination until no later than 130 days after the date on which Commerce initiated the investigation if: (A) The petitioner makes a timely request for a postponement; or (B) Commerce concludes that the parties concerned are cooperating, that the investigation is extraordinarily complicated, and that additional time is necessary to make a preliminary determination. Under 19 CFR 351.205(e), the petitioner must submit a request for postponement 25 days or more before the scheduled date of the preliminary determination and must state the reasons for the request. Commerce will grant the request unless it finds compelling reasons to deny the request.

On February 10, 2020, the petitioners[2] submitted a timely request that Commerce postpone the preliminary CVD determinations.[3] The petitioners stated that they request postponement because, ''[a]s currently scheduled, the deadlines for responding to Commerce's questionnaire fall almost in parallel with the scheduled preliminary determinations. Without extending the preliminary determinations, [p]etitioners would be unable to comment on the responses, and Commerce would be similarly unable to consider the responses.''[4] In accordance with 19 CFR 351.205(e), the petitioners have stated the reasons for requesting a postponement of the preliminary determinations, and Commerce finds no compelling reason to deny the request. Therefore, in accordance with section 703(c)(1)(A) of the Act, Commerce is postponing the deadline for the preliminary determinations to no later than 130 days after the date on which these investigations were initiated, *i.e.,* May 18, 2020.[5] Pursuant to section 705(a)(1) of the Act and 19 CFR 351.210(b)(1), the deadline for the final determinations of these investigations will continue to be 75 days after the date of the preliminary determinations.

Notification to Interested Parties

This notice is issued and published pursuant to section 703(c)(2) of the Act and 19 CFR 351.205(f)(1).

[1] *See Forged Steel Fluid End Blocks from Germany, India, Italy, and the People's Republic of China,* 85 FR 2385 (January 15, 2020).

[2] The petitioners are the FEB Fair Trade Coalition, Ellwood Group, and Finkl Steel.

[3] *See* Petitioners' Letter, ''Forged Steel Fluid End Blocks from China, Germany, India, and Italy: Request to Extend Preliminary Results,'' dated February 10, 2020.

[4] *Id.*

[5] Postponing the preliminary determination to 130 days after initiation would place the deadline on Sunday, May 17, 2020. Commerce's practice dictates that where a deadline falls on a weekend or federal holiday, the appropriate deadline is the next business day. *See Notice of Clarification: Application of ''Next Business Day'' Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended,* 70 FR 24533 (May 10, 2005).

Dated: February 21, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2020–04002 Filed 2–26–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–996, A–428–843, A–588–872, A–580–872, A–401–809, A–583–851]

Non-Oriented Electrical Steel From People's Republic of China, Germany, Japan, Republic of Korea, Sweden, and Taiwan: Final Results of Expedited First Sunset Reviews of Antidumping Duty Orders

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: As a result of these sunset reviews, the Department of Commerce (Commerce) finds that revocation of the antidumping duty orders on non-oriented electrical steel (NOES) from People's Republic of China (China), Germany, Japan, Republic of Korea (Korea), Sweden, and Taiwan would be likely to lead to continuation or recurrence of dumping, at the levels identified in the ''Final Results of Sunset Reviews'' section of this notice.

DATES: Applicable February 27, 2020.

FOR FURTHER INFORMATION CONTACT: Abdul Alnoor, Eva Kim, Paola Aleman-Ordaz, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4554, (202) 482–8283, or (202) 482–4031, respectively.

SUPPLEMENTARY INFORMATION:

Background

On December 3, 2014, Commerce published in the **Federal Register** the notices of the antidumping duty orders on NOES from China, Germany, Japan, Korea, Sweden, and Taiwan.[1] On November 1, 2019, Commerce published the initiation of the first sunset reviews of the *Orders,* pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[2] On November 15, 2019, Commerce received timely and complete notices of intent to participate in these sunset reviews from AK Steel Corporation (AK Steel) (domestic interested party), within the deadline specified in 19 CFR 351.218(d)(1)(i).[3] The domestic interested party claimed interested party status within the meaning of section 771(9)(C) of the Act as a manufacturer in the United States of the domestic like product.[4]

On November 27, 2019, the domestic interested party filed timely and adequate substantive responses, within the deadline specified in 19 CFR 351.218(d)(3)(i).[5] Commerce did not receive substantive responses from any respondent interested party, with respect to any of the orders covered by these sunset reviews. As a result, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), Commerce conducted expedited (120-day) sunset reviews of the *Orders.*

Scope of the Orders

The merchandise covered by these orders is NOES from China, Germany, Japan, Korea, Sweden, and Taiwan. The subject merchandise is provided for in subheadings 7225.19.0000, 7226.19.1000, and 7226.19.9000 of the HTSUS. Subject merchandise may also be entered under subheadings 7225.50.8085, 7225.99.0090, 7226.92.5000, 7226.92.7050, 7226.92.8050, 7226.99.0180 of the HTSUS. Although HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive. A full description of the scope of the *Orders* is contained in the accompanying Issues and Decision Memorandum.[6]

Analysis of Comments Received

A complete discussion of all issues raised in these sunset reviews, including the likelihood of continuation or recurrence of dumping in the event of revocation of the *Orders* and the magnitude of the margins likely to prevail if the *Orders* were to be revoked, is provided in the accompanying Issues and Decision Memorandum, which is hereby adopted by this notice. A list of the topics discussed in the Issues and Decision Memorandum is attached as an Appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov* and to all parties in the Central Records Unit, Room B8024 of the main Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the internet at *http://enforcement.trade.gov/frn/.* The signed Issues and Decision Memorandum and the electronic version of the Issues and Decision Memorandum are identical in content.

[1] *See Non-Oriented Electrical Steel from the People's Republic of China, Germany, Japan, the Republic of Korea, Sweden, and Taiwan: Antidumping Duty Orders,* 79 FR 71741 (December 3, 2014) (*Orders*).

[2] *See Initiation of Five-Year (Sunset) Reviews,* 84 FR 58687 (November 1, 2019).

[3] *See* Domestic Interested Party's Letters, ''Five-Year ('Sunset') Review of Antidumping Duty Order On Non-Oriented Electrical Steel From The People's Republic Of China: Domestic Interested Party Notice of Intent to Participate,'' dated November 15, 2019 (AK Steel's Intent to Participate for China); ''Five Year ('Sunset') Review of Antidumping Duty Order On Non-Oriented Electrical Steel From Germany: Domestic Interested Party Notice Of Intent To Participate,'' dated November 15, 2019 (AK Steel's Intent to Participate for Germany); ''Five-Year ('Sunset') Review of Antidumping Duty Order On Non-Oriented Electrical Steel From Japan: Notice of Intent to Participate,'' dated November 15, 2019 (AK Steel's Intent to Participate for Japan); ''Five-Year ('Sunset') Review of Antidumping Duty Order On Non-Oriented Electrical Steel From The Republic of Korea: Notice of Intent to Participate,'' dated November 1, 2019 (AK Steel's Intent to Participate for Korea); ''Five-Year ('Sunset') Review of Antidumping Duty Order On Non-Oriented Electrical Steel From Sweden: Domestic Interested Party Notice of Intent To Participate,'' dated November 15, 2019 (AK Steel's Intent to Participate for Sweden); and ''Five-Year ('Sunset') Review of Antidumping Duty Order On Non-Oriented Electrical Steel From Taiwan: Domestic Interested Party Notice of Intent to Participate,'' dated November 15, 2019 (AK Steel's Intent to Participate for Taiwan).

[4] *See* AK Steel's Intent to Participate for China at 2; *see also* AK Steel's Intent to Participate for Germany; AK Steel's Intent to Participate for Japan; AK Steel's Intent to Participate for Korea; AK Steel's Intent to Participate for Sweden; and AK Steel's Intent to Participate for Taiwan at 2.

[5] *See* Domestic Interested Party's Letters, ''Five Year ('Sunset') Review of Antidumping Duty Order on Non-Oriented Electrical Steel From the People's Republic of China: Domestic Interested Party Substantive Response,'' dated November 27, 2019; ''Five Year ('Sunset') Review Of Antidumping Duty Order On Non-Oriented Electrical Steel From Germany: Domestic Interested Party Substantive Response,'' dated November 27, 2019; ''Five-Year ('Sunset') Review Of Antidumping Duty Order On Non-Oriented Electrical Steel From The Republic of Korea: Domestic Interested Party Substantive Response,'' dated November 27, 2019; ''Five-Year ('Sunset') Review Of Antidumping Duty Order On Non-Oriented Electrical Steel From Japan: Domestic Interested Party Substantive Response,'' dated November 27, 2019; ''Five Year ('Sunset') Review Of Antidumping Duty Order On Non-Oriented Electrical Steel From Sweden: Domestic Interested Party Substantive Response,'' dated November 27, 2019; and ''Five Year ('Sunset') Review of Antidumping Duty Order on Non-Oriented Electrical Steel From Taiwan: Domestic Interested Party Substantive Response,'' dated November 27, 2019.

[6] *See* Memorandum, ''Issues and Decision Memorandum for the Expedited First Sunset Reviews of the Antidumping Duty Orders on Non-Oriented Electrical Steel from People's Republic of China, Germany, Japan, Republic of Korea, Sweden, and Taiwan'' (Issues and Decision Memorandum), dated concurrently with this notice.

Final Results of Sunset Reviews

Pursuant to sections 751(c)(1) and 752(c)(1) and (3) of the Act, Commerce determines that revocation of the *Orders* on NOES from China, Germany, Japan, Korea, Sweden, and Taiwan would be likely to lead to continuation or recurrence of dumping, and that the magnitude of the dumping margins likely to prevail would be weighted-average margins of up to 407.52 percent for China, 98.84 percent for Germany, 204.79 percent for Japan, 6.88 percent for Korea, 126.72 percent for Sweden, and 52.23 percent for Taiwan.

Notification Regarding Administrative Protective Orders

This notice also serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of the return or destruction of APO materials, or conversion to judicial protective, orders is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

We are issuing and publishing these final results and notice in accordance with sections 751(c), 752(c), and 777(i)(1) of the Act, and 19 CFR 351.218 and 19 CFR 351.221(c)(5)(ii).

Dated: February 20, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2020–03999 Filed 2–26–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–842]

Large Residential Washers From Mexico: Preliminary Results of the Antidumping Duty Administrative Review; 2018–2019

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that the producer/exporter subject to this administrative review made sales of subject merchandise at less than normal value (NV). Interested parties are invited to comment on these preliminary results.

DATES: Applicable February 27, 2020.

FOR FURTHER INFORMATION CONTACT: Rebecca Janz or William Miller, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2972 or (202) 482–3906, respectively.

SUPPLEMENTARY INFORMATION:

Background

On May 2, 2019, based on a timely request for review, in accordance with 19 CFR 351.221(c)(1)(i), we initiated an administrative review of the antidumping duty order on large residential washers from Mexico, for one company, Electrolux Home Products Corp. N.V. and Electrolux Home Products de Mexico, S.A. de C.V. (collectively, Electrolux).[1] The period of review (POR) is February 1, 2018 through January 31, 2019. In October 2019, we extended the preliminary results of this review to no later than February 28, 2020.[2] For a complete description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[3]

Scope of the Order

The products covered by the order are all large residential washers and certain subassemblies thereof from Mexico.[4] The products are currently classifiable under subheadings 8450.20.0040 and 8450.20.0080 of the Harmonized Tariff System of the United States (HTSUS). Products subject to this order may also enter under HTSUS subheadings 8450.11.0040, 8450.11.0080, 8450.90.2000, and 8450.90.6000. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to this scope is dispositive.

Methodology

Commerce is conducting this review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act). Constructed export price is calculated in accordance with section 772 of the Act. NV is calculated in accordance with section 773 of the Act. For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov* and to all parties in the Central Records Unit, room B8024 of the main Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed at *https://enforcement.trade.gov/frn/summary/mexico/mexico-fr.htm.* The signed and electronic versions of the Preliminary Decision Memorandum are identical in content. A list of the topics discussed in the Preliminary Decision Memorandum is attached as an appendix to this notice.

Preliminary Results of the Review

As a result of this review, we preliminarily determine that a weighted-average margin of 3.53 percent exists for Electrolux for the period February 1, 2018 through January 31, 2019.

Assessment Rates

Upon completion of this administrative review, Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries.[5]

Pursuant to 19 CFR 351.212(b)(1), we calculated importer-specific *ad valorem*

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 84 FR 18777 (May 2, 2019).

[2] *See* Memorandum, ''Large Residential Washers from Mexico: Extension of the Deadline for Preliminary Results of the 2018–2019 Antidumping Duty Administrative Review,'' dated October 21, 2019.

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the 2018–2019 Administrative Review of the Antidumping Duty Order on Large Residential Washers from Mexico,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] For a complete description of the scope of the order, *see* the Preliminary Decision Memorandum.

[5] *See* 19 CFR 351.212(b).

duty assessment rates based on the ratio of the total amount of dumping calculated for the examined sales to the total entered value of the sales for which entered value was reported. Where either the respondent's weighted-average dumping margin is zero or *de minimis* within the meaning of 19 CFR 351.106(c)(1), or an importer-specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.[6]

We intend to issue instructions to CBP 41 days after the publication date of the final results of this review.

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for Electrolux will be that established in the final results of this review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for previously reviewed or investigated companies not participating in this review, the cash deposit rate will continue to be the company-specific cash deposit rate published for the most recently completed segment; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (LTFV) investigation, but the producer is, then the cash deposit rate will be the rate established for the most recent segment for the producer of the merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 36.52 percent, the all-others rate established in the LTFV investigation.[7] These deposit requirements, when imposed, shall remain in effect until further notice.

Disclosure and Public Comment

Commerce intends to disclose the calculations performed in connection with these preliminary results to interested parties within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).[8] Interested parties may submit case briefs no later than 30 days after the date of publication of this notice.[9] Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than five days after the time limit for filing case briefs.[10] Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[11] Case and rebuttal briefs should be filed using ACCESS.[12]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS within 30 days after the date of publication of this notice.[13] Hearing requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Issues raised in the hearing will be limited to issues raised in the briefs. If a request for a hearing is made, parties will be notified of the time and date for the hearing to be held at the U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.[14]

An electronically-filed document must be received successfully in its entirety by ACCESS by 5 p.m. Eastern Time on the established deadline.

Commerce intends to issue the final results of this administrative review, including the results of its analysis of issues raised in any written briefs, not later than 120 days after the date of publication of this notice, unless the deadline is extended.[15]

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: February 20, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Discussion of the Methodology
V. Recommendation

[FR Doc. 2020–04008 Filed 2–26–20; 8:45 am]

BILLING CODE 3510–DS–P

[6] *See* section 751(a)(2)(C) of the Act.

[7] *See Large Residential Washers from Mexico and the Republic of Korea: Antidumping Duty Orders,* 78 FR 11148 (February 15, 2013).

[8] *See* 19 CFR 351.224(b).

[9] *See* 19 CFR 351.309(c).

[10] *See* 19 CFR 351.309(d).

[11] *See* 19 CFR 351.309(c)(2) and (d)(2).

[12] *See* 19 CFR 351.303.

[13] *See* 19 CFR 351.310(c).

[14] *See* 19 CFR 351.310(d).

[15] *See* section 751(a)(3)(A) of the Act.

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–997]

Non-Oriented Electrical Steel From the People's Republic of China: Final Results of the Expedited First Sunset Review of the Countervailing Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) finds that revocation of the countervailing duty (CVD) order would be likely to lead to the continuation or recurrence of a countervailable subsidy at the levels indicated in the ''Final Results of Review'' section of this notice.

DATES: Applicable February 27, 2020.

FOR FURTHER INFORMATION CONTACT: Mary Kolberg or Dusten Hom, 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) 482–1785 or (202) 482–5075, respectively.

SUPPLEMENTARY INFORMATION:

Background

On December 3, 2014, Commerce published in the **Federal Register** the CVD order on non-oriented electrical steel (NOES) from the People's Republic of China (China).[1] On November 1,

[1] *See Non-Oriented Electrical Steel from the People's Republic of China and Taiwan: Countervailing Duty Orders,* 79 FR 71749 (December 3, 2014) (*Order*).

2019, Commerce published the notice of initiation of the first sunset review of the CVD order on NOES from China, pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[2] On November 15, 2019, Commerce received a notice of intent to participate from the domestic interested party, AK Steel Corporation (AK Steel).[3] The notice of intent to participate was timely filed within the deadline specified in 19 CFR 351.218(d)(1)(i). Additionally, AK Steel claimed interested party status under section 771(9)(C) of the Act, as a domestic producer of NOES.

Commerce received an adequate substantive response to the notice of initiation from the domestic producer within the 30-day deadline specified in 19 CFR 351.218(d)(3)(i).[4] However, because we did not receive a substantive response from the Government of China (GOC) or from any other respondent interested parties who are producers or exporters of NOES, we determined that respondent interested parties provided inadequate responses to Commerce's notice of initiation.

On December 13, 2019, Commerce notified the U.S. International Trade Commission that it did not receive an adequate substantive response from respondent interested parties.[5] As a result, pursuant to 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(B)(2) and 351.218(e)(1)(ii)(C)(2), Commerce conducted an expedited (120-day) sunset review of the CVD *Order* on NOES from China.

Scope of the Order

The merchandise covered by the *Order* is NOES, which includes cold-rolled, flat-rolled, alloy steel products, whether or not in coils, regardless of width, having an actual thickness of 0.20 mm or more, in which the core loss is substantially equal in any direction of magnetization in the plane of the material. The term ''substantially equal'' means that the cross grain direction of core loss is no more than 1.5 times the straight grain direction (*i.e.,* the rolling direction) of core loss. NOES has a magnetic permeability that does not exceed 1.65 Tesla when tested at a field of 800 A/m (equivalent to 10 Oersteds) along (*i.e.,* parallel to) the rolling direction of the sheet (*i.e.,* B_{800} value). NOES contains by weight more than 1.00 percent of silicon but less than 3.5 percent of silicon, not more than 0.08 percent of carbon, and not more than 1.5 percent of aluminum. NOES has a surface oxide coating, to which an insulation coating may be applied.

NOES is subject to the *Order* whether it is fully processed (*i.e.,* fully annealed to develop final magnetic properties) or semi-processed (*i.e.,* finished to final thickness and physical form but not fully annealed to develop final magnetic properties). Fully processed NOES is typically made to the requirements of ASTM specification A 677, Japanese Industrial Standards (JIS) specification C 2552, and/or International Electrotechnical Commission (IEC) specification 60404–8–4. Semi-processed NOES is typically made to the requirements of ASTM specification A 683. However, the scope of the *Order* is not limited to merchandise meeting the ASTM, JIS, and IEC specifications noted immediately above.

NOES is sometimes referred to as cold-rolled non-oriented (CRNO), non-grain oriented (NGO), non-oriented (NO), or cold-rolled non-grain oriented (CRNGO) electrical steel. These terms are interchangeable.

Excluded from the scope of the *Order* are flat-rolled products not in coils that, prior to importation into the United States, have been cut to a shape and undergone all punching, coating, or other operations necessary for classification in Chapter 85 of the Harmonized Tariff Schedule of the United States (HTSUS) as a part (*i.e.,* lamination) for use in a device such as a motor, generator, or transformer.

The subject merchandise is provided for in subheadings 7225.19.0000, 7226.19.1000, and 7226.19.9000 of the HTSUS. Subject merchandise may also be entered under subheadings 7225.50.8085, 7225.99.0090, 7226.92.5000, 7226.92.7050, 7226.92.8050, 7226.99.0180 of the HTSUS. Although the HTSUS subheadings above are provided for convenience and customs purpose, the written description of the scope of the *Order* is dispositive.

Analysis of Comments Received

All issues raised in this sunset review are addressed in the Issues and Decision Memorandum,[6] which is hereby adopted by this notice. The issues discussed in the Issues and Decision Memorandum are the likelihood of continuation or recurrence of a countervailable subsidy and the net countervailable subsidy rates likely to prevail if the order were revoked. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov,* and to all in the Central Records Unit, Room B8024 of the main Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.*

Final Results of Review

Pursuant to sections 751(c)(1) and 752(b) of the Act, Commerce determines that revocation of the CVD order on NOES from China would be likely to lead to the continuation or recurrence of a countervailable subsidy at the rates listed below:

Producer/exporter	Net subsidy rate (percent)
Baoshan Iron & Steel Co., Ltd ...	158.88
All Others	158.88

Administrative Protective Order (APO)

This notice also serves as the only reminder to parties subject to an APO of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

Notification to Interested Parties

We are issuing and publishing these results in accordance with sections 751(c), 752(b), and 777(i)(1) of the Act and 19 CFR 351.218.

[2] *See Initiation of Five-Year (Sunset) Reviews,* 84 FR 58687 (November 1, 2019).

[3] *See* AK Steel's Letter, ''Five-Year ('Sunset') Review of Countervailing Duty Order on Non-Oriented Electrical Steel from The People's Republic of China: Domestic Interested Party Notice of Intent to Participate,'' dated November 15, 2019.

[4] *See* AK Steel's Letter, ''Five-Year ('Sunset') Review of Countervailing Duty Order on Non-Oriented Electrical Steel from the People's Republic of China: Domestic Interested Party Substantive Response,'' dated November 27, 2019.

[5] *See* Commerce's Letter, ''Sunset Reviews Initiated on November 1, 2019,'' dated December 13, 2019.

[6] *See* Memorandum ''Issues and Decision Memorandum for the Final Results of the Expedited First Sunset Review of the Countervailing Duty Order on Non-Oriented Electrical Steel from the People's Republic of China,'' dated concurrently with this notice (Issues and Decision Memorandum).

Dated: February 20, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2020–03987 Filed 2–26–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–552–825]

Utility Scale Wind Towers From the Socialist Republic of Vietnam: Postponement of Final Determination of Sales at Less-Than-Fair-Value Investigation

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) is postponing the deadline for issuing the final determination in the less-than-fair-value (LTFV) investigation of utility scale wind towers (wind towers) from the Socialist Republic of Vietnam (Vietnam) until June 29, 2020, and is extending the provisional measures from a four-month period to a period of not more than six months.

DATES: Applicable February 27, 2020.

FOR FURTHER INFORMATION CONTACT: Joshua A. DeMoss, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3362.

SUPPLEMENTARY INFORMATION:

Background

On August 5, 2019, Commerce initiated an LTFV investigation of imports of wind towers from Vietnam.[1] The period of investigation is January 1, 2019 through June 30, 2019. On February 14, 2020, Commerce published its *Preliminary Determination* in this LTFV investigation.[2]

Postponement of Final Determination

Section 735(a)(2) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.210(b)(2) provide that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by the exporters or producers who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Further, 19 CFR 351.210(e)(2) requires that such postponement requests by exporters be accompanied by a request for extension of provisional measures from a four-month period to a period of not more than six months, in accordance with section 733(d) of the Act.

On February 11, 2020, CS Wind Vietnam Co., Ltd. (CS Wind), the mandatory respondent in this investigation, requested that Commerce postpone the deadline for the final determination until no later than 135 days from the publication of the *Preliminary Determination,* and extend the application of the provisional measures from a four-month period to a period of not more than six months.[3] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) The preliminary determination was affirmative; (2) the request was made by the exporter and producer who accounts for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination until no later than 135 days after the date of the publication of the *Preliminary Determination,* and extending the provisional measures from a four-month period to a period of not more than six months. Accordingly, Commerce will issue its final determination no later than June 29, 2020.[4]

Notice to Interested Parties

This notice is issued and published pursuant to section 735(a)(2) of the Act and 19 CFR 351.210(g).

Dated: February 21, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2020–03995 Filed 2–26–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–983]

Drawn Stainless Steel Sinks From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2018–2019

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that the two mandatory respondents, Guangdong New Shichu Import and Export Company Limited (New Shichu) and KaiPing Dawn Plumbing Products, Inc. (KaiPing), have not established their eligibility for a separate rate and are part of the China-wide entity. We also continue to assign the China-wide rate to an additional nine companies, because we determine that they are not eligible for a separate rate. Finally, we continue to grant a separate rate to Jiangmen New Star Hi-Tech Enterprise Ltd. (New Star), which demonstrated eligibility for separate rate status but was not selected for individual examination. The period of review (POR) is April 1, 2018 through March 31, 2019.

DATES: Applicable February 27, 2020.

FOR FURTHER INFORMATION CONTACT: Rebecca Janz or Adam Simons, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2972 or (202) 482–6172, respectively.

SUPPLEMENTARY INFORMATION: On December 26, 2019, Commerce

[1] *See Utility Scale Wind Towers from Canada, Indonesia, the Republic of Korea, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations,* 84 FR 37992 (August 5, 2019).

[2] *See Utility Scale Wind Towers from the Socialist Republic of Vietnam: Preliminary Affirmative Determination of Sales at Less-Than-Fair-Value and Preliminary Affirmative Determination of Critical Circumstances,* 85 FR 8565 (February 14, 2020) (*Preliminary Determination*).

[3] *See* CS Wind's Letter, ''CS Wind's Request to Extend the Final Determination: Less Than Fair Value Investigation of Utility Scale Wind Towers from Vietnam (A–552–825),'' dated February 11, 2020.

[4] Postponing the final determination to 135 days after the publication of the *Preliminary Determination* would place the deadline on Sunday, June 28, 2020. Commerce's practice dictates that where a deadline falls on a weekend or federal holiday, the appropriate deadline is the next business day. *See Notice of Clarification: Application of ''Next Business Day'' Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended,* 70 FR 24533 (May 10, 2005).

published the *Preliminary Results.*[1] Although we invited parties to comment on the *Preliminary Results,*[2] no interested party submitted comments. Accordingly, no decision memorandum accompanies this **Federal Register** notice. Commerce conducted this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of the Order

The products covered by the order include drawn stainless steel sinks. Imports of subject merchandise are currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7324.10.0000 and 7324.10.0010. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the order is dispositive.[3]

Final Results of Review and Final Determination of No Shipments

We made no changes from the *Preliminary Results.* Therefore, as a result of this review, we determine that the two mandatory respondents, New Shichu and KaiPing, have not established their eligibility for a separate rate and are part of the China-wide entity. We also determine that, because the following companies did not submit separate rate applications or certifications, they are ineligible for a separate rate and are part of the China-wide entity: B&R Industries Limited (B&R); Feidong Import and Export Co. Ltd. (Feidong); Guangdong G-Top Import & Export Co., Ltd. (G-Top); Jiangmen Pioneer Import & Export Co., Ltd. (Pioneer); Ningbo Afa Kitchen and Bath Co., Ltd. (Ningbo Afa); Xinhe Stainless Steel Products Co., Ltd. (Xinhe); Yuyao Afa Kitchenware Co., Ltd. (Yuyao Afa); and Zhongshan Superte Kitchenware Co., Ltd. (Superte). We also determine that, because Zhuhai Kohler Kitchen & Bathroom Products Co. Ltd. (Kohler) failed to respond to Commerce's supplemental separate rate questionnaire, this company is ineligible for a separate rate and is part of the China-wide entity. Finally, we continue to grant a separate rate to New Star, which demonstrated eligibility for separate rate status, but was not selected for individual examination.[4] We determine that the dumping margin for New Star for the period April 1, 2018 through March 31, 2019 is as follows:

Exporter	Weighted-average dumping margin (percent)
Jiangmen New Star Hi-Tech Enterprise Ltd.	1.78

Assessment Rates

Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries in accordance with section 751(a)(2)(C) of the Act and 19 CFR 351.212(b). Because we determined that the following companies were not eligible for a separate rate and are part of the China-wide entity, we will instruct CBP to apply an *ad valorem* assessment rate of 76.45 percent to all entries of subject merchandise during the POR that were produced and/or exported by: B&R; Feidong; G-Top; KaiPing; Kohler; New Shichu; Ningbo Afa; Pioneer; Superte; Xinhe; and Yuyao Afa. We will instruct CBP to apply an assessment rate to all entries of merchandise produced and/or exported by New Star equal to the dumping margin indicated above. Commerce intends to issue assessment instructions to CBP 15 days after the date of publication of these final results of review.

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) For the company listed above that has a separate rate, the cash deposit rate will be the rate established in these final results of review; (2) for previously investigated or reviewed Chinese and non-Chinese exporters not listed above that have separate rates, the cash deposit rate will continue to be equal to the exporter-specific weighted-average dumping margin published of the most recently-completed segment of this proceeding; (3) for all Chinese exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the rate for China-wide entity, 76.45 percent; and (4) for all exporters of subject merchandise which are not located in China and which are not eligible for a separate rate, the cash deposit rate will be the rate applicable to Chinese exporter(s) that supplied that non-Chinese exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a reminder to importers of their responsibility, under 19 CFR 351.402(f)(2), to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i) of the Act, and 19 CFR 351.213(h) and 351.221(b)(5).

Dated: February 20, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2020–04007 Filed 2–26–20; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Drawn Stainless Steel Sinks from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2018–2019,* 84 FR 70946 (December 26, 2019) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *Id.,* 84 FR at 70947.

[3] For a complete description of the scope of the order, *see* the *Preliminary Results* PDM at 3–4.

[4] We assigned New Star the most recently assigned separate rate in this proceeding (*i.e.,* 1.78 percent). *See Drawn Stainless Steel Sinks from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2017–2018,* 84 FR 38211 (August 6, 2019).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–890]

Wooden Bedroom Furniture From the People's Republic of China: Initiation of Antidumping Duty New Shipper Review

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) has determined that a request for a new shipper review (NSR) of the antidumping duty order on wooden bedroom furniture (WBF) from the People's Republic of China (China) meets the statutory and regulatory requirements for initiation. The period of review (POR) for the NSR is January 1, 2019 through December 31, 2019.

DATES: Applicable February 27, 2020.

FOR FURTHER INFORMATION CONTACT: Jonathan Hill, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3518.

SUPPLEMENTARY INFORMATION:

Background

Commerce published the Order on January 4, 2005.[1] On January 28, 2020, pursuant to section 751(a)(2)(B)(i) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.214(c), Commerce received a timely NSR request from Kunshan Jujia Decoration Design Co., Ltd (Kunshan Jujia).[2] The deadline for publication of the NSR initiation is February 28, 2020.

In its submission, Kunshan Jujia certified that it is the producer and exporter of the subject merchandise upon which its request for a NSR is based.[3] Pursuant to section 751(a)(2)(B)(i)(I) of the Act and 19 CFR 351.214(b)(2)(i), Kunshan Jujia certified that it did not export WBF to the United States during the period of investigation (POI).[4] Additionally, pursuant to section 751(a)(2)(B)(i)(II) of the Act and 19 CFR 351.214(b)(2)(iii)(A), Kunshan Jujia certified that, since the initiation of the investigation, it has never been affiliated with any producer or exporter that exported WBF to the United States during the POI, including those not individually examined during the investigation.[5] As required by 19 CFR 351.214(b)(2)(iii)(B), Kunshan Jujia also certified that its export activities are not controlled by the central government of China.[6] Further, Kunshan Jujia certified that it has not made subsequent shipments of subject merchandise.[7]

In addition to the certifications described above, pursuant to 19 CFR 351.214(b)(2)(iv), Kunshan Jujia submitted documentation establishing the following: (1) The date on which it first shipped WBF for export to the United States and the date on which the WBF was first entered, or withdrawn from warehouse, for consumption; (2) the volume of its first shipment; and (3) the date of its first sale to an unaffiliated customer in the United States.[8]

Commerce conducted a query of U.S. Customs and Border Protection (CBP) data and confirmed that Kunshan Jujia's subject merchandise entered the United States for consumption and that liquidation of such entries had been properly suspended for antidumping duties. The CBP data that Commerce examined are consistent with information provided by Kunshan Jujia in its NSR request. In particular, the CBP data confirm the price and quantity reported by Kunshan Jujia for the sale that forms that basis of its NSR request.[9]

Period of Review

Pursuant to 19 CFR 351.214(c), an exporter or producer may request an NSR within one year of the date on which its subject merchandise was first entered, or withdrawn from warehouse, for consumption, or shipped to the United States, as appropriate. Kunshan Jujia requested this NSR within one year of the date on which its WBF first entered the United States, and made its request in the month of January, which is the anniversary month of the Order.[10] In accordance with 19 CFR 351.214(g)(l)(i)(A), the POR is January 1, 2019, through December 31, 2019.

Initiation of NSR

Pursuant to section 751(a)(2)(B) of the Act, 19 CFR 351.214(b), and based on the information on the record, we find that Kunshan Jujia's NSR request meets the threshold requirements for initiation of a NSR of its shipment(s) of WBF to the United States.[11] However, if the information supplied by Kunshan Jujia is later found to be incorrect or insufficient during the course of this NSR, Commerce may rescind the review or apply adverse facts available, pursuant to section 776 of the Act, as appropriate. Pursuant to 19 CFR 351.221(c)(1)(i), Commerce will publish the notice of initiation of an NSR no later than the last day of the month following the anniversary or semiannual anniversary month of the order. Commerce intends to issue the preliminary results of this review no later than 180 days from the date of initiation, and the final results of this review no later than 90 days after the date the preliminary results are issued.[12]

It is Commerce's usual practice, in cases involving non-market economies, to require that a company seeking to establish eligibility for an antidumping duty rate separate from the country-wide rate (*i.e.,* separate rate) to provide evidence of *de jure* and *de facto* absence of government control over the company's export activities.[13] Accordingly, Commerce will issue questionnaires to Kunshan Jujia requesting, *inter alia,* information regarding its export activities for the purpose of determining whether it is eligible for a separate rate. The review of the exporter will proceed if the response provides sufficient indication that the exporter is not subject to either *de jure* or *de facto* government control with respect to its exports of WBF.

We will conduct this NSR in accordance with section 751(a)(2)(B) of the Act.[14] Because Kunshan Jujia certified that it produced and exported subject merchandise, the sale of which is the basis for its NSR request, Commerce will instruct CBP to continue to suspend liquidation of all entries of subject merchandise produced and exported by Kunshan Jujia. To assist in its analysis of the *bona fide* nature of Kunshan Jujia's sales, upon initiation of this NSR, Commerce will require Kunshan Jujia to submit, on an ongoing basis, complete transaction information concerning any sales of subject merchandise to the United States that were made subsequent to the POR.

Interested parties requiring access to proprietary information in this NSR should submit applications for disclosure under administrative protective order in accordance with 19 CFR 351.305 and 351.306. This initiation notice is published in accordance with section 751(a)(2)(B) of the Act and 19 CFR 351.214 and 351.221(c)(1)(i).

[1] *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture from the People's Republic of China,* 70 FR 329 (January 4, 2005) (Order).

[2] *See* Kunshan Jujia's January 28, 2020 New Shipper Review Request (NSR Request).

[3] *Id.* at Exhibit 1.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.* at 3.

[8] *Id.* at Exhibit 2.

[9] *Id.; see also* Memorandum, ''Initiation of Antidumping New Shipper Review of Wooden Bedroom Furniture from the People's Republic of China: Kunshan Jujia Decoration Design Co., Ltd. Initiation Checklist,'' dated concurrently with this notice.

[10] *See* NSR Request at Exhibit 2.

[11] *See generally* NSR request.

[12] *See* section 751(a)(2)(B)(iii) of the Act.

[13] *See* Import Administration Policy Bulletin, Number: 05.1. (*http://ia.ita.doc.gov/policy/bull05-l.pdf*).

[14] The Act was amended by the Trade Facilitation and Trade Enforcement Act of 2015 which removed from section 751(a)(2)(B) of the Act the provision directing Commerce to instruct CBP to allow an importer the option of posting a bond or security in lieu of a cash deposit during the pendency of an NSR.

Dated: February 21, 2020.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2020–04006 Filed 2–26–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket Number: 200213–0056]

Request for Information Regarding Manufacturing USA Institutes and Processes

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Request for Information (RFI).

SUMMARY: The Manufacturing USA reauthorization prescribes three pathways for creating centers for manufacturing innovation or institutes in the Manufacturing USA network. Through this Request for Information (RFI), NIST is seeking comment from the public on the pathway where manufacturing centers outside of Manufacturing USA are recognized by the Secretary of Commerce as centers for manufacturing innovation in response to a formal request by the centers for such recognition. The law provides that a manufacturing center substantially similar to Manufacturing USA institutes, but which do not have federal sponsorship, may be recognized for participation in the network, but does not specify criteria for similarity. This pathway may be termed the ''alliance'' model for membership in Manufacturing USA. These could be existing agency-sponsored institutes which are no longer under a federal financial aid agreement or existing entities not in the network with relevant characteristics that are new to the network. Through this RFI, NIST also is seeking broad input and participation from stakeholders to assist in identifying and prioritizing issues and proposed solutions on the information provided regarding the proposed ''alliance'' path to designate a Manufacturing USA Institute, including what should be the minimum characteristics and requirements for such entities.

DATES: Comments must be received by 5:00 p.m. Eastern time on August 25, 2020. Written comments in response to the RFI should be submitted according to the instructions in the **ADDRESSES** and **SUPPLEMENTARY INFORMATION** sections below. Submissions received after that date may not be considered.

ADDRESSES:

For Comments:

Responses can be submitted by either of the following methods:

Website: https://docs.google.com/forms/d/e/1FAIpQLSd1NhLXHHHy-hnj9xpxZ85MAMmTMxMxgGglc8LW6r7QWI55Xg/viewform. Follow the instructions for sending comments on the agency website.

Email: manufacturingusa@nist.gov. Include ''RFI Response: Manufacturing USA Institutes and Processes'' in the subject line of the message.

Instructions: Attachments will be accepted in plain text, Microsoft Word, or Adobe PDF formats. Comments containing references, studies, research, and other empirical data that are not widely published should include copies or electronic links of the referenced materials.

All submissions, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. NIST reserves the right to publish relevant comments publicly, unedited and in their entirety. Personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Do not submit confidential business information, or otherwise sensitive or protected information. Comments that contain profanity, vulgarity, threats, or other inappropriate language or content will not be considered.

FOR FURTHER INFORMATION CONTACT: Ms. Margaret Phillips, Associate Director for Competitions, Office of Advanced Manufacturing, National Institute of Standards and Technology, 100 Bureau Drive MS 4700, Gaithersburg, MD 20899, 301–975–4350, or by email to *manufacturingusa@nist.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Manufacturing USA was authorized by the Revitalize American Manufacturing and Innovation Act in December 2014.[1] In 2019 the House Science Committee convened a hearing on Manufacturing USA, leading to the House passing the American Manufacturing Leadership Act. Concurrently the Senate developed and passed the Global Leadership in Manufacturing Act. Both of these bills were reconciled and included into the National Defense Authorization Act, which was signed into law on December 20, 2019.[2] This Manufacturing USA reauthorization prescribes three pathways for creating centers for manufacturing innovation, or institutes in the Manufacturing USA network. The three pathways are:

(1) Institutes established pursuant to Federal law or executive actions which became members of the network,

(2) institutes created via competitions held by the Secretary of Commerce through the National Institute of Standards and Technology (NIST), and

(3) manufacturing centers outside of Manufacturing USA but recognized by the Secretary of Commerce as centers for manufacturing innovation in response to a formal request by the centers for such recognition. ''A manufacturing center that is substantially similar to those established under this subsection but does not receive financial assistance under subsection (d) may, upon request of the center, be recognized as a center for manufacturing innovation by the Secretary for purposes of participation in the Network''.

The third pathway may be termed the ''alliance'' model for membership in Manufacturing USA. These could be existing agency-sponsored institutes which are no longer under a federal financial aid agreement or existing entities not in the network with relevant characteristics that are new to the network. NIST is seeking broad input and participation from stakeholders to assist in identifying and prioritizing issues and proposed solutions on the information provided regarding the proposed ''alliance'' path to establish a Manufacturing USA Institute.

Anticipated Benefits and Impact of the ''Alliance'' Model

Benefits to the Joining Entities

Entities that seek to join Manufacturing USA through the ''alliance'' model stand to benefit in ways that are both tangible and intangible. Some of the key benefits are identified below.

- Formal recognition and ''branding'' with associated visibility as a national manufacturing innovation institute.
- Membership in a nationwide network of manufacturing innovation institutes with associated support.
  - Enhanced communication with leadership of the Manufacturing USA Institutes.

[1] Consolidated and Further Continuing Appropriations Act, 2015, Public Law 113–235, Title VII—Revitalize American Manufacturing Innovation Act of 2014, codified at 15 U.S.C. 278s.

[2] National Defense Authorization Act for Fiscal Year 2020, Public Law 116–92, codified at 15 U.S.C. 278s, as amended.

○ Opportunities for synergistic collaboration with other institutes in the network.

○ Access to the shared network services offered by the National Program Office.[3]

• Eligibility for programmatic funding specifically for entities designated as Manufacturing USA Institutes which are not federally sponsored. Grants may be awarded on a competitive basis, subject to the availability of funds, for public service activities, such as workforce development, outreach to small- and medium-sized manufacturers, and other activities aligned with the mission of Manufacturing USA.

Benefits to the Manufacturing USA Program and Existing Institutes

The alliance model for new manufacturing innovation institutes and their induction into Manufacturing USA can facilitate expansion of the network, and technical areas not currently addressed by existing or pending Manufacturing USA Institutes can be established. In doing so, the federal government can significantly leverage its existing and future Manufacturing USA investments to spur the U.S. advanced manufacturing efforts already underway.

The extensive public and private sector inputs gathered by the Advanced Manufacturing Partnership (AMP) initiatives[4] [5] and by the five ''Designing for Impact'' regional workshops[6] held around the country clearly indicate that several technology areas of importance to U.S. manufacturers remain to be addressed by Manufacturing USA. The alliance model can serve as a cost-effective pathway to rapidly expand technology coverage, geographical reach, and national impact of Manufacturing USA. It should however be noted that the ''alliance'' model is not intended to be a substitute for robust long-term federal support of Manufacturing USA.

Institutes in the network have the potential to improve the competitiveness of United States manufacturing, including in key advanced manufacturing technologies, and to accelerate non-Federal investment in advanced manufacturing production capacity in the United States.

Existing institutes in Manufacturing USA also stand to benefit from their association with the alliance members. Some of the key potential benefits to existing institutes that are already in the network are listed below.

• The new technology topics of the joining entities will enrich the network of institutes and will provide additional opportunities for the existing institutes to leverage complementary technical capabilities and services offered by the alliance members.

• Alliance members will have different operational and governance models. The existing and future Manufacturing USA Institutes, and their federal sponsor agencies, stand to benefit from the best practices gleaned from the different operational models adopted.

Proposed Process for Alliance Model Institutes

1. Information about the application process will be on the Manufacturing USA website.

2. Interested applicants can apply at any time.

3. Applications will be evaluated by a panel of Federal employees against evaluation criteria to be determined. If additional information is needed, it can be requested by the panel.

4. Applicants will be notified of the decision with regard to the review.

5. If an applicant is selected for as an alliance institute, a binding Memorandum of Understanding will be executed by the applicant and NIST. A template MOU will be made available on the website along with instructions.

6. The addition is announced and added to appropriate messaging as a network member.

7. An orientation to the network will be provided by Advanced Manufacturing National Program Office to each new member.

Request for Information

Respondents are encouraged—but are not required—to respond to each question and to present their answers after each question. The following questions cover the major areas about which NIST seeks comment. Respondents may organize their submissions in response to this RFI in any manner. Responses may include estimates, which should be identified as such.

All responses that comply with the requirements listed in the **DATES** and **ADDRESSES** sections of this RFI will be considered.

NIST is interested in receiving responses to the following questions from the stakeholder community:

1. Congress has defined specific goals and activities for federally sponsored Manufacturing USA Institutes. Which of these goals and activities should be minimal requirements for ''alliance pathway'' institutes?

2. Should all Manufacturing USA Institutes brought into the network under an ''alliance pathway'' follow the same process? If not, what should be the differences?

3. Who/what types of entities should be eligible to join the Manufacturing USA network using the ''alliance pathway''?

4. What additional opportunities should be considered for a Manufacturing USA alliance institute? Technical projects? Education and workforce efforts? Others?

5. Should joining the Manufacturing USA network change any aspect of how a current organization operates?

6. What, if any, administrative, reporting, and meeting responsibilities should be required for the alliance institutes? For those responsibilities, what technical or other support should NIST provide to assist the alliance institutes?

7. Should institutes joining the Manufacturing USA network be able to accept projects or funding from foreign entities? If so, under what terms should foreign entities be able to participate?

8. If an existing organization becomes a member of Manufacturing USA via the ''alliance pathway,'' should that organization still be eligible to apply to be a fully funded institute under a competition sponsored by a federal agency?

9. How might the alliance pathway be structured to ease entry to the network by manufacturing centers that specifically address underrepresented technology areas of importance to U.S. manufacturers, or that increase the geographic reach and accessibility of the Network to underserved customers and communities?

10. What types of relationships should exist, or be required, between applicant entities and other federal manufacturing programs, such as NIST's Manufacturing Extension Partnership (MEP)?

11. Does the proposed process, as described in this notice, seem appropriate? Any suggestions for changes?

[3] The interagency Advanced Manufacturing National Program Office (AMNPO), which is headquartered at NIST, is tasked with the role of the National Program Office for Manufacturing USA.

[4] *Report to the President on Capturing Domestic Competitive Advantage in Advanced Manufacturing,* Executive Office of the President, President's Council of Advisors on Science and Technology, July 2012.

[5] *Report to the President on Accelerating U.S. Advanced Manufacturing,* Executive Office of the President, President's Council of Advisors on Science and Technology, October 2014.

[6] *National Network for Manufacturing Innovation: A Preliminary Design,* Executive Office of the President, National Science and Technology Council, Advanced Manufacturing National Program Office, January 2013.

12. Applications will be evaluated by a panel using evaluation criteria that has yet to be determined. What are some relevant evaluation criteria for use in this process?

13. Do you have any other comments or suggestions related to this proposed approach?

Authority: 15 U.S.C. 278s, as amended.

Kevin A. Kimball,

Chief of Staff.

[FR Doc. 2020–03896 Filed 2–26–20; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XT034]

Schedules for Atlantic Shark Identification Workshops and Safe Handling, Release, and Identification Workshops

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

ACTION: Notice of public workshops.

SUMMARY: Free Atlantic Shark Identification Workshops and Safe Handling, Release, and Identification Workshops will be held in April, May, and June of 2020. Certain fishermen and shark dealers are required to attend a workshop to meet regulatory requirements and to maintain valid permits. Specifically, the Atlantic Shark Identification Workshop is mandatory for all federally permitted Atlantic shark dealers. The Safe Handling, Release, and Identification Workshop is mandatory for vessel owners and operators who use bottom longline, pelagic longline, or gillnet gear, and who have also been issued shark or swordfish limited access permits. Additional free workshops will be conducted during 2020 and will be announced in a future notice.

DATES: The Atlantic Shark Identification Workshops will be held on April 2, May 7, and June 11, 2020. The Safe Handling, Release, and Identification Workshops will be held on April 1, April 3, May 1, May 4, June 1, and June 11, 2020. See **SUPPLEMENTARY INFORMATION** for further details.

ADDRESSES: The Atlantic Shark Identification Workshops will be held in Wilmington, NC; Bohemia, NY; and Manahawkin, NJ. The Safe Handling, Release, and Identification Workshops will be held in Kitty Hawk, NC; Revere, MA; Key Largo, FL; Kenner, LA; Palm Coast, FL; and Ocean City, MD. See **SUPPLEMENTARY INFORMATION** for further details on workshop locations.

FOR FURTHER INFORMATION CONTACT: Rick Pearson by phone: (727) 824–5399.

SUPPLEMENTARY INFORMATION: The workshop schedules, registration information, and a list of frequently asked questions regarding the Atlantic Shark ID and Safe Handling, Release, and ID workshops are posted on the internet at: *https://www.fisheries.noaa.gov/atlantic-highly-migratory-species/atlantic-shark-identification-workshops* and *https://www.fisheries.noaa.gov/atlantic-highly-migratory-species/safe-handling-release-and-identification-workshops*.

Atlantic Shark Identification Workshops

Since January 1, 2008, Atlantic shark dealers have been prohibited from receiving, purchasing, trading, or bartering for Atlantic sharks unless a valid Atlantic Shark Identification Workshop certificate is on the premises of each business listed under the shark dealer permit that first receives Atlantic sharks (71 FR 58057; October 2, 2006). Dealers who attend and successfully complete a workshop are issued a certificate for each place of business that is permitted to receive sharks. These certificate(s) are valid for 3 years. Thus, certificates that were initially issued in 2017 will be expiring in 2020. Approximately 169 free Atlantic Shark Identification Workshops have been conducted since April 2008.

Currently, permitted dealers may send a proxy to an Atlantic Shark Identification Workshop. However, if a dealer opts to send a proxy, the dealer must designate a proxy for each place of business covered by the dealer's permit which first receives Atlantic sharks. Only one certificate will be issued to each proxy. A proxy must be a person who is currently employed by a place of business covered by the dealer's permit; is a primary participant in the identification, weighing, and/or first receipt of fish as they are offloaded from a vessel; and who fills out dealer reports. Atlantic shark dealers are prohibited from renewing a Federal shark dealer permit unless a valid Atlantic Shark Identification Workshop certificate for each business location that first receives Atlantic sharks has been submitted with the permit renewal application. Additionally, trucks or other conveyances that are extensions of a dealer's place of business must possess a copy of a valid dealer or proxy Atlantic Shark Identification Workshop certificate.

Workshop Dates, Times, and Locations

1. April 2, 2020, 12 p.m.–4 p.m., Hampton Inn, 124 Old Eastwood Road, Wilmington, NC 28403.

2. May 7, 2020, 12 p.m.–4 p.m., La Quinta Inn, 10 Aero Road, Bohemia, NY 11716.

3. June 11, 2020, 12 p.m.–4 p.m., Holiday Inn, 151 Route 72 West, Manahawkin, NJ 08050.

Registration

To register for a scheduled Atlantic Shark Identification Workshop, please contact Eric Sander at *ericssharkguide@yahoo.com* or at (386) 852–8588. Pre-registration is highly recommended, but not required.

Registration Materials

To ensure that workshop certificates are linked to the correct permits, participants will need to bring the following specific items to the workshop:

- Atlantic shark dealer permit holders must bring proof that the attendee is an owner or agent of the business (such as articles of incorporation), a copy of the applicable permit, and proof of identification.
- Atlantic shark dealer proxies must bring documentation from the permitted dealer acknowledging that the proxy is attending the workshop on behalf of the permitted Atlantic shark dealer for a specific business location, a copy of the appropriate valid permit, and proof of identification.

Workshop Objectives

The Atlantic Shark Identification Workshops are designed to reduce the number of unknown and improperly identified sharks reported in the dealer reporting form and increase the accuracy of species-specific dealer-reported information. Reducing the number of unknown and improperly identified sharks will improve quota monitoring and the data used in stock assessments. These workshops will train shark dealer permit holders or their proxies to properly identify Atlantic shark carcasses.

Safe Handling, Release, and Identification Workshops

Since January 1, 2007, shark limited-access and swordfish limited-access permit holders who fish with longline or gillnet gear have been required to submit a copy of their Safe Handling, Release, and Identification Workshop certificate in order to renew either permit (71 FR 58057; October 2, 2006). These certificate(s) are valid for 3 years. Certificates issued in 2017 will be expiring in 2020. As such, vessel

owners who have not already attended a workshop and received a NMFS certificate, or vessel owners whose certificate(s) will expire prior to the next permit renewal, must attend a workshop to fish with, or renew, their swordfish and shark limited-access permits. Additionally, new shark and swordfish limited-access permit applicants who intend to fish with longline or gillnet gear must attend a Safe Handling, Release, and Identification Workshop and submit a copy of their workshop certificate before either of the permits will be issued. Approximately 340 free Safe Handling, Release, and Identification Workshops have been conducted since 2006.

In addition to certifying vessel owners, at least one operator on board vessels issued a limited-access swordfish or shark permit that uses longline or gillnet gear is required to attend a Safe Handling, Release, and Identification Workshop and receive a certificate. Vessels that have been issued a limited-access swordfish or shark permit and that use longline or gillnet gear may not fish unless both the vessel owner and operator have valid workshop certificates onboard at all times. Vessel operators who have not already attended a workshop and received a NMFS certificate, or vessel operators whose certificate(s) will expire prior to their next fishing trip, must attend a workshop to operate a vessel with swordfish and shark limited-access permits that uses longline or gillnet gear.

Workshop Dates, Times, and Locations

1. April 1, 2020, 9 a.m.–5 p.m., Hilton Garden Inn, 5353 North Virginia Dare Trail, Kitty Hawk, NC 27949.

2. April 3, 2020, 9 a.m.–5 p.m., Hampton Inn, 230 Lee Burbank Highway, Revere MA 02151,

3. May 1, 2020, 9 a.m.–5 p.m., Holiday Inn, 99701 Overseas Highway, Key Largo, FL 33037.

4. May 4, 2020, 9 a.m.–5 p.m., Hilton Hotel, 901 Airline Drive, Kenner, LA 70062.

5. June 1, 2020, 9 a.m.–5 p.m., Hilton Garden Inn, 55 Town Center Boulevard, Palm Coast, FL 32164.

6. June 11, 2020, 9 a.m.–5 p.m., Residence Inn, 300 Seabay Lane, Ocean City, MD 21842.

Registration

To register for a scheduled Safe Handling, Release, and Identification Workshop, please contact Angler Conservation Education at (386) 682–0158. Pre-registration is highly recommended, but not required.

Registration Materials

To ensure that workshop certificates are linked to the correct permits, participants will need to bring the following specific items with them to the workshop:

- Individual vessel owners must bring a copy of the appropriate swordfish and/or shark permit(s), a copy of the vessel registration or documentation, and proof of identification.
- Representatives of a business-owned or co-owned vessel must bring proof that the individual is an agent of the business (such as articles of incorporation), a copy of the applicable swordfish and/or shark permit(s), and proof of identification.
- Vessel operators must bring proof of identification.

Workshop Objectives

The Safe Handling, Release, and Identification Workshops are designed to teach longline and gillnet fishermen the required techniques for the safe handling and release of entangled and/or hooked protected species, such as sea turtles, marine mammals, smalltooth sawfish, Atlantic sturgeon, and prohibited sharks. In an effort to improve reporting, the proper identification of protected species and prohibited sharks will also be taught at these workshops. Additionally, individuals attending these workshops will gain a better understanding of the requirements for participating in these fisheries. The overall goal of these workshops is to provide participants with the skills needed to reduce the mortality of protected species and prohibited sharks, which may prevent additional regulations on these fisheries in the future.

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

Dated: February 24, 2020.

Karyl K. Brewster-Geisz,

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

[FR Doc. 2020–04022 Filed 2–26–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–BI58

Draft Supplemental Environmental Impact Statement

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

ACTION: Notice of intent to prepare.

SUMMARY: Pursuant to the National Environmental Policy Act (NEPA), this notice announces that NMFS is preparing a Draft Supplemental Environmental Impact Statement (DSEIS) to supplement information in the 2015 Draft Environmental Impact Statement (DEIS) on the Makah Tribe Request to Hunt Gray Whales, which was prepared in response to the Makah Indian Tribe's request that NMFS authorize a limited ceremonial and subsistence hunt of eastern North Pacific (ENP) gray whales in the Makah Tribe's usual and accustomed (U&A) fishing grounds off the coast of Washington State.

DATES: Because NMFS has previously requested (80 FR 13373, March 13, 2015; 80 FR 30676, May 29, 2015) and received information from the public on issues addressed in the DEIS, and because the Council on Environmental Quality (CEQ) regulations for implementing the NEPA do not require additional scoping for this DSEIS process (40 CFR 1502.9(c)(4)), NMFS is not asking for further public scoping information and comment at this time. Upon release of the DSEIS, NMFS will provide a 45-day public review/comment period.

ADDRESSES: The DEIS is available in electronic form on the internet at the following address: *https://www.fisheries.noaa.gov/west-coast/makah-tribal-whale-hunt.* The DEIS also may be viewed at various libraries identified at this internet address or at the following NMFS offices:

(1) NMFS Protected Resources Division, 1201 NE Lloyd Blvd., Suite 1100, Portland, OR 97232. Contact Steve Stone at 503–231–2317; and

(2) NMFS, Protected Resources Division, 7600 Sand Point Way NE, Building 1, Seattle, WA 98115–6349. Contact Lesley Kilp at 206–526–6150.

FOR FURTHER INFORMATION CONTACT: Grace Ferrara, NMFS Protected Resources Division, by email at *grace.ferrara@noaa.gov* or by phone at 206–526–6172.

SUPPLEMENTARY INFORMATION:

Background

On February 14, 2005, the Makah Indian Tribe submitted to NMFS a request to resume treaty-based hunting of eastern North Pacific (ENP) gray whales in the coastal portion of the Tribe's usual and accustomed fishing grounds (U&A). The Tribe's request stems from the 1855 Treaty of Neah Bay, which expressly secures the Makah Tribe's right to hunt whales. To exercise

that right, the Makah Tribe is seeking authorization from NMFS under the Marine Mammal Protection Act (MMPA) and Whaling Convention Act. The MMPA imposes a general moratorium on the taking of marine mammals but authorizes the Secretary of Commerce to waive the moratorium and issue regulations governing the take of marine mammals if certain statutory criteria are met. The decision to waive the moratorium and issue regulations must be made on the record after an opportunity for an agency hearing on both the waiver and regulations (16 U.S.C. 1373(d)).

On May 9, 2008, NMFS released a DEIS but later terminated that DEIS in 2012 (77 FR 29967, May 21, 2012) because of new scientific information. In that 2012 notice the agency announced its intent to prepare a new DEIS and open a scoping process (77 FR 29967, May 21, 2012). On March 13, 2015, NMFS released a new DEIS (80 FR 13373) for public comment that included a no-action alternative and five action alternatives. On April 5, 2019, NMFS published a proposed rule (84 FR 13604) and notice of hearing (84 FR 13639) to issue a waiver under the MMPA and propose regulations governing the hunting of ENP gray whales by the Makah Tribe for a 10-year period. The hunt proposal as set forth in the proposed rule represents a composite alternative that combines certain elements from the five DEIS action alternatives.

As required under the MMPA, NMFS convened a hearing before an Administrative Law Judge regarding the proposed waiver and regulations (16 U.S.C. 1373(d)). The hearing took place from November 14, 2019 through November 21, 2019 in Seattle, Washington. In addition to NMFS, five parties participated at the hearing. Following the hearing, the Administrative Law Judge will issue a recommended decision regarding the proposed waiver and regulations, NMFS will provide notice of a 20-day public comment period, and then the NMFS Assistant Administrator will make a final decision on the proposed regulations and waiver in accordance with the regulations at 50 CFR part 228.

NEPA regulations at 40 CFR 1502.9 provide for supplementing a DEIS if the agency determines that there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. An agency may also prepare a supplement when it determines that the purposes of NEPA will be furthered by doing so. A new issue of fact that occurred after issuance of the 2015 DEIS but was addressed at the agency hearing is the Unusual Mortality Event (UME) for ENP gray whales declared by NMFS in May 2019 (see information posted *https://www.fisheries.noaa.gov/national/marine-life-distress/2019-gray-whale-unusual-mortality-event-along-west-coast*). Because information concerning the ongoing 2019 UME was presented at the agency hearing but not expressly addressed in the 2015 DEIS, NMFS has determined that it would now benefit both the public and agency decision making to prepare a supplement to the DEIS. NMFS expects that the supplement will incorporate the information presented at the hearing regarding the 2019 UME and any additional relevant information and will take into consideration the Administrative Law Judge's recommended decision. NMFS also intends to expressly identify the hunt proposal, as described in the proposed rule and addressed at the agency hearing, as a separate action alternative in the supplement. Previously, NMFS determined that because the hunt proposal comprises elements and outcomes within the scope of the DEIS action alternatives and does not substantially change the proposed action in a manner relevant to environmental concerns, a supplement to the DEIS was not warranted based on the consideration of the composite alternative alone. Given our determination that NEPA's purposes would be furthered through a DSEIS addressing the 2019 UME, we will also separately evaluate the composite alternative/hunt proposal in the DEIS.

Authority

The environmental review of the Makah Tribe's request to resume treaty-based hunting of ENP gray whales will be conducted under the authority and in accordance with the requirements of the NEPA of 1969 as amended (42 U.S.C. 4321 *et seq.*), Council on Environmental Quality Regulations (40 CFR parts 1500–1508), the MMPA (16 U.S.C. 1361–1421h), other applicable Federal laws and regulations, and policies and procedures of NMFS for compliance with those regulations.

Dated: February 24, 2020.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2020–04044 Filed 2–26–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Coastal and Marine Ecological Classification Standard Solicitation for Revisions

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before April 27, 2020.

ADDRESSES: Direct all written comments to Adrienne Thomas, PRA Officer, NOAA, 151 Patton Avenue, Room 159, Asheville, NC 28801 (or via the internet at *PRAcomments@doc.gov*). All comments received are part of the public record. Comments will generally be posted without change. All Personally Identifiable Information (for example, name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Becky Allee, Office for Coastal Management, 1021 Balch Blvd., Suite 1003, Stennis Space Center, MS 39529, (228) 688–1701, *becky.allee@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This is a request for review of a new information collection.

NOAA's Office of Coastal Management (OCM) is proposing a new information collection that will allow interested parties to submit requests for revisions to update the Coastal and Marine Ecological Classification Standard (CMECS). CMECS was approved by the Federal Geographic Data Committee (FGDC) in August 2012 and provides a national standard for consistent descriptions of coastal and marine ecological features. The primary uses of CMECS are in mapping and

classifying the geological, physical, biological, and chemical components of the environment. Among other applications, the CMECS framework can be used to integrate data from disparate sources, facilitate comparisons among sites, and organize data for regional assessment. Since its publication in 2012, the CMECS has been used to characterize habitats ranging from coastal wetlands and estuaries to the deep ocean and at local to global scales. Benefits of CMECS include: Data collected by different sensors and methods can be integrated into a single database; all the physical, biological, and chemical-forcing functions that collectively determine a habitat type can be captured; and the system has the flexibility to accommodate new units as additional information becomes available.

The CMECS was developed as a dynamic standard to allow periodic revisions to continue to meet the needs of the user community and as such, the CMECS can be updated to accommodate the requirements of evolving scientific practices, technology, and coastal and marine resource management. The review process allows the CMECS to retain its consistency, credibility, and rigor through periodic reviews and an orderly, authoritative, and transparent updating process as required by the Federal Geographic Data Committee. Anyone can propose changes, which can include minor edits, such as grammatical or typographical corrections, clarifications of definitions and meaning, or more substantial changes to the hierarchy within components. The CMECS Implementation Group, through the Office for Coastal Management, has determined it is necessary to initiate the dynamic standard process to revise the CMECS. We are soliciting recommendations for revisions to the CMECS through a form to be posted on the CMECS website. All recommendations collected will be reviewed and revisions will be made to the CMECS to reflect those recommendations found to be valuable for implementation of the CMECS and supportive of the user community needs.

II. Method of Collection

Information will primarily be collected through a form on the CMECS website; however, we will also accept paper format for anyone unable to access the form through the internet. Some follow up interviews may occur to better understand recommendations as needed.

III. Data

OMB Control Number: 0648–NEW.

Form Number(s): None.

Type of Review: Regular submission; request for a new information collection.

Affected Public: Coastal scientists and managers throughout the United States responsible for characterization of coastal and marine habitats or ecosystems more broadly. This may include academia; non-governmental organizations; State, Local or Tribal government; Federal government; and for-profit environmental support businesses.

Estimated Number of Respondents: 100

Estimated Time per Response: 1 hour

Estimated Total Annual Burden Hours: 100

Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Sheleen Dumas,

Departmental Lead PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2020–03963 Filed 2–26–20; 8:45 am]

BILLING CODE 3510–JE–P

COURT SERVICES AND OFFENDER SUPERVISION AGENCY FOR THE DISTRICT OF COLUMBIA

Notice of CSOSA and PSA Guidance Portals

AGENCY: Court Services and Offender Supervision Agency for the District of Columbia.

ACTION: Notice of availability.

SUMMARY: Pursuant to Executive Order 13891 and OMB M–20–02: Memorandum for Regulatory Policy Officers at Executive Departments and Agencies and Managing and Executive Directors of Certain Agencies and Commissions (OMB Memorandum M–20–02), Court Services and Offender Supervision Agency for the District of Columbia (CSOSA) and Pretrial Services Agency for the District of Columbia (PSA) are noticing the February 28, 2020 by both CSOSA and PSA of a single, searchable, indexed database, each containing all of the respective agency's guidance documents currently in effect.

DATES: Applicable February 28, 2020.

FOR FURTHER INFORMATION CONTACT:

CSOSA, Hyun-Ju E. Park, Supervisory Policy Analyst, Office of Policy Analysis, Court Services and Offender Supervision Agency, 633 Indiana Avenue NW, Washington, DC 20004, *hyun-ju.park@csosa.gov*

PSA: Victor Valentine Davis, Chief of Staff, Pretrial Services Agency for the District of Columbia, 633 Indiana Avenue NW, Washington, DC 20004, *Victor.Davis@psa.gov*

SUPPLEMENTARY INFORMATION: The Court Services and Offender Supervision Agency for the District of Columbia (CSOSA) was established within the Executive Branch of the Federal Government by the National Capital Revitalization and Self-Government Improvement Act of 1997, Public Law 105–33, 111 Stat. 251, 712 (D.C. Code § 24–133(a)). On August 4, 2000, CSOSA was certified by the United States Attorney General as an independent Federal agency. The Pretrial Services Agency for the District of Columbia (PSA) is an independent entity within CSOSA.

Section 3 of Executive Order 13891 requires federal agencies to ''establish or maintain on its website a single, searchable, indexed database that contains or links to all guidance documents in effect from such agency or component.'' Executive Order 13891, 84 FR 55, 235 (October 9, 2019). OMB Memorandum M–20–02 further requires agencies to ''send to the **Federal Register** a notice announcing the existence of the new guidance portal and explaining that all guidance documents remaining in effect are contained on the new guidance portal.'' OMB Memorandum M–20–02, page 1 (October 31, 2019).

In compliance with the above, CSOSA and PSA are respectively noticing the availability of a single, searchable, indexed database for CSOSA containing all CSOSA guidance documents currently in effect, which may be

accessed at *https://www.csosa.gov/guidance;* and the availability of a single, searchable, indexed database for PSA containing all PSA guidance currently in effect, which may be accessed at *https://www.psa.gov/?q=subject_index.*

Rochelle Durant,

Federal Register Liaison.

[FR Doc. 2020–04003 Filed 2–26–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID: USA–2020–HQ–0005]

Privacy Act of 1974; System of Records

AGENCY: Department of the Army (USA), Department of Defense (DoD).

ACTION: Rescindment of a System of Records Notice (SORN).

SUMMARY: The USA is rescinding a System of Records, A0385–1040 ASO, Army Safety Management Information System (ASMIS). These records consist of safety investigation case files retrieved by the report identification number, incident date, location, unit identification code, accident classification, or accident description. Personal information is collected during the investigation on individuals involved in or witness to an incident; however, their personal identifiers are not used to maintain or retrieve the records. To maintain the integrity of investigatory material, the USA established specialized procedures to restrict queries to descriptors of the incident, therefore these records are not subject to the Privacy Act of 1974. Individuals involved in or witness to the incident, and other interested parties may request information collected in safety investigations records under the provisions of the Freedom of Information Act (FOIA).

DATES: This System of Records rescindment is effective upon publication.

FOR FURTHER INFORMATION CONTACT: Mr. Myron Wong, Department of the Army, U.S. Army Records Management and Declassification Agency, ATTN: Army Privacy and Civil Liberties Office, 9301 Chapek Road (Building 1458), Fort Belvoir, VA 22060–5605, or by phone at (571) 515–0500.

SUPPLEMENTARY INFORMATION: The ASMIS covers records pertaining to safety investigation data and travel risk assessments. The records are associated with two USA information technology (IT) systems: Army Safety Management Information System-Revised (ASMIS–R) and Travel Risk Planning System (TRiPS). The ASMIS–R is the USA's enterprise IT system for collecting, storing, and managing USA safety incident data. The TRiPS is a web-based application which allows individuals to generate risk assessments when traveling by a personally owned automobile or motorcycle. Records generated by the ASMIS–R and TRiPS are not retrieved by the use of a personal identifier, therefore the records are not subject to the Privacy Act of 1974 (5 U.S.C. 552a, as amended).

The U.S. Army Combat Readiness Center (USACRC) uses safety incident data stored in the ASMIS–R to produce reports, operational guidance, training materials, and incident analyses for the USA. Investigations for mishaps and occupational injuries are mandated by 5 U.S.C. 7902, Safety Programs and DoD Instruction 6055.07, ''Mishap Notification, Investigation, Reporting, and Record Keeping.'' The investigations are conducted in accordance with USA Regulation 385–10, ''The Army Safety Program,'' and USA Pamphlet 385–40, ''Army Accident Investigations and Reporting.'' Safety investigations are used exclusively for accident prevention purposes. As such, the USA established specialized procedures to maintain the integrity of investigatory case files by restricting queries to descriptors of the incident. Safety investigation records may contain privileged information to include witness statements, deliberative products, pictures, diagrams, audio and video tapes, investigatory notes, and findings. The information collected is required to determine causal factors, implement corrective actions, and develop mitigation strategies. Although personal information is collected during the course of the investigation, it is not used to retrieve safety records. The collection and use of personal information is necessary to conduct interviews and to assess causal factors (human error, material, or environmental). Personal identifiers may be used to request data maintained in existing DoD Systems of Records to include personnel, training, medical, and law enforcement records.

Individuals involved in, witness to a USA safety incident, and or other interested parties may request information collected in safety investigations records under the provisions of the FOIA. The USACRC Commander has oversight of the USA Safety program under authority granted by the Assistant Secretary of the Army for Installations, Energy and Environment. Accordingly, the USACRC is the repository for all USA safety accident reports. All FOIA requests pertaining to USA safety accident investigation reports will be referred through command channels to Commander, U.S. Army Combat Readiness Center, Ruf Avenue, Building 4905, Fort Rucker, AL 36362–5363. Electronic FOIA requests may be submitted via the USACRC web page at: *https://safety.army.mil/HOME/FOIA.aspx.* The USACRC Commander has the authority to act as the initial denial authority on requests for information from USA Safety Accident Reports.

Records pertaining to individual travel risk assessments are created in the TRiPS application. The TRiPS is a web-based tool accessible to all DoD service members and civilians. The TRiPS allows individuals to create a safety assessment when traveling by a privately owned automobile or motorcycle for leave, pass or other purpose. The application provides a fillable worksheet and generates a PDF file and is automatically emailed to the addressee specified by the individual completing the worksheet. Personal information entered in the worksheet includes name, email address, supervisor's email address, departure location, destination, and travel dates. All personal information entered in the TRiPS is stored in a temporary cache while the assessment is generated. The output (PDF) is a travel risk assessment for the individual to submit to his or her supervisor for face-to-face counseling. The risk assessment provides tips to help with trip planning and reinforces safe driving practices. The individual may optionally save the PDF to a location of his or her choosing. The completed worksheet is retained by the supervisor in the individual's local supervisory/counseling record. The application does not store or share data with the ASMIS–R. The application was included as a System of Records under the ASMIS during initial development, however, the requirements changed as the application was expanded to support all services. The TRiPS does not require user registration and does not maintain any records on individuals.

Rescission of this SORN does not affect the safeguards, retention, or disposition of the records. Paper and electronic records are protected in accordance with policies in DoD Manual 5200.01, Volume 4, DoD Information Security Program: Controlled Unclassified Information (CUI). Records are accessed by person(s) responsible for servicing the records

system in performance of their official duties and by properly screened authorized personnel cleared for need-to-know. Records are stored in locked rooms, cabinets, and in computer storage devices protected by computer system software. Access to computerized data is restricted by use of Common Access Cards (CACs) and is accessible only by users with an authorized account. USA safety mishap and occupational injury records, both physical and digital will be retained for 50 year(s) after the event and until no longer needed for business use, in accordance with the approved records schedule. Travel assessments generated by the TRiPS are maintained based on the component's disposition schedules for local supervisory/counseling records.

The DoD notices for Systems of Records subject to the Privacy Act of 1974, as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT** or via the Defense Privacy, Civil Liberties, and Transparency Division website at *https://dpcld.defense.gov.*

The proposed systems reports, as required by the Privacy Act of 1974, as amended, were submitted on December 30, 2019, to the House Committee on Oversight and Reform, the Senate Committee on Homeland Security and Governmental Affairs, and to the Office of Management and Budget (OMB) pursuant to Section 6 of OMB Circular No. A–108, ''Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act,'' revised December 23, 2016 (December 23, 2016, 81 FR 94424).

SYSTEM NAME AND NUMBER:

Army Safety Management Information System (ASMIS), A0385–1040 ASO.

HISTORY:

June 15, 2010, 75 FR 33794.

Dated: February 24, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–03949 Filed 2–26–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket Number DARS–2020–0003; OMB Control Number 0704–0398]

Information Collection Requirement; Defense Federal Acquisition Regulation Supplement (DFARS); Describing Agency Needs

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 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: Consideration will be given to all comments received by April 27, 2020.

ADDRESSES: You may submit comments, identified by OMB Control Number 0704–0398, 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 0704–0398 in the subject line of the message.

Fax: 571–372–6094.

Mail: Defense Acquisition Regulations System, Attn: Ms. Carrie Moore, OUSD(A&S)DPC(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. Carrie Moore, telephone 571–372–6093.

SUPPLEMENTARY INFORMATION:

Title and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS) Part 211, Describing Agency Needs, and Related Clause at 252.211; OMB Control Number 0704–0398.

Type of Request: Revision and extension.

Affected Public: Businesses or other for-profit and not-for-profit institutions.

Respondent's Obligation: Required to obtain or retain benefits.

Number of Respondents: 256.

Responses per Respondent: About 254.

Annual Responses: 65,000.

Average Burden per Response: .25 hours, approximately.

Annual Burden Hours: 16,250.

Reporting Frequency: On occasion.

Needs and Uses: This information collection pertains to DFARS clause 252.211–7007, Reporting of Government-Furnished Property, which requires contractors to report to the Item Unique Identification (IUID) Registry all Government-furnished property (GFP), as well as contractor receipt of non-serially managed items. ''Serially managed item'' means an item designated by DoD to be uniquely tracked, controlled, or managed in maintenance, repair, and/or supply systems by means of its serial number. The clause provides a list of specific data elements contractors are to report to the IUID registry, as well as procedures for updating the registry. DoD needs this information to strengthen the accountability and end-to-end traceability of GFP within DoD. Through electronic notification of physical receipt, DoD is made aware that GFP has arrived at the contractor's facility. The DoD logistics community uses the information as a data source of available DoD equipment. In addition, the DoD organization responsible for contract administration uses the data to test the adequacy of the contractor's property management system.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

[FR Doc. 2020–03887 Filed 2–26–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket Number DARS–2020–0009; OMB Control Number 0704–0286]

Information Collection Requirement; Defense Federal Acquisition Regulation Supplement (DFARS); Publicizing Contract Actions

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 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 0704–0286, 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 0704–0286 in the subject line of the message.

Fax: 571–372–6094.

Mail: Defense Acquisition Regulations System, Attn: Ms. Carrie Moore, OUSD(A&S)DPC(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. Carrie Moore, at 571–372–6093.

SUPPLEMENTARY INFORMATION: *Title and OMB Number:* Defense FAR Supplement (DFARS) Part 205, Publicizing Contract Actions, and DFARS 252–205–7000, Provision of Information to Cooperative Agreement Holders; OMB Control Number 0704–0286.

Needs and Uses: DFARS 205.470 prescribes the use of the clause at DFARS 252.205–7000, Provision of Information to Cooperative Agreement Holders, in solicitations and contracts, including solicitations and contracts using Federal Acquisition Regulation (FAR) part 12 procedures for the acquisition of commercial items, which are expected to exceed $1,000,000. This clause implements 10 U.S.C. 2416, by requiring contractors to provide cooperative agreement holders, upon request, with a list of the contractor's employees or offices responsible for entering into subcontracts under Department of Defense (DoD) contracts. The Contractor need not provide the listing to a particular cooperative agreement holder more frequently than once a year. Upon receipt of a contractor's list, the cooperative agreement holder utilizes the information to help businesses identify and pursue contracting opportunities with DoD and expand the number of businesses capable of participating in Government contracts.

Affected Public: Businesses or other for-profit and not-for profit institutions.

Number of Respondents: 7,027.

Responses per Respondent: 1.

Annual Responses: 7,027.

Average Burden per Response: Approximately 1.1 hours.

Annual Burden Hours: 7,730.

Reporting Frequency: On occasion.

Summary of Information Collection

DFARS 205.470 prescribes the use of the clause at DFARS 252.205–7000, Provision of Information to Cooperative Agreement Holders, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, which are expected to exceed $1,000,000. The clause requires contractors to provide cooperative agreement holders, upon request, with a list of the contractor's employees or offices responsible for entering into subcontracts under DoD contracts. The list must include the business address, telephone number, and area of responsibility of each employee or office.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

[FR Doc. 2020–03891 Filed 2–26–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket Number DARS–2020–0004; OMB Control Number 0704–0225]

Information Collection Requirement; Defense Federal Acquisition Regulation Supplement (DFARS); Administrative Matters

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 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 0704–0225, 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 0704–0225 in the subject line of the message.

Fax: 571–372–6094.

Mail: Defense Acquisition Regulations System, Attn: Ms. Heather Kitchens, OUSD(A&S)DPC(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. Heather Kitchens, telephone 571–372–6104.

SUPPLEMENTARY INFORMATION:

Title and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS), Part 204, Administrative Matters and Related Clause at 252.204; OMB Control Number 0704–0225.

Type of Request: Revision and extension.

Affected Public: Businesses or other for-profit and not-for profit institutions.

Respondent's Obligation: Required to obtain or retain benefits.

Number of Respondents: 545.

Responses per Respondent: Approximately 5.57.

Annual Responses: 3,036.

Average Burden per Response: Approximately 3 hours.

Annual Burden Hours: 9,108.

Reporting Frequency: On occasion.

Needs and Uses: DFARS 204.404–70(a) prescribes use of DFARS Clause 252.204–7000, Disclosure of Information, in contracts that require the contractor to access or generate unclassified information that may be sensitive and inappropriate for release to the public. The clause requires the contractor to obtain approval of the contracting officer before release of any unclassified contract-related information outside the contractor's organization, unless the information is already in the public domain. In requesting this approval, the contractor must identify the specific information to be released, the medium to be used, and the purpose for the release. Upon receipt of a contractor's request, the Government reviews the information provided by the contractor to determine if it is sensitive or otherwise inappropriate for release for the stated purpose.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

[FR Doc. 2020–03888 Filed 2–26–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket Number DARS–2020–0005; OMB Control Number 0704–0229]

Information Collection Requirement; Defense Federal Acquisition Regulation Supplement (DFARS); Foreign Acquisition

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 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: Consideration will be given to all comments received by April 27, 2020.

ADDRESSES: You may submit comments, identified by OMB Control Number 0704–0229, 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 0704–0229 in the subject line of the message.

Fax: 571–372–6094.

Mail: Defense Acquisition Regulations System, Attn: Ms. Kimberly Bass, OUSD(A&S)DPC(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. Kimberly Bass, telephone 571–372–6174.

SUPPLEMENTARY INFORMATION:

Title, Associated Form, and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS) Defense Federal Acquisition Regulation Supplement Part 225, Foreign Acquisition, and Related Clauses at 252.225; DD Form 2139; OMB Control Number 0704–0229.

Affected Public: Businesses or other for-profit and not-for-profit institutions.

Number of Respondents: 39,221.

Responses per Respondent: 10, approximately.

Annual Responses: 382,876.

Average Burden per Response: .28 hours, approximately.

Annual Burden Hours: 106,730 (106,995 reporting hours and recordkeeping hours).

Reporting Frequency: On occasion.

Needs and Uses: DoD needs this information to ensure compliance with restrictions on the acquisition of foreign products imposed by statute or policy to protect the industrial base; to ensure compliance with U.S. trade agreements and memoranda of understanding that promote reciprocal trade with the U.S. allies; and to prepare reports for submission to the Department of Commerce on the Balance of Payments Program. This information collection includes requirements related to foreign acquisition in DFARS Part 225, Foreign Acquisition, and the related clauses at DFARS 252.225 as follows:

DFARS 252.225–7000, Buy American—Balance of Payments Program Certificate, as prescribed in 225.1101(1) and (1)(i), requires the offeror to identify in its proposal supplies that do not meet the definition of domestic end product, separately listing qualifying country and other foreign end products. The Buy American statute does not apply to acquisitions of commercial information technology.

DFARS 252.225–7003, Report of Intended Performance Outside the United States and Canada—Submission with Offer, and 252.225–7004, Report of Intended Performance Outside the United States and Canada—Submission after Award, as prescribed in DFARS 225.7204(a) and (b) respectively, require offerors and contractors to submit a Report of Contract Performance Outside the United States for subcontracts to be performed outside the United States. The reporting threshold is $750,000 for contracts that exceed $15 million. The contractor may submit the report on DD Form 2139, Report of Contract Performance Outside the United States, or a computer-generated report that contains all information required by DD Form 2139.

DFARS 252.225–7005, Identification of Expenditures in the United States, as prescribed in DFARS 225.1103(1), requires contractors incorporated or located in the United States to identify, on each request for payment under contracts for supplies to be used, or for construction or services to be performed, outside the United States, that part of the requested payment representing estimated expenditures in the United States.

DFARS 252.225–7010, Commercial Derivative Military Article—Specialty Metals Compliance Certificate, as prescribed at DFARS 225.7003–5(b), requires the offeror to certify that it will take certain actions with regard to specialty metals if the offeror chooses to use the alternative compliance approach when providing commercial derivative military articles to the Government.

DFARS 252.225–7013, Duty-Free Entry, prescribed at DFARS 225.1101(4), requires the contractor or an authorized agent to provide information on shipping documents and customs forms regarding those items that are eligible for duty-free entry.

DFARS 252.225–7018, Photovoltaic Devices—Certificate, as prescribed at DFARS 225.7017–4(b), requires offerors to certify that no photovoltaic devices with an estimated value exceeding the micro-purchase threshold will be utilized in performance of the contract or to specify the country of origin.

DFARS 252.225–7020, Trade Agreements Certificate, as prescribed in 225.1101(5) and (5)(i), only requires listing of nondesignated country end products. This provision is used in solicitations for all acquisitions subject to the World Trade Organization Government Procurement Agreement.

DFARS 252.225–7021, Alternate II, Trade Agreements, as prescribed in DFARS 225.1101(6) and (6)(ii), in order to comply with a condition of the waiver authority provided by the United States Trade Representative to the Secretary of Defense, requires contractors from a South Caucasus/Central or South Asian state to inform the government of its participation in the acquisition and also advise their governments that they generally will not have such opportunities in the future unless their governments provide reciprocal procurement opportunities to U.S. products and services and suppliers of such products and services.

DFARS 252.225–7023, Preference for Products or Services from Afghanistan, as prescribed in DFARS 225.7703–4(a), requires offerors to identify products or services that are not products or services from Afghanistan.

DFARS 252.225–7025, Restriction on Acquisition of Forgings, as prescribed in DFARS 225.7102–4, also requires contractor retention of records showing compliance with the restrictions until 3 years after final payment. The contractor agrees to make the records available to the contracting officer upon request. The contractor may request a waiver in accordance with DFARS 225.7102–3.

DFARS 252.225–7032, Waiver of United Kingdom Levies—Evaluation of Offers, and 252.225–7033, Waiver of United Kingdom Levies, as prescribed in DFARS 225.1101(7) and (8) respectively, require United Kingdom offerors and prime contractors, and offerors and prime contractors with subcontracts of a dollar value exceeding $1 million with United Kingdom firms, to provide certain information necessary for DoD to obtain a waiver of United kingdom levies.

DFARS 252.225–7035, Buy American—Free Trade Agreements—Balance of Payments Program Certificate, as prescribed in 225.1101(9) and (9)(i), requires separate listing of qualifying country (except Canada), FTA country, or other foreign end products. Alternate I, as prescribed in 225.1101(9) and (9)(ii), requires listing of Canadian end products, rather than FTA country end products, in solicitations between $25,000 and the FTA threshold. The Buy American statute no longer applies to acquisitions of commercial information technology.

DFARS 252.225–7046, Exports of Approved Community Members in Response to the Solicitation, as prescribed at DFARS 225.7902–5(a), requires a representation whether exports or transfers of qualifying defense articles were made in preparing the response to the solicitation. If yes, the offeror represents that such exports or transfers complied with the requirements of the provision.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

[FR Doc. 2020–03889 Filed 2–26–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2020–OS–0027]

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary, Department of Defense (DoD).

ACTION: Rescindment of a System of Records Notice (SORN).

SUMMARY: The Office of the Secretary of Defense (OSD) is rescinding a System of Records titled, the Department of Defense Education Activity (DoDEA) Summer Workshop Application (SWA), DoDEA 28. No DoDEA SWA records were ever created by the system.

DATES: This System of Records rescindment is effective upon publication. The DoDEA SWA system was decommissioned on August 10, 2015. The records retention schedule for these records was five years; however, no records were ever created.

FOR FURTHER INFORMATION CONTACT: Ms. Luz D. Ortiz, Chief, Records, Privacy and Declassification Division (RPDD), 1155 Pentagon, Washington, DC 20311–1155 or by phone at (571) 372–0478.

SUPPLEMENTARY INFORMATION: This System of Records was intended to assist DoDEA personnel with registering for professional development sessions which were planned to be provided over the summer months. However, the summer professional development sessions were cancelled prior to opening them up for registration. As such, no records were ever created by the system and thus this SORN can be deleted.

The OSD notices for Systems of Records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT** or at the Defense Privacy, Civil Liberties and Transparency Division website at *https://dpcld.defense.gov.*

The proposed systems reports, as required by the Privacy Act of 1974, as amended, were submitted on December 6, 2019, to the House Committee on Oversight and Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to Section 6 of OMB Circular No. A–108, ''Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act,'' revised December 23, 2016 (December 23, 2016, 81 FR 94424).

SYSTEM NAME AND NUMBER:

Department of Defense Education Activity Summer Workshop Application, DoDEA 28.

HISTORY:

May 18, 2011, 76 FR 28757.

Dated: February 24, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–03953 Filed 2–26–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2020–OS–0022]

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary, Department of Defense (DoD).

ACTION: Rescindment of a System of Records Notice (SORN).

SUMMARY: The Office of the Secretary of Defense (OSD) is rescinding a SORN, Research and Engineering Prize Competition, DSMC 08. This system was used to award cash prizes in recognition of outstanding achievements in basic, advanced, and applied research, technology development, and prototype development.

DATES: This System of Records rescindment is effective upon publication. The system was decommissioned in July 2012, the records retention schedule for these records have been met and the records were destroyed in accordance with the approved retention and disposition schedule.

FOR FURTHER INFORMATION CONTACT: To submit general questions about the rescinded system, please contact Ms. Luz D. Ortiz, Chief, Records, Privacy and Declassification Division (RPDD), 1155 Defense Pentagon, Washington, DC 20301–1155, or by phone at (571) 372–0478.

SUPPLEMENTARY INFORMATION: The application was decommissioned in July 2012, and the records were subsequently destroyed in accordance with the National Archives and Records Administration's approved records retention and disposition schedule. Therefore, this SORN can be deleted.

The OSD notices for Systems of Records subject to the Privacy Act of 1974, as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT** or at the Defense Privacy, Civil Liberties, and Transparency Division website at *https://dpcld.defense.gov.*

The proposed system reports, as required by the Privacy Act of 1974, as amended, were submitted on December 13, 2019, to the House Committee on Oversight and Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to Section 6 of OMB Circular No. A–108, ''Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act,'' revised December 23, 2016 (December 23, 2016, 81 FR 94424).

SYSTEM NAME AND NUMBER:

Research and Engineering Prize Competition, DSMC 08.

HISTORY:

September 4, 2007, 72 FR 50669.

Dated: February 21, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–03916 Filed 2–26–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2020–OS–0026]

Privacy Act of 1974; System of Records

AGENCY: National Geospatial-Intelligence Agency (NGA), Department of Defense (DoD).

ACTION: Rescindment of a System of Records Notice (SORN).

SUMMARY: The NGA is rescinding a System of Records, Vehicle Registration and Driver Record Files, B0503–05. This System of Records maintained traffic offenses, incidents, actions taken, and parking permits issued to agency personnel and contractors. All records previously covered by the Vehicle Registration and Driver Record Files have been destroyed in accordance with the policy and direction specified within the SORN.

DATES: This System of Records rescindment is effective upon publication. The specific date when this system ceased to be a Privacy Act System of Records is August 31, 2017.

FOR FURTHER INFORMATION CONTACT: To submit general questions about the rescinded system, please contact Mr. Charles R. Melton, Chief FOIA, National Geospatial-Intelligence Agency, Security and Installation, Attn: FOIA Office, 7500 GEOINT Drive, Springfield, VA 22150–7500, or by phone at (571) 558–3715.

SUPPLEMENTARY INFORMATION: On November 19, 2013, the Office of the Secretary of Defense (OSD), published a new System of Records, National Geospatial-Intelligence Agency Enterprise Workforce System (EWS) (November 19, 2013, 78 FR 69393). All records previously covered by the NGA Vehicle Registration and Drivers Record Files are now covered by the Enterprise Workforce System, System of Records.

The DoD notices for Systems of Records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT** or at the Defense Privacy, Civil Liberties and Transparency Division website at *https://dpcld.defense.gov.*

The proposed system reports, as required by the Privacy Act of 1974, as amended, were submitted on December 6, 2019, to the House Committee on Oversight and Reform, the Senate Committee on Homeland Security and Governmental Affairs, and to the Office of Management and Budget (OMB) pursuant to Section 6 of OMB Circular No. A–108, ''Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act,'' revised December 23, 2016 (December 23, 2016, 81 FR 94424).

System Name and Number

Vehicle Registration and Driver Record Files, B0503–05.

HISTORY:

March 19, 2002, 67 FR 12532.

Dated: February 24, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–03948 Filed 2–26–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2020–OS–0025]

Privacy Act of 1974; System of Records

AGENCY: National Geospatial-Intelligence Agency (NGA), Department of Defense.

ACTION: Rescindment of a System of Records Notice (SORN).

SUMMARY: The NGA is rescinding a System of Records, Alcoholism and Drug Abuse Files, B0901–07. This System of Records maintained documents relating to alcohol and narcotic use, treatment, assistance, and advice provided to NGA personnel. This system is no longer in use at NGA and all records previously contained within the Alcoholism and Drug Abuse Files were destroyed in accordance with the retention and disposition schedule as stated in the SORN. Currently, all records collected relating to drug and alcohol use are covered by the Personnel Vetting Records System,

DUSDI 02-DoD and the NGA Enterprise Workforce System, NGA–003 SORNs.

DATES: This System of Records rescindment is effective upon publication. The specific date for when this system ceased to be a Privacy Act System of Records is July 1, 2015.

FOR FURTHER INFORMATION CONTACT: To submit general questions about the rescinded system, please contact Mr. Terrance J. Reeves, Chief Privacy Officer, Mission Oversight and Compliance, National Geospatial-Intelligence Agency, 7500 GEOINT Drive, Springfield, VA 22150–7500, or at (571) 558–7641 or *terrance.j.reeves@nga.mil.*

SUPPLEMENTARY INFORMATION: This system tracked personnel alcoholism and drug abuse records. All files were destroyed in accordance with the records disposition in the SORN and the system is no longer active.

The OSD notices for Systems of Records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT** or at the Defense Privacy, Civil Liberties and Transparency Division website at *https://dpcld.defense.gov.*

The proposed systems reports, as required by the Privacy Act of 1974, as amended, were submitted on January 14, 2020, to the House Committee on Oversight and Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to Section 6 of OMB Circular No. A–108, ''Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act,'' revised December 23, 2016 (December 23, 2016, 81 FR 94424).

SYSTEM NAME AND NUMBER:

Alcoholism and Drug Abuse Files, B0901–07.

HISTORY:

July 13, 1995, 60 FR 36124.

Dated: February 21, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–03933 Filed 2–26–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2020–OS–0023]

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary, Department of Defense (DoD).

ACTION: Rescindment of a System of Records Notice (SORN).

SUMMARY: The Office of the Secretary of Defense (OSD), is rescinding a System of Records titled, the Defense Travel Management Office (DTMO) Workforce Assessment, DHRA 13 DoD.

DATES: The System of Records rescindment is effective upon publication. The DTMO system was decommissioned on December 28, 2017 and the records retention schedules for these records have been met since no records were ever input to date. The DTMO Workforce Assessment is no longer in use and is considered deactivated.

FOR FURTHER INFORMATION CONTACT: Ms. Luz D. Ortiz, Chief, Records, Privacy and Declassification Division (RPDD), 1155 Pentagon, Washington, DC 20311–1155 or by phone at (571) 372–0478.

SUPPLEMENTARY INFORMATION: The DTMO never performed an internal workforce assessment and no records were ever placed in this system. Because no assessments were conducted by DTMO, the DTMO Workforce SORN is not required; therefore, the SORN can be rescinded.

The OSD notices for Systems of Records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT** or at the Defense Privacy, Civil Liberties and Transparency Division website at *https://dpcld.defense.gov.*

The proposed system reports, as required by the Privacy Act of 1974, as amended, were submitted on December 6, 2020, to the House Committee on Oversight and Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to Section 6 of OMB Circular No. A–108, ''Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act,'' revised December 23, 2016 (December 23, 2016, 81 FR 94424).

SYSTEM NAME AND NUMBER:

Defense Travel Management Office (DTMO) Workforce Assessment, DHRA 13 DoD.

HISTORY:

June 11, 2014, 79 FR 33528.

Dated: February 21, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–03926 Filed 2–26–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2020–OS–0020]

Proposed Collection; Comment Request

AGENCY: Defense Contract Management Agency, DoD.

ACTION: Information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Defense Contract Management Agency announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's 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 through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by April 27, 2020.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail: Department of Defense, Office of the Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24 Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket 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.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Contract Management Agency, ATTN John Heib, Action Officer for Policy, at 8000 Jefferson Davis Hwy., Bldg. 54 North Tower, Richmond, VA 23297–5002.

Title; Associated Form; and OMB Number: Request for Approval for Qualification Training and Approval of Contractor Flight Crewmember; DD Form 2627, DD Form 2628, DD Form 3062; OMB Control Number 0704–0347.

Needs and Uses: This is a request for OMB approval of updated versions of previously approved collections (for DD Form 2627 and 2628) for which approval has expired, and for OMB approval of new collection (DD Form 3062) which replaces the Defense Contract Management Agency (DCMA) Form 644. The requirements to have government approval of contract flight crewmembers and contract flights is in Defense Contract Management Command Instruction (DCMA INST) 8210.1, Contractor's Ground and Flight Operations, Chapter 4. The contractor provides information on contractor personnel to the government. The government approves the contractor's request for aircrew training and eventually, approval for contractor personnel to operate and fly government aircraft. The government also approves all flights under contract.

Affected Public: Individuals or Households.

Annual Burden Hours: 5,400.

Number of Respondents: 150.

Responses per Respondent:

DD Form 2627: 2.

DD Form 2628: 2.

DD Form 3062: 52.

Annual Responses: 22,450.

Average Burden per Response:

DD Form 2627: 30 minutes.

DD Form 2628: 30 minutes.

DD Form 3062: 1 hour.

Frequency:

DD Form 2627: On occasion.

DD Form 2628: On occasion.

DD Form 3062: Weekly.

Dated: February 24, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–03946 Filed 2–26–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2020–OS–0021]

Privacy Act of 1974; System of Records

AGENCY: Defense Intelligence Agency (DIA), Department of Defense (DoD).

ACTION: Rescindment of a System of Records Notice (SORN).

SUMMARY: The DIA is rescinding a System of Records, DIA Military Recognition and Awards Files, LDIA 0435. The DIA determined this System of Records was duplicative of the Systems of Records held by the military branches which maintain the official records of military personnel. The DIA decommissioned this System of Records on January 9, 2020 to improve record-keeping efficiency, optimize business processes and better protect military members' privacy. All files within this System of Records were destroyed in accordance with the policies and practices for the retention and disposal of the records.

Military service member awards and recognition records are covered by the following SORNs: AF 036 AF PC C (Air Force), A0600–8 AHRC (Army) and N01070–3 (Navy and Marine Corps).

DATES: This System of Records rescindment is effective upon publication. This system was decommissioned on January 9, 2020.

FOR FURTHER INFORMATION CONTACT: To submit general questions about the rescinded system, please contact Ms. Theresa Lowery, Component Privacy Officer, Office of Oversight and Compliance, Defense Intelligence Agency, 7400 Pentagon, Washington, DC 20301–2400, or at (202) 231–5270 or *theresa.lowery@dodiis.mil.*

SUPPLEMENTARY INFORMATION: This rescindment removes a duplicative system of records. The original personnel records continue to be maintained in accordance with the following SORNs: AF 036 AF PC C (Air Force), A0600–8 AHRC (Army) and N01070–3 (Navy and Marine Corps).

The DoD notices for Systems of Records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT** or at the Defense Privacy, Civil Liberties and Transparency Division website at *https://dpcld.defense.gov.*

The proposed system reports, as required by the Privacy Act of 1974, as amended, were submitted on February 14, 2020, to the House Committee on Oversight and Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to Section 6 of OMB Circular No. A–108, ''Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act,'' revised December 23, 2016 (December 23, 2016, 81 FR 94424).

SYSTEM NAME AND NUMBER:

DIA Military Recognition and Awards Files, LDIA 0435.

HISTORY:

April 12, 2012, 77 FR 21976.

Dated: February 21, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–03911 Filed 2–26–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2020–OS–0024]

Privacy Act of 1974; System of Records

AGENCY: National Geospatial-Intelligence Agency (NGA), Department of Defense (DoD).

ACTION: Rescindment of a System of Records Notice (SORN).

SUMMARY: The NGA is rescinding a System of Records, Contracting Officer Designation Files, B1202–17. This System of Records maintained documents showing the designation of contracting officers to include restrictions and limitations on authority, and associated peripheral data required for Agency contacts. All Contracting Officer Designation Files have been transitioned to the Enterprise Workforce System (EWS), which are covered by SORN NGA–003.

DATES: This System of Records rescindment is effective upon publication. The specific date for when this system ceased to be a Privacy Act System of Records was August 31, 2017 and the records transitioned to EWS.

FOR FURTHER INFORMATION CONTACT: To submit general questions about the rescinded system, please contact Mr. Charles R. Melton, Chief FOIA, National Geospatial-Intelligence Agency, Security and Installation, Attn: FOIA Office, 7500 GEOINT Drive, Springfield, VA 22150–7500, or by phone at (571) 558–3715.

SUPPLEMENTARY INFORMATION: On November 19, 2013, the Office of the Secretary of Defense (OSD) published a new System of Records, National Geospatial-Intelligence Agency Enterprise Workforce System (EWS) (November 19, 2013, 78 FR 69393). Since that time, the NGA Contracting Officer Designation records have been subsumed by the EWS System of Records and all records previously covered by the NGA Contracting Officer Designation Files System of Records have transitioned to the EWS System of Records.

The OSD notices for Systems of Records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT** or at the Defense Privacy, Civil Liberties and Transparency Division website at *https://dpcld.defense.gov.*

The proposed system reports, as required by the Privacy Act of 1974, as amended, were submitted on December 16, 2019, to the House Committee on Oversight and Reform, the Senate Committee on Homeland Security and Governmental Affairs, and to the Office of Management and Budget (OMB) pursuant to Section 6 of OMB Circular No. A–108, ''Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act,'' revised December 23, 2016 (December 23, 2016, 81 FR 94424).

SYSTEM NAME AND NUMBER:

Contracting Officer Designation Files, B1202–17.

HISTORY:

March 19, 2002, 67 FR 12532.

Dated: February 21, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–03931 Filed 2–26–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2019–ICCD–0157]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Credit Enhancement for Charter School Facilities Program Performance Report

AGENCY: Office of Innovation and Improvement (OII), 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 30, 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–0157. 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 Clifton Jones, 202–205–2204.

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: Credit Enhancement for Charter School Facilities Program Performance Report.

OMB Control Number: 1855–0010.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: Private Sector.

Total Estimated Number of Annual Responses: 60.

Total Estimated Number of Annual Burden Hours: 1,500.

Abstract: The purpose of the Credit Enhancement program is to award grants to eligible entities that demonstrate innovative methods of helping charter schools address the cost of acquiring, constructing, and renovating facilities by enhancing the availability of loans and bond financing. This program provides grants to eligible entities to permit them to enhance the credit of charter schools so that the charter schools can access private-sector and other non-Federal capital in order to acquire, construct, and renovate facilities at a reasonable cost. The Credit Enhancement for Charter School Facilities Program and the Charter Schools Facilities Financing Demonstration Program have a statutory mandate for an annual report. This reporting is a requirement in order to obtain or retain benefits according to section 4304 of the Elementary and Secondary Education Act of 1965 as amended by the Every Student Succeeds Act (ESSA) of 2015. The information is collected in order to adhere to statutory requirements and to perform monitoring and evaluation of grantees.

Dated: February 21, 2020.

Kate Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer.

[FR Doc. 2020–03903 Filed 2–26–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC20–40–000.
Applicants: EAM Nelson Holding, LLC, Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, Entergy Nuclear Palisades, LLC, Entergy Nuclear Power Marketing, LLC, Entergy Power, LLC, EWO Marketing, LLC, RS Cogen, LLC.
Description: Joint Application for Authorization Under Section 203 of the Federal Power Act, et al. of EAM Nelson Holding, LLC, et al.
Filed Date: 2/21/20.
Accession Number: 20200221–5105.
Comments Due: 5 p.m. ET 3/13/20.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER19–2727–002.
Applicants: California Independent System Operator Corporation.
Description: Compliance filing: 2020–02–20 CCDEBE Compliance Filing to be effective 1/28/2020.
Filed Date: 2/20/20.
Accession Number: 20200220–5134.
Comments Due: 5 p.m. ET 3/12/20.
Docket Numbers: ER20–669–001.
Applicants: Midcontinent Independent System Operator, Inc.
Description: Tariff Amendment: 2020–02–21_Amendment to Revisions to Enhance Module D filing to be effective 3/1/2020.
Filed Date: 2/21/20.
Accession Number: 20200221–5070.
Comments Due: 5 p.m. ET 2/28/20.
Docket Numbers: ER20–755–001.
Applicants: Midcontinent Independent System Operator, Inc., ITC Midwest LLC.
Description: Tariff Amendment: 2020–02–21_SA 3397 ITC–MEC Substitute FSA (J475) to be effective 3/9/2020.
Filed Date: 2/21/20.
Accession Number: 20200221–5052.
Comments Due: 5 p.m. ET 3/13/20.
Docket Numbers: ER20–768–001.
Applicants: Midcontinent Independent System Operator, Inc., ITC Midwest LLC.
Description: Tariff Amendment: 2020–02–21_SA 3398 ITC–MEC Substitute FSA (J498 J499 J500) to be effective 3/11/2020.
Filed Date: 2/21/20.
Accession Number: 20200221–5053.
Comments Due: 5 p.m. ET 3/13/20.
Docket Numbers: ER20–769–001.
Applicants: Midcontinent Independent System Operator, Inc., ITC Midwest LLC.
Description: Tariff Amendment: 2020–02–21_SA 3399 ITC-Duane Arnold Solar Substitute FSA (J504) to be effective 3/11/2020.
Filed Date: 2/21/20.
Accession Number: 20200221–5068.
Comments Due: 5 p.m. ET 3/13/20.
Docket Numbers: ER20–794–001.
Applicants: Midcontinent Independent System Operator, Inc., Otter Tail Power Company.
Description: Tariff Amendment: 2020–02–21_SA 3403 OTP–NSP Substitute FSA (J460) CapX Brookings to be effective 3/16/2020.
Filed Date: 2/21/20.
Accession Number: 20200221–5089.
Comments Due: 5 p.m. ET 3/13/20.
Docket Numbers: ER20–806–001.
Applicants: Midcontinent Independent System Operator, Inc., Otter Tail Power Company.
Description: Tariff Amendment: 2020–02–21_SA 3404 OTP–NSP Substitute FSA (J436 J437) Hankinson-Ellendale to be effective 3/16/2020.
Filed Date: 2/21/20.
Accession Number: 20200221–5093.
Comments Due: 5 p.m. ET 3/13/20.
Docket Numbers: ER20–902–000.
Applicants: sPower Energy Marketing.
Description: Supplement to January 31, 2020 sPower Energy Marketing tariff filing.
Filed Date: 2/20/20.
Accession Number: 20200220–5148.
Comments Due: 5 p.m. ET 3/12/20.
Docket Numbers: ER20–1046–000.
Applicants: GridLiance High Plains LLC.
Description: Compliance filing: GridLiance High Plains LLC Compliance Filing to be effective N/A.
Filed Date: 2/20/20.
Accession Number: 20200220–5131.
Comments Due: 5 p.m. ET 3/12/20.
Docket Numbers: ER20–1047–000.
Applicants: GridLiance High Plains LLC.
Description: Compliance filing: GHP Revised Wholesale Distribution Formula Rate Template to be effective 1/1/2020.
Filed Date: 2/20/20.
Accession Number: 20200220–5132.
Comments Due: 5 p.m. ET 3/12/20.
Docket Numbers: ER20–1048–000.
Applicants: GridLiance High Plains LLC.
Description: Compliance filing: GHP Revisions to OATT Formula Rate Template to be effective 3/31/2018.
Filed Date: 2/20/20.
Accession Number: 20200220–5133.
Comments Due: 5 p.m. ET 3/12/20.
Docket Numbers: ER20–1049–000.
Applicants: New York Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 205 re: enhancements to the ICAP demand curve annual update procedures to be effective 4/22/20.20.
Filed Date: 2/21/20.
Accession Number: 20200221–5012.
Comments Due: 5 p.m. ET 3/13/20.
Docket Numbers: ER20–1050–000.
Applicants: Midcontinent Independent System Operator, Inc, GridLiance Heartland LLC.
Description: Compliance filing: 2020–02–21_GridLiance Attachment O Revisions to Comply with Docket No. EC20–13 to be effective 12/31/9998.
Filed Date: 2/21/20.
Accession Number: 20200221–5014.
Comments Due: 5 p.m. ET 3/13/20.
Docket Numbers: ER20–1051–000.
Applicants: American Transmission Systems, Incorporated, PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: ATSI submits ECSA SA Nos. 5569, 5570, and 5571 to be effective 4/21/2020.
Filed Date: 2/21/20.
Accession Number: 20200221–5020.
Comments Due: 5 p.m. ET 3/13/20.
Docket Numbers: ER20–1052–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2020–02–21_SA 3423 ATC–WPSC GIA (J870) to be effective 2/6/2020.
Filed Date: 2/21/20.
Accession Number: 20200221–5047.
Comments Due: 5 p.m. ET 3/13/20.
Docket Numbers: ER20–1053–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2020–02–21_SA 3424 ATC-Badger Hollow Solar Farm GIA (J871) to be effective 2/6/2020.
Filed Date: 2/21/20.
Accession Number: 20200221–5049.
Comments Due: 5 p.m. ET 3/13/20.
Docket Numbers: ER20–1054–000.
Applicants: Wisconsin Public Service Corporation.
Description: Notice of Cancellation of Rate Schedule No. 82 of Wisconsin Public Service Corporation.
Filed Date: 2/20/20.
Accession Number: 20200220–5162.
Comments Due: 5 p.m. ET 3/12/20.
Docket Numbers: ER20–1055–000.
Applicants: Southern California Edison Company.
Description: § 205(d) Rate Filing: Letter Agreement Santa Paula Energy

Storage Project SA No. 1096 to be effective 2/14/2020.

Filed Date: 2/21/20.

Accession Number: 20200221–5072.

Comments Due: 5 p.m. ET 3/13/20.

Docket Numbers: ER20–1056–000.

Applicants: Mid-Atlantic Interstate Transmission, LLC, PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: MAIT submits ECSA SA Nos. 5262, 5444, 5507, 5508, 5509, 5567, and 5568 to be effective 4/21/2020.

Filed Date: 2/21/20.

Accession Number: 20200221–5086.

Comments Due: 5 p.m. ET 3/13/20.

Docket Numbers: ER20–1057–000.

Applicants: Southern California Edison Company.

Description: § 205(d) Rate Filing: Revised Non-Transmission Depreciation Rates in SCE's Formula Transmission Rate to be effective 11/12/2019.

Filed Date: 2/21/20.

Accession Number: 20200221–5091.

Comments Due: 5 p.m. ET 3/13/20.

Docket Numbers: ER20–1058–000.

Applicants: Idaho Power Company.

Description: § 205(d) Rate Filing: Concurrence Agreement Between IPC and NorthWestern Corporation to be effective 2/21/2020.

Filed Date: 2/21/20.

Accession Number: 20200221–5092.

Comments Due: 5 p.m. ET 3/13/20.

Take notice that the Commission received the following qualifying facility filings:

Docket Numbers: QF20–640–000.

Applicants: Energy Center Caguas LLC.

Description: Form 556 of Energy Center Caguas LLC.

Filed Date: 2/20/20.

Accession Number: 20200220–5077.

Comments Due: Non-Applicable.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 21, 2020. .

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–04021 Filed 2–26–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP20–30–000]

Texas Eastern Transmission, LP; Notice of Schedule for Environmental Review of the Middlesex Extension Project

On December 19, 2019, Texas Eastern Transmission, LP (Texas Eastern) filed an application in Docket No. CP20–30–000 with the Federal Energy Regulatory Commission (FERC or Commission) 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 in Middlesex County, New Jersey. The proposed project is known as the Middlesex Extension Project (Project) would provide 264 million cubic feet (264,000 dekatherms) per day of natural gas transportation to interconnects with Transcontinental Gas Pipe Line Company, LLC's (Transco) mainline system and Transco's existing Woodbridge Lateral for the delivery to the 725-Megawatt natural gas-fueled combined-cycle Woodbridge Energy Center in Woodbridge Township, New Jersey.

On January 6, 2020, the Commission 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—May 21, 2020
90-day Federal Authorization Decision Deadline—August 19, 2020

If a schedule change becomes necessary, additional notice will be provided so that the relevant agencies are kept informed of the Project's progress.

Project Description

The Middlesex Extension Project would consist of the following facilities:

- 1.55 Miles of 20-inch-diameter pipeline;
- a new metering and regulating station;
- 0.20 mile of 16-inch-diameter interconnecting piping; and
- related appurtenances and ancillary facilities.

Background

On February 7, 2020, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment for the Proposed Middlesex Extension Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Session* (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.,* CP20–30), 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 20, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–03901 Filed 2–26–20; 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: EC20–36–000.
Applicants: Tropico, LLC, Nicolis, LLC, Gulf Coast Solar Center I, LLC, Gulf Coast Solar Center II, LLC, Gulf Coast Solar Center III, LLC, Avalon Solar Partners, LLC.
Description: Supplement to February 11, 2020 Application for Authorization Under Section 203 of the Federal Power Act (Exhibit B documents in .XLS format) of Tropico, LLC, et al.
Filed Date: 2/20/20.
Accession Number: 20200220–5078.
Comments Due: 5 p.m. ET 3/12/20.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER19–1864–003.
Applicants: Public Service Company of Colorado.
Description: Compliance filing: Errata_OATT-Att N–LGIP–Order 845 Compliance_ER19–1864–Test to be effective N/A.
Filed Date: 2/20/20.
Accession Number: 20200220–5019.
Comments Due: 5 p.m. ET 3/12/20.
Docket Numbers: ER20–270–003.
Applicants: Dynegy Oakland, LLC.
Description: Tariff Amendment: Amended Filing—Request for Commission Action to be effective 1/1/2020.
Filed Date: 2/19/20.
Accession Number: 20200219–5132.
Comments Due: 5 p.m. ET 3/11/20.
Docket Numbers: ER20–519–000; TS20–2–000.
Applicants: Wilderness Line Holdings, LLC.
Description: Supplement to December 4, 2019 Request for Waivers of the Standards of Conduct and Order Nos. 889 and 1000 Requirements of Wilderness Line Holdings, LLC.
Filed Date: 2/19/20.
Accession Number: 20200219–5151.
Comments Due: 5 p.m. ET 3/11/20.
Docket Numbers: ER20–1039–000.
Applicants: GridLiance Heartland LLC.
Description: Compliance filing: GLH Compliance Filing—2/19/2020 to be effective 12/31/9998.
Filed Date: 2/19/20.
Accession Number: 20200219–5130.
Comments Due: 5 p.m. ET 3/11/20.
Docket Numbers: ER20–1040–000.
Applicants: GridLiance West LLC.
Description: Compliance filing: GridLiance West 02/19/2020 Compliance Filing to be effective 2/19/2020.
Filed Date: 2/19/20.
Accession Number: 20200219–5131.
Comments Due: 5 p.m. ET 3/11/20.
Docket Numbers: ER20–1041–000.
Applicants: Wabash Valley Power Association, Inc.
Description: § 205(d) Rate Filing: Agreement for Early Termination of Wholesale Power Supply Contracts to be effective 4/20/2020.
Filed Date: 2/20/20.
Accession Number: 20200220–5001.
Comments Due: 5 p.m. ET 3/12/20.
Docket Numbers: ER20–1042–000.
Applicants: Nevada Gold Energy LLC.
Description: Compliance filing: Baseline Filing to be effective 1/1/2020.
Filed Date: 2/20/20.
Accession Number: 20200220–5026.
Comments Due: 5 p.m. ET 3/12/20.
Docket Numbers: ER20–1043–000.
Applicants: Union Electric Company, TG High Prairie, LLC.
Description: Baseline eTariff Filing: Test Power and Station Service Agreement to be effective 4/21/2020.
Filed Date: 2/20/20.
Accession Number: 20200220–5064.
Comments Due: 5 p.m. ET 3/12/20.
Docket Numbers: ER20–1044–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: First Revised ISA No. 5227; Queue No. AE1–154 to be effective 1/22/2020.
Filed Date: 2/20/20.
Accession Number: 20200220–5066.
Comments Due: 5 p.m. ET 3/12/20.
Docket Numbers: ER20–1045–000.
Applicants: Tri-State Generation and Transmission Association, Inc.
Description: § 205(d) Rate Filing: Unexecuted Service Agreement No. 608 between Tri-State and Leeward to be effective 2/20/2020.
Filed Date: 2/20/20.
Accession Number: 20200220–5096.
Comments Due: 5 p.m. ET 3/12/20.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES20–16–000.
Applicants: Horizon West Transmission, LLC.
Description: Application for Authorization of Issuance of Long-Term Debt Securities Under Section 204 of the Federal Power Act, et al. of Horizon West Transmission, LLC.
Filed Date: 2/19/20.
Accession Number: 20200219–5165.
Comments Due: 5 p.m. ET 3/11/20.

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 20, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–03930 Filed 2–26–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP20–50–000; Docket No. CP20–51–000]

Tennessee Gas Pipeline Company, L.L.C.; Southern Natural Gas Company, L.L.C.; Notice of Application

Take notice that on February 7, 2020, Tennessee Gas Pipeline Company, L.L.C. (Tennessee), 1001 Louisiana Street, Suite 1000, Houston, Texas 77002, filed in the above referenced docket an application pursuant to section 7(c) of the Natural Gas Act, requesting authorization to construct, install, modify, operate, and maintain the Evangeline Pass Expansion Project located in Louisiana. Specifically, Tennessee proposes to: (i) Construct, operate and maintain approximately 9.1 miles of 36-inch-loop pipeline, along Tennessee's existing 24-inch Toca 529D–100 Yscloskey Lateral located in St. Bernard Parish, Louisiana; (ii) construct, operate and maintain approximately 4.0 miles of 36-inch-loop pipeline, along Tennessee's existing 36-inch 500–2 Pipeline in Plaquemines Parish, Louisiana; and (iii) construct, operate and maintain a new 23,470 horsepower compressor station, CS 529, along Tennessee's existing 500 line system at mainline valve 529 in St. Bernard Parish, Louisiana. In addition, and in conjunction with the Project,

Tennessee will replace certain facilities including a like-for-like replacement of two 10,410 hp units at its existing Compressor Station 527 located in Plaquemines Parish, Louisiana. Tennessee also seeks to acquire lease capacity from Southern Natural Gas Company, L.L.C. pursuant to a lease agreement between the parties. Tennessee estimates the cost of the project to be $261 million, all as more fully described in the application which is on file with the Commission and open to public inspection.

Take notice that on February 7, 2020, Southern Natural Gas Company, L.L.C. (SNG), 569 Brookwood Village, Suite 749, Birmingham, Alabama 35209, filed in the above referenced docket an application pursuant to section 7(b) and 7(c) of the Natural Gas Act, requesting authorization to construct, install, own, lease, operate, and maintain the SNG Evangeline Pass Expansion Project located in Mississippi and Louisiana. Specifically, SNG proposes to: (i) Install 22,220 hp of compression at a new compressor station in Clark County Mississippi; (ii) construct three new meter stations in Clark and Smith Counties, Mississippi and in St. Bernard Parish, Louisiana; and (iii) construct and/or modify certain system auxiliary and appurtenant facilities under Section 2.55(a) at existing compressor stations and along the pipeline corridor in Mississippi and Louisiana. SNG estimates the cost of the project to be $171 million. The SNG Evangeline Pass

Expansion Project will add 1,100 mmcf/d of southbound capacity to the existing SNG system, which SNG will lease to Tennessee Gas Pipeline Company, L.L.C., all as more fully described in the application which is on file with the Commission and open to public inspection.

These filings are available for review at the Commission in the Public Reference Room or may be viewed on the Commission's website web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Any questions regarding this application should be directed to Ben Carranza, Director, Regulatory, Tennessee Gas Pipeline Company, L.L.C., 1001 Louisiana Street, Suite 1000, Houston, Texas 77002, by telephone at (713) 420–5535 or by email at *ben_carranza@kindermorgan.com*, or Debbie Kalisek, Senior Regulatory Analyst II, Tennessee Gas Pipeline Company, L.L.C., 1001 Louisiana Street, Suite 1000, Houston, Texas 77002, by telephone at (713) 420–3292 or by email at *debbie_kalisek@kindermorgan.com.*

Any questions regarding this application should be directed to Tim Hardy, Manager, Rate & Regulatory Affairs, Southern Natural Gas Company, L.L.C., 569 Brookwood Village, Suite 749, Birmingham, Alabama 35209, by telephone at (205) 325–3668 or by email at *tina_hardy@kindermorgan.com.*

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 3 copies of filings made in the proceeding with the Commission and must provide a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list and will be notified of any meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission and will not have the right to seek court review of the Commission's final order.

As of the February 27, 2018 date of the Commission's order in Docket No. CP16–4–001, the Commission will apply its revised practice concerning out-of-time motions to intervene in any new Natural Gas Act section 3 or section 7 proceeding.[1] Persons desiring to become a party to a certificate proceeding are to intervene in a timely manner. If seeking to intervene out-of-time, the movant is required to show good cause why the time limitation should be waived, and should provide justification by reference to factors set forth in Rule 214(d)(1) of the Commission's Rules and Regulations.[2]

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the eFiling link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 3 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

Comment Date: 5:00 p.m. Eastern Time on March 13, 2020.

Dated: February 21, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–04023 Filed 2–26–20; 8:45 am]

BILLING CODE 6717–01–P

[1] *Tennessee Gas Pipeline Company, L.L.C.,* 162 FERC 61,167 at 50 (2018).

[2] 18 CFR 385.214(d)(1).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ID–8853–000]

McCormick, Brian A.; Notice of Filing

Take notice that on February 19, 2020, Brian A. McCormick, submitted for filing, an application for authority to hold interlocking positions, pursuant to section 305(b) of the Federal Power Act, 16 U.S.C. 825d(b), Part 45 of the Federal Energy Regulatory Commission's Rules of Practice and Procedure, 18 CFR part 45.8 (2019).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is 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.

Comment Date: 5:00 p.m. Eastern Time on March 11, 2020.

Dated: February 20, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–03900 Filed 2–26–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP20–526–000.
Applicants: Bear Creek Storage Company, L.L.C.
Description: Compliance filing Annual Report on Operational Transactions 2020.
Filed Date: 2/19/20.
Accession Number: 20200219–5016.
Comments Due: 5 p.m. ET 3/2/20.

Docket Numbers: RP20–527–000.
Applicants: Columbia Gas Transmission, LLC.
Description: § 4(d) Rate Filing: THQ Negotiated Rate Filing to be effective 2/19/2020.
Filed Date: 2/19/20.
Accession Number: 20200219–5047.
Comments Due: 5 p.m. ET 3/2/20.

Docket Numbers: RP20–528–000.
Applicants: Empire Pipeline, Inc.
Description: § 4(d) Rate Filing: Fuel Tracker GT&C 23.6 (Empire) to be effective 4/1/2020.
Filed Date: 2/19/20.
Accession Number: 20200219–5051.
Comments Due: 5 p.m. ET 3/2/20.

Docket Numbers: RP20–529–000.
Applicants: Enable Mississippi River Transmission, LLC.
Description: § 4(d) Rate Filing: Negotiated Rate Filing—City of Chester RP18–923 & RP20–131 Settlement to be effective 1/1/2019.
Filed Date: 2/19/20.
Accession Number: 20200219–5058.
Comments Due: 5 p.m. ET 3/2/20.

Docket Numbers: RP20–530–000.
Applicants: National Fuel Gas Supply Corporation.
Description: § 4(d) Rate Filing: Fuel Tracker GT&C 41 (Supply) to be effective 4/1/2020.
Filed Date: 2/19/20.
Accession Number: 20200219–5066.
Comments Due: 5 p.m. ET 3/2/20.

Docket Numbers: RP20–531–000.
Applicants: Northwest Pipeline LLC.
Description: § 4(d) Rate Filing: Renewable Natural Gas Filing to be effective 4/1/2020.
Filed Date: 2/19/20.
Accession Number: 20200219–5106.
Comments Due: 5 p.m. ET 3/2/20.

Docket Numbers: RP20–532–000.
Applicants: Southern Star Central Gas Pipeline, Inc.
Description: § 4(d) Rate Filing: Fuel Filing—Eff. April 1, 2020 to be effective 4/1/2020.
Filed Date: 2/19/20.
Accession Number: 20200219–5124.
Comments Due: 5 p.m. ET 3/2/20.

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 date(s). Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 20, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–03925 Filed 2–26–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM20–8–000]

Virtualization and Cloud Computing Services

AGENCY: Federal Energy Regulatory Commission, Department of Energy.

ACTION: Notice of inquiry.

SUMMARY: The Federal Energy Regulatory Commission (Commission) seeks comments regarding the potential benefits and risks associated with the use of virtualization and cloud computing services in association with bulk electric system operations, as well as whether barriers exist in the Commission-approved Critical Infrastructure Protection Reliability Standards that impede the voluntary adoption of virtualization or cloud computing services.

DATES: Initial Comments are due April 27, 2020, and Reply Comments are due May 27, 2020.

ADDRESSES: Comments, identified by docket number, may be filed in the following ways:

- Electronic Filing through *http://www.ferc.gov.* Documents created electronically using word processing software should be filed in native

applications or print-to-PDF format and not in a scanned format.

- *Mail/Hand Delivery:* Those unable to file electronically may mail or hand-deliver comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.
- *Instructions:* For detailed instructions on submitting comments, see the Comment Procedures Section of this document.

FOR FURTHER INFORMATION CONTACT:

Patricia Ephraim Eke, (Technical Information), Office of Electric Reliability, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–8388, *Patricia.Eke@ferc.gov*

Kevin Ryan, (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–6840, *Kevin.Ryan@ferc.gov.*

SUPPLEMENTARY INFORMATION: 1. In this Notice of Inquiry (NOI), the Commission seeks comments on the potential benefits and risks associated with the use of virtualization and cloud computing services in association with bulk electric system operations. In addition, the Commission seeks comment on whether barriers exist in the Critical Infrastructure Protection (CIP) Reliability Standards, which are developed by the North American Electric Reliability Corporation (NERC) and approved by the Commission, that impede the voluntary adoption of virtualization or cloud computing services.

2. This NOI is an outgrowth of discussions concerning the potential benefits and risks associated with the adoption of virtualization and cloud computing services for bulk electric system operations at the Commission's June 27, 2019 Reliability Technical Conference and the March 28, 2019 Commission/Department of Energy (DOE) Security Investments for Energy Infrastructure Technical Conference.[1]

3. The Commission intends to use the record developed in this proceeding to determine whether it would be appropriate, pursuant to section 215(d)(5) of the Federal Power Act, to direct that NERC develop modifications to the CIP Reliability Standards to facilitate the voluntary adoption of virtualization and cloud computing services by registered entities.[2]

Background

A. Virtualization

4. Virtualization is the process of creating virtual, as opposed to physical, versions of computer hardware to minimize the amount of physical computer hardware resources required to perform various functions.[3] Virtualization is commonly used in business applications and is managed through centralized software, referred to as a hypervisor, that manages multiple virtual computer resources that can be used by different processes, customers, clients, and users. A virtual environment can be a single program and the operating system on which it executes; a combination of multiple programs and associated operating systems, networks, computing environments, storage devices, or other such digital environments.

5. Virtualization can be used on a stand-alone basis in a bulk electric system control center environment to reduce capital and operating costs, increase the efficiency of existing computing assets, and improve incident recovery, among other reasons. Virtualization offers the potential for cost savings in asset management, including minimizing the need for physical assets, which require building space and procuring and maintaining physical computer hardware. A virtualized system can also be more quickly recovered than physical systems in the event of a malfunction or compromise.

6. Virtualization is a necessary technical enabler if the functions of BES Cyber Systems are to be moved to a cloud computing environment since a customer choosing to migrate one or more on-premise systems to the cloud will need to virtualize those systems for use in the cloud.[4]

B. Cloud Computing

7. The National Institute of Standards and Technology (NIST) Information Technology Laboratory Computer Security Resource Center defines cloud computing as a ''model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (*e.g.,* networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction.'' [5]

8. The primary cloud service models include Infrastructure as a Service (IaaS), Platform as a Service (PaaS), and Software as a Service (SaaS). These three cloud service models provide different levels of flexibility and control to organizations choosing to use cloud computing services. Entities may use cloud computing services for the simple storage of data or, as discussed above, to host and operate virtual systems used for bulk electric system operations. As a general matter, cloud computing enables entities to focus resources on providing core services, such as transmission or generation of electric energy, while outsourcing the IT infrastructure required to support them.

9. Leveraging cloud computing services in technology and business processes provides entities the opportunity to realize benefits in their IT operations, including greater scalability, greater flexibility and lower capital investment. Cloud computing services provide computing power and storage at a lower cost than maintaining in-house IT infrastructure while providing the capability for almost instantaneous expansion of services. Other potential benefits from the adoption of cloud computing services include enhanced access to data and applications due to the inherent redundancy and multiple pathways used to access cloud computing services.

C. Commission Technical Conferences

10. On June 27, 2019, the Commission held its annual Reliability Technical Conference to discuss four fundamental topics, including the impact of cloud-based services and virtualization on bulk electric system operations, planning and security.[6] The technical conference addressed, among other things: (1) Evolution of cloud computing and virtualization of cloud computing and virtualization technologies; (2) outsourcing risk; (3) Reliability Standards modifications; (4) appropriate systems for a cloud environment; and

[1] The records of the June 27, 2019 Reliability Technical Conference and March 28, 2019 Commission/DOE conference are available on the Commission's eLibrary document retrieval system in Docket Nos. AD19–13–000 and AD19–12–000, respectively.

[2] 16 U.S.C. 824o(d)(5).

[3] *See* National Institute of Standards and Technology, *Guide to Security for Full Virtualization Technologies,* Special Publication 800–125 (Jan. 2011), *https://nvlpubs.nist.gov/nistpubs/Legacy/SP/nistspecialpublication800-125.pdf.*

[4] BES Cyber System is defined as ''[o]ne or more BES Cyber Assets logically grouped by a responsible entity to perform one or more reliability tasks for a functional entity.'' Glossary of Terms Used in NERC Reliability Standards, *http://www.nerc.com/files/glossary_of_terms.pdf.* The acronym BES refers to the bulk electric system.

[5] NIST, *The NIST Definition of Cloud Computing,* Special Publication 800–145 (Sept. 2011), *https://nvlpubs.nist.gov/nistpubs/Legacy/SP/nistspecialpublication800-145.pdf.*

[6] FERC, Notice Inviting Post-Technical Conference Comments, Docket No. AD19–13–000 (Jul. 23, 2019).

(5) security and non-security related benefits.

11. In general, panelists at the Reliability Technical Conference acknowledged the emergence of virtualization and cloud computing services and indicated that the Commission should take some action to address the use of these technologies for bulk electric system data management. Midcontinent Independent System Operator (MISO) recommended that the Commission further engage industry and cloud service providers in one or more technical conferences to clarify issues and direct timely industry action to establish a way forward with changes to CIP Reliability Standards specifically to accommodate the use of cloud computing services.[7] MISO explained that the benefits of virtualization include enhanced system recovery. In particular, MISO noted that during the past year it was able to recover virtual assets quicker than traditional computing assets when testing backup and recovery processes. American Public Power Association and Large Public Power Council, moreover, stated that if done with care, cloud computing solutions can reduce risk, increase flexibility and improve the security posture of the bulk electric system.[8]

12. During the Commission/DOE Security Investments for Energy Infrastructure Technical Conference on March 28, 2019, Southwest Power Pool (SPP) urged more flexibility regarding the use of cloud computing. SPP stated that it evaluated a number of products that would enable it to do a better job of protecting system data. SPP asserted the view that the currently-effective CIP Reliability Standards do not allow cloud-based technologies despite the fact that the vast majority of new products from many of its vendors are cloud-based. As an example, SPP stated that it:

> believes that it cannot deploy the required CIP controls for certain system information were it to be stored on externally-hosted servers (*i.e.,* ''the cloud''). Yet, we are finding that more and more vendors have flagship products that require all or a portion of CIP system information to be stored off-premises. This was a driving factor in our recent replacement of our service management software and has also been a complicating factor in the evaluation of vulnerability scanning and vulnerability management solutions. Hence, SPP has given weight to solutions that are more expensive or do not provide as much value as some cloud alternatives. The standards should not be so prescriptive as to force SPP to avoid industry trends that have proven to be secure, but not necessarily compliant.[9]

13. The concerns reflected in the comments from the two recent technical conferences have prompted the issuance of this NOI to seek additional comments on the benefits and risks associated with the use of virtualization and cloud computing services in association with bulk electric system operations. Further, to the extent that there are barriers in the currently-effective CIP Reliability Standards to their use, the Commission seeks comment on whether it is appropriate for the Commission to direct action to facilitate the voluntary adoption of virtualization and cloud computing services.

II. Request for Comments

14. In this proceeding, the Commission seeks comments on the potential benefits and risks associated with the use of virtualization and cloud computing services, as well as whether barriers may exist in the CIP Reliability Standards that impede the adoption of virtualization or cloud computing. Specifically, the Commission seeks comments on four general topics as part of this inquiry: (A) Scope of potential use of virtualization and cloud computing services; (B) potential benefits and risks associated with virtualization and cloud computing services; (C) potential impediments to adopting virtualization and cloud computing services; and (D) potential use of new and emerging technologies in the current CIP standards framework.

15. In the following sections, we pose questions that commenters should address in their submissions. However, commenters need not address every topic or answer every question identified below.

A. Scope of Potential Use of Virtualization and Cloud Computing Services

16. As discussed above, virtualization and cloud computing services offer a wide variety of potential uses in the context of users, owners and operators of the bulk electric system. Some entities may choose to utilize the cloud simply for data storage. Other entities may rely on virtualization and cloud storage to operate systems that control one or more core functions. Potential uses may include one or more of the BES reliability operating services described in the Guidelines and Technical Basis section of Reliability Standard CIP–002–5.1a (Cyber Security—BES Cyber System Categorization).[10] Specifically, it is possible that either virtualization or cloud computing services could be leveraged for the following reliability operating services:

- Dynamic Response to BES conditions
- Balancing Load and Generation
- Controlling Frequency (Real Power)
- Controlling Voltage (Reactive Power)
- Managing Constraints
- Monitoring & Control
- Restoration of BES
- Situational Awareness
- Inter-Entity Real-Time Coordination and Communication

17. Using BES reliability operating services as a point of reference to distinguish among possible applications of virtualization and cloud computing services in bulk electric system operations:

A1. Identify and discuss which BES reliability operating services referenced above could be implemented in a virtualized environment.

A2. Identify and discuss which BES reliability operating services referenced above could be implemented in a cloud computing environment.

A3. Identify and discuss any other BES reliability operating or support services that could be implemented in a virtualized environment.

A4. Identify and discuss any other BES reliability operating, data storage or support services that could be implemented in a cloud computing environment.

B. Potential Benefits and Risks Associated With Virtualization and Cloud Computing Services

18. The Commission seeks comment on the potential benefits and risks associated with virtualization and cloud computing services:

B1. What are the potential benefits associated with adopting virtualization for the BES reliability operating services identified in response to Questions A1 and A3?

B2. Are there risks associated with adopting virtualization for the BES reliability operating services identified in response to Questions A1 and A3? If risks exist, discuss whether these risks can be effectively mitigated by a responsibility entity.

B3. What are the potential benefits associated with adopting cloud computing services for the BES reliability operating services, data storage and support services identified in response to Questions A2 and A4?

B4. Are there risks associated with adopting cloud computing services for the BES reliability operating services data storage

[7] *See* Reliability Technical Conference, Docket No. AD19–13–000, Tr. 118:6–12 (Rosenthal).

[8] Tr. 114:12–14 (Jacobs).

[9] *See* Nick Brown, Prepared Statement for Commission/DOE Security Investments for Energy Infrastructure Technical Conference, Docket No. AD19–12–000, at 3 (filed Apr. 2, 2019).

[10] *See* Reliability Standard CIP–002–5.1a (Cyber Security—BES Cyber System Categorization), Guidelines and Technical Basis at 17–18.

and support services identified in response to Questions A2 and A4? If risks exist, discuss whether these risks can be effectively mitigated by a responsible entity.

B5. What are the potential benefits of relying on third-party assessments to ensure the secure use of virtualization and cloud computing services for BES reliability operations and support services?

B6. Discuss any risks associated with relying on third party assessments to ensure the secure use of virtualization and cloud computing services for BES reliability operations and support services and potential solutions to mitigate those risks.

C. Potential Impediments to Adopting Virtualization and Cloud Computing Services

19. As discussed above, during the Commission's 2019 annual Reliability Technical Conference, several commenters alluded to the fact that cloud-based offerings continue to increase as vendors are moving more of their services to the cloud.[11] Commenters further asserted that there is uncertainty on how virtualization and cloud computing services can be leveraged within the existing CIP framework. Similarly, at the March 2019 Commission/DOE Security Investments for Energy Infrastructure Technical Conference, a panelist asserted that there is uncertainty among registered entities on whether the CIP Reliability Standards allow cloud-based technologies ''despite the fact that the majority of new products from many vendors are cloud-based.'' [12]

20. In light of the concerns expressed at these technical conferences, the Commission seeks comment on potential challenges with how the implementation of virtualization and cloud computing technologies will fit into the framework of the CIP Reliability Standards, and possible solutions to those challenges:

C1. Provide comment on the validity of the panelists' concern discussed above and discuss the extent to which the trend toward cloud-based services could affect reliable and secure bulk electric system operations.

C2. Are there any technical challenges in implementing virtualization technology for the BES reliability operating services identified in response to Question A1 that result from the current CIP Reliability Standards? Discuss how the CIP Reliability Standards could be augmented to address these challenges.

C3. Are there any challenges in implementing virtualization technology for the BES reliability operating services identified in response to Question A1 that result from compliance obligations associated with the CIP Reliability Standards? Discuss how the CIP Reliability Standards could be augmented to address these challenges.

C4. Are there any technical challenges in implementing cloud computing technology for the BES reliability operating services identified in response to Question A2 that result from the current CIP Reliability Standards? Discuss how the CIP Reliability Standards could be augmented to address these challenges.

C5. Are there any challenges in implementing cloud computing technology for the BES reliability operating services identified in response to Question A2 that result from compliance obligations associated with the CIP Reliability Standards? Discuss how the CIP Reliability Standards could be augmented to address these challenges.

D. Potential Use of New and Emerging Technologies in the Current CIP Standards Framework

21. The Commission seeks comment on potential new and emerging technologies beyond virtualization and cloud computing that responsible entities may be interested in adopting for the BES reliability operating services and if the CIP Reliability Standards would allow these technologies to be adopted.

D1. In addition to virtualization and clouding computing, discuss whether the CIP Reliability Standards limit the ability to take full advantage of new and emerging technologies for BES reliability operating services. Explain the types of new technologies, the potential benefits and how the CIP Reliability Standards may limit their use.

III. Comment Procedures

22. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due April 27, 2020, and Reply Comments are due May 27, 2020. Comments must refer to Docket No. RM20–8–000, and must include the commenter's name, the organization they represent, if applicable, and their address.

23. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's website at *http://www.ferc.gov.* The Commission accepts most standard word-processing formats. Documents created electronically using word-processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

24. Commenters that are not able to file comments electronically must send an original of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.

25. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

IV. Document Availability

26. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. eastern time) at 888 First Street NE, Room 2A, Washington, DC 20426.

27. From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

28. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at (202) 502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

By direction of the Commission.

Issued: February 20, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–03928 Filed 2–26–20; 8:45 am]

BILLING CODE 6717–01–P

[11] *See* June 27, 2019 annual Reliability Technical Conference, Transcript pages 113 and 115–116.

[12] *See* March 28, 2019, Commission/DOE Security Investments for Energy Infrastructure Technical Conference, Transcript page 128.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 3273–024]

Chittenden Falls Hydropower, Inc.; Notice of Application Ready for Environmental Analysis and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Subsequent Minor License.

b. *Project No.:* 3273–024.

c. *Date filed:* May 31, 2019.

d. *Applicant:* Chittenden Falls Hydropower, Inc. (Chittenden Falls Hydro).

e. *Name of Project:* Chittenden Falls Hydropower Project.

f. *Location:* On Kinderhook Creek, near the Town of Stockport, Columbia County, New York. The project does not occupy federal land.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791 (a)–825(r).

h. *Applicant Contact:* Mark Boumansour, Chief Operating Officer, Gravity Renewables, Inc., 1401 Walnut Street, Suite 420, Boulder, CO 80302; (303) 440–3378; *mark@gravityrenewables.com* and/or Celeste N. Fay, Regulatory Manager, Gravity Renewables, Inc., 5 Dartmouth Drive, Suite 104, Auburn, NH 03032; (413) 262–9466; *celeste@gravityrenewables.com.*

i. *FERC Contact:* Monir Chowdhury at (202) 502–6736 or *monir.chowdhury@ferc.gov.*

j. *Deadline for filing comments, recommendations, terms and conditions, and prescriptions:* 60 days from the issuance date of this notice; reply comments are due 105 days from the issuance date of this notice.

The Commission strongly encourages electronic filing. Please file comments, recommendations, terms and conditions, and prescriptions using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. The first page of any filing should include docket number P–3273–024.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted and is ready for environmental analysis at this time.

l. *The Chittenden Falls Hydropower Project consists of:* (1) An approximately 4-foot-high, 320-foot-long concrete gravity dam, topped with 2-foot-high wooden flashboards, and having a dam crest elevation of 59.6 feet National Geodetic Vertical Datum of 1929 (NGVD29); (2) a reservoir with a surface area of about 18 acres and a storage capacity of 63 acre-feet at a normal pool elevation of 61.6 feet NGVD29; (3) an 8-foot-wide, 22-foot-long intake structure on the east side of the dam connecting to an 8-foot-wide, 118-foot-long concrete and wooden power canal; (4) a 7.5-foot-diameter, 45-foot-long steel penstock that conveys water from the power canal to a powerhouse on the east side of the dam containing two turbine-generator units with a total rated capacity of 453 kilowatts (kW); (5) an 8-foot-wide, 10-foot-long intake structure on the west side of the dam connecting to a 6-foot-diameter, 62-foot-long steel penstock; (6) a powerhouse on the west side of the dam containing a single turbine-generator unit with a rated capacity of 300 kW; (7) two 480-volt, 40-foot-long generator leads connecting the east powerhouse to a transformer yard and a 2,300-volt, 400-foot-long generator lead connecting the west powerhouse to the transformer yard; and (8) appurtenant facilities.

The Chittenden Falls Project is operated in a run-of-river mode with an estimated average annual generation of 2,300 megawatt-hours between 2012 and 2018. Chittenden Falls Hydro proposes to continue to operate the project in run-of-river mode.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's website at *http://www.ferc.gov* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

All filings must (1) bear in all capital letters the title COMMENTS, REPLY COMMENTS, RECOMMENDATIONS, TERMS AND CONDITIONS, or PRESCRIPTIONS; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions, or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Each filing must be accompanied by proof of service on all persons listed on the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34 (b) and 385.2010.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. *A license applicant must file no later than 60 days following the date of issuance of this notice:* (1) A copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification.

o. *Procedural schedule:* The application will be processed according to the following schedule. Revisions to the schedule will be made as appropriate.

Milestone	Target date
Deadline for Filing Comments, Recommendations and Agency Terms and Conditions/Prescriptions.	April 2020.
Deadline for Filing Reply Comments.	June 2020.
Commission issues EA	October 2020.
Comments on EA Due	November 2020.

Dated: February 21, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–04032 Filed 2–26–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER20–840–000]

Golden Fields Solar IV, LLC; Supplemental Notice That Section 205 Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced Golden Fields Solar IV, 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 February 27, 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 20, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–03923 Filed 2–26–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Records Governing Off-the-Record Communications; Public Notice

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding, to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. The communications listed are grouped by docket numbers in ascending order. These filings are available for electronic review at the Commission in the Public Reference Room or may be viewed on the Commission's website at *http://www.ferc.gov* using the eLibrary link. Enter the docket number, excluding the last three digits, in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Docket No.	File date	Presenter or requester
Prohibited		
NONE		
Exempt		
NONE		

Dated: February 21, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–04026 Filed 2–26–20; 8:45 am]

BILLING CODE 6717–01–P

FEDERAL ACCOUNTING STANDARDS ADVISORY BOARD

Notice of Issuance of Technical Bulletin 2020–1, Loss Allowance for Intragovernmental Receivables

AGENCY: Federal Accounting Standards Advisory Board.

ACTION: Notice.

Pursuant to 31 U.S.C. 3511(d), the Federal Advisory Committee Act, as amended (5 U.S.C. App.), and the FASAB Rules Of Procedure, as amended in October 2010, notice is hereby given that the Federal Accounting Standards Advisory Board (FASAB) has issued Technical Bulletin 2020–1, *Loss Allowance for Intragovernmental Receivables.*

The Technical Bulletin is available on the FASAB website at *https://fasab.gov/accounting-standards/.* Copies can be obtained by contacting FASAB at (202) 512–7350.

FOR FURTHER INFORMATION CONTACT: Ms. Monica R. Valentine, Executive Director, 441 G Street NW, Suite 1155, Washington, DC 20548, or call (202) 512–7350.

(Authority: Federal Advisory Committee Act (5 U.S.C. App.))

Dated: February 20, 2020.

Monica R. Valentine,

Executive Director.

[FR Doc. 2020–03912 Filed 2–26–20; 8:45 am]

BILLING CODE 1610–02–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than March 27, 2020.

A. Federal Reserve Bank of New York (Ivan Hurwitz, Senior Vice President) 33 Liberty Street, New York, New York 10045–0001. Comments can also be sent electronically to *Comments.applications@ny.frb.org:*

1. *SBD Bancorp, Inc., Danbury, Connecticut;* to become a bank holding company by acquiring The Savings Bank of Danbury, Danbury, Connecticut.

Board of Governors of the Federal Reserve System, February 21, 2020.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2020–03909 Filed 2–26–20; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue, NW, Washington DC 20551–0001, not later than March 29, 2020.

A. Federal Reserve Bank of Cleveland (Mary S. Johnson, Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101–2566. Comments can also be sent electronically to *Comments.applications@clev.frb.org:*

1. *Bancorp of Baltic, Inc., Baltic, Ohio;* to become a bank holding company by acquiring The Baltic State Bank, Baltic, Ohio.

Board of Governors of the Federal Reserve System, February 24, 2020.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2020–03957 Filed 2–26–20; 8:45 am]

BILLING CODE P

GENERAL SERVICES ADMINISTRATION

[Notice–MA–2020–01; Docket No. 2020–0002; Sequence No. 5]

Relocation Allowances: Withholding Tax Allowance (WTA) and Relocation Income Tax Allowance (RITA) Eligibility

AGENCY: Office of Government-wide Policy (OGP), General Services Administration (GSA).

ACTION: Notice.

SUMMARY: The purpose of this notice is to inform Federal agencies that Federal Travel Regulation (FTR) Bulletin 20–04, pertaining to changes to eligibility for WTA and RITA impacted by recent changes to Federal law, has been published and is now available online at *www.gsa.gov/ftrbulletins.*

DATES: *Applicability date:* This notice applies to all individuals who are authorized reimbursement for relocation expenses under the FTR and who receive some or all reimbursements, direct payments, or indirect payments on or after January 1, 2018, and on or before December 31, 2025.

FOR FURTHER INFORMATION CONTACT: For clarification of content, please contact Mr. Rick Miller, Program Analyst, Office of Government-wide Policy, Office of Asset and Transportation Management, at 202–501–3822, or by email at *travelpolicy@gsa.gov.* Please cite Notice of FTR Bulletin 20–04.

Jessica Salmoiraghi,

Associate Administrator, Office of Government-wide Policy.

[FR Doc. 2020–03942 Filed 2–26–20; 8:45 am]

BILLING CODE 6820–14–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2019–D–5664]

Standardized Medicated Feed Assay Limits; Draft Guidance for Industry; 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 draft guidance for industry (GFI) #264 entitled ''Standardized Medicated Feed Assay Limits.'' This draft guidance recommends a standardized set of assay limits for medicated feeds. Standardized

medicated feed assay limits allow predictability in the review process as sponsors can determine early in the drug development process what assay limits they should expect to meet for medicated feeds used in Target Animal Safety, Effectiveness, Chemistry, Manufacturing, and Controls, Bioequivalence, and Human Food Safety residue chemistry studies.

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–2019–D–5664 for ''Standardized Medicated Feed Assay Limits.'' 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)).

Submit written requests for single copies of the guidance to the Policy and Regulations Staff (HFV–6), Center for Veterinary Medicine, Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Katie Ciesienski, Center for Veterinary Medicine (HFV–141), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–402–0676, *Katie.Ciesienski@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft GFI #264 entitled ''Standardized Medicated Feed Assay Limits.'' This draft guidance recommends a standardized set of assay limits for medicated feeds. Standardized medicated feed assay limits allow predictability in the review process as the sponsor can determine early in the drug development process what assay limits they should expect to meet for medicated feeds used in Target Animal Safety, Effectiveness, Chemistry, Manufacturing, and Controls, Bioequivalence, and Human Food Safety residue chemistry studies. Assay limits are used pre-approval to ensure that medicated feeds in these studies contain the appropriate amount of drug, and post-approval for compliance and customer service purposes.

II. Significance of Guidance

This Level 1 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 ''Standardized Assay Limits for Medicated Feeds.'' 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. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. 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 section 512(n)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(n)(1)) have been approved under OMB control number 0910–0669. The collections of information in 21 CFR part 514 have been approved under OMB control number 0910–0032.

IV. Electronic Access

Persons with access to the internet may obtain the draft guidance at either *https://www.fda.gov/AnimalVeterinary/*

GuidanceComplianceEnforcement/GuidanceforIndustry/default.htm or *https://www.regulations.gov.*

Dated: February 21, 2020.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2020–03943 Filed 2–26–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–0625]

Improving 510(k) Submission Preparation and Review: Voluntary Electronic Submission Template and Resource Pilot Program; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; request for comments.

SUMMARY: The Food and Drug Administration's (FDA or Agency) Center for Devices and Radiological Health (CDRH or Center) is announcing its voluntary Electronic Submission Template and Resource (eSTAR) Pilot Program. The eSTAR Pilot Program is voluntary and intends to improve consistency and efficiency in both industry's preparation and FDA's review of premarket notification (510(k)) submissions. During the voluntary eSTAR Pilot Program, pilot participants will have the opportunity to provide input to FDA on eSTAR.

DATES: FDA is seeking participation in the voluntary eSTAR Pilot Program beginning February 27, 2020. See section I.A. for instructions on how to submit a request to participate. The voluntary eSTAR Pilot Program will select up to nine participants who best match the selection criteria. This pilot program will begin February 27, 2020.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2020–N–0625 for ''Voluntary eSTAR Pilot Program.'' 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.

FOR FURTHER INFORMATION CONTACT: Jacqueline Gertz, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1655, Silver Spring, MD 20993, 240–402–9677, email: *jacqueline.gertz@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In the Medical Device User Fee Amendments of 2012 (MDUFA III) Commitment Letter from the Secretary of Health and Human Services to Congress, FDA committed to streamlining review processes by moving beyond paper-based review (Ref. 1). Under section 745A(b) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 379k–1), added by section 1136 of the Food and Drug Administration Safety and Innovation Act (Pub. L. 112–144), an electronic copy (eCopy) is required for certain premarket submission types, including 510(k) submissions. FDA provided additional information about the submissions subject to the eCopy requirements in section 745A(b) of the FD&C Act and recommendations about the use of eCopy generally in a guidance initially issued in 2013 (Ref. 2), and subsequently published a final rule in the **Federal Register** of December 16, 2019 (84 FR 68334) amending FDA's regulations, where appropriate, to reflect the requirement of a single submission in electronic format, including the use of eCopy requirements.

In the Medical Device User Fee Amendments of 2017 (MDUFA IV) Commitment Letter from the Secretary of Health and Human Services to Congress (Ref. 3), FDA committed to developing ''electronic submission templates that will serve as guided

submission preparation tools for industry to improve submission consistency and enhance efficiency in the review process.'' In addition, section 745A(b) of the FD&C Act, as amended by section 207 of the FDA Reauthorization Act of 2017 (Pub. L. 115–52), also requires that presubmissions and submissions for devices, including 510(k) submissions, be submitted in such electronic format as specified in guidance by FDA.

eCopies are an electronic version of a medical device submission created and submitted on a CD, DVD, or flash drive. eSubmissions are submission packages produced by an electronic submission template (*e.g.,* eSubmitter, eSTAR) that contains all the structured and unstructured data of a complete submission. FDA considers both eCopies and eSubmissions to be submissions in electronic format.

As a first step in the transition to submissions solely in electronic format, FDA used the eSubmitter platform to develop an electronic submission template for 510(k) submissions. It is a free tool, and its use is optional. The eSubmitter application includes an electronic submission template that is a collection of questions, text, logic, and prompts that guides a user through preparation of a 510(k) submission. Upon completion, the resulting submission package contains all the structured and unstructured data of a complete 510(k) submission. This platform and submission process is currently being piloted through the ''Quality in 510(k) Review Program Pilot'' (Ref. 4) for the submission of traditional and abbreviated 510(k)s for devices that are reviewed by CDRH and fall under selected product codes.

Based on the experience with the eSubmitter platform, FDA has developed eSTAR, which includes similar benefits as eSubmitter, as well as additional benefits. Similar to eSubmitter, eSTAR includes the following benefits: Automation (*e.g.,* form construction, autofilling); content and structure that is complementary to CDRH internal review templates; integration of multiple resources (*e.g.,* guidances, databases); guided construction for each submission section; automatic verification (*i.e.,* FDA does not intend to conduct a Refuse to Accept (RTA) review (Ref. 5); and it is free to use. In comparison to eSubmitter, eSTAR contains the following additional benefits:

- More intuitive interface
- no special software installation (if the user has Adobe Acrobat or similar software already installed)
- support for images and dynamic pop-up messages
- mobile device and Apple iOS support
- ability to comment when converted to a static PDF
- ability to share (*e.g.,* email) an eSTAR file that is in the process of being constructed
- no necessary packaging process

FDA is announcing and soliciting participation from 510(k) submitters for the voluntary eSTAR Pilot Program. Data collected through the pilot program will help inform FDA on how to improve eSTAR.

A. Voluntary eSTAR Pilot Program Participation

FDA seeks participation in the voluntary eSTAR Pilot Program beginning February 27, 2020. The voluntary eSTAR Pilot Program will select up to nine participants who provide a holistic representation of the medical device industry and meet the selection criteria.

Companies that may be eligible to participate in this voluntary eSTAR Pilot Program are limited to those firms following the procedures set out in section I.B and that also meet all the selection qualities that follow:

1. Intent to submit a traditional, special, or abbreviated 510(k) for a medical device (not a combination product) using eSTAR within 3 months of acceptance to the voluntary eSTAR Pilot Program;

2. willing to provide feedback on eSTAR as outlined in section I.C. of this document; and

3. intent to submit at least one 510(k) for a device that contacts body tissue and includes software.

At its discretion, FDA may withdraw a manufacturer from the voluntary eSTAR Pilot Program for not carrying out any of the commitments mentioned previously.

B. Procedure

To be considered for the voluntary eSTAR Pilot Program, a company should submit a statement of interest for participation to *esubpilot@fda.hhs.gov.* The statement of interest should include agreement to the selection qualities listed in section I.A. of this document, as well as a description of the device in enough detail to allow verification that it is not a combination product, and that it is a software enabled tissue contacting device.

The following captures the proposed process for the voluntary eSTAR Pilot Program:

1. FDA will collect statements of interest for participation in the pilot program beginning February 27, 2020.

The statement of interest should include:

- Agreement to the selection qualities listed in section I.A of this document
- the size of the company by specifying the number of personnel and the amount of revenue per year
- the device(s) that is/are likely to be submitted during the pilot program using eSTAR

2. FDA will select no more than nine participants, who best meet the selection criteria and who reflect the broad spectrum of device manufacturers, including companies that develop a range of products. Enrollment in the pilot program will be ongoing throughout the duration of the program. FDA will apply lessons learned from the initial participants in the pilot program to refine the eSTAR tool with participants.

3. FDA intends to notify the manufacturer via email if the manufacturer is enrolled as a participant in the voluntary eSTAR Pilot Program.

4. The enrolled manufacturer should download eSTAR from the following website: *https://www.fda.gov/medical-devices/premarket-notification-510k/510k-program-pilots. Note:* eSTAR should not be submitted to FDA unless the sponsor is a pilot participant.

5. Directions for preparing and submitting an eSTAR to FDA are in the final section of the eSTAR pdf. We recommend that you use Adobe Acrobat with eSTAR.

6. If eligible and enrolled as a participant, the manufacturer should submit a 510(k) submission prepared and verified using eSTAR within the timeframe identified in the selection criteria in section I.A. of this document.

7. Once the eSTAR-prepared 510(k) is received by FDA, FDA does not intend to conduct the RTA process. The remainder of the procedure will be conducted according to the FDA guidance ''The 510(k) Program: Evaluating Substantial Equivalence in Premarket Notifications'' (Ref. 6) and the procedures identified in 21 CFR part 807, subpart E. However, if the contents of any attachment or text field are irrelevant to the purpose of the attachment or text field (*e.g.,* the Device Description attachment does not contain any descriptive information about the device) we may put your submission on hold, and request this particular information only, before beginning a comprehensive review.

8. Following completion of the review of 510(k)s in the voluntary eSTAR Pilot Program, participating manufacturers will have the opportunity to provide individual feedback on the voluntary

eSTAR Pilot Program through the procedures outlined on the voluntary eSTAR Pilot Program website. Non-pilot participants are welcome to submit feedback to the Docket (see **ADDRESSES**).

During the voluntary eSTAR Pilot Program, CDRH staff intends to be available to answer questions or concerns that may arise.

C. Targeted Questions

FDA requests responses to the following questions about eSTAR from pilot program participants and stakeholders outside the pilot who want to submit comments to the docket.

(1) Is eSTAR able to integrate into your organization's business process?

(2) Are you able to open eSTAR, and are you able to add values to the structured data fields, as well as add attachments? Once entered and added, are the data retained after closing and reopening eSTAR?

(3) If you use Assistive Technology, are you able to navigate through and complete eSTAR?

(4) If eSTAR is not intuitive to use, why?

(5) Is the organization and content in eSTAR as expected, or do you have suggestions for improvement?

(6) Is eSTAR able to accommodate PDF attachments that are of the size you typically would provide in a submission?

(7) If all the required questions (indicated by red or green indicators) are provided values, and all the required attachments are added, does eSTAR properly indicate it is complete on the first page, and are all the sections listed in the ''Completed'' column in the final section?

(8) Do you have any suggestions to improve the effectiveness of eSTAR in its purpose, or suggestions to improve the usability?

II. Paperwork Reduction Act of 1995

This notice refers to previously approved FDA 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 21 CFR part 807, subpart E have been approved under OMB control number 0910–0120.

III. References

The following references are on display in the Dockets Management Staff (see **ADDRESSES**), and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they are also available electronically at *https://www.regulations.gov.* FDA has verified the website addresses, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

1. MDUFA III Commitment Letter, available at: *https://www.fda.gov/downloads/MedicalDevices/NewsEvents/WorkshopsConferences/UCM295454.pdf.*
2. FDA Guidance for Industry and FDA Staff ''eCopy Program for Medical Device Submissions,'' dated October 10, 2013. This document was superseded by the guidance of the same title dated December 16, 2019, available at: *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/ecopy-program-medical-device-submissions.*
3. MDUFA IV Commitment Letter, available at: *https://www.fda.gov/media/102699/download.*
4. Quality in 510(k) Review Program Pilot, available at: *https://www.fda.gov/medical-devices/premarket-notification-510k/510k-program-pilots#quik.*
5. FDA Guidance for Industry and FDA Staff ''Refuse to Accept Policy for 510(k)s,'' dated September 13, 2019, available at: *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/refuse-accept-policy-510ks.*
6. FDA Guidance for Industry and FDA Staff ''The 510(k) Program: Evaluating Substantial Equivalence in Premarket Notifications [510(k)],'' dated July 28, 2014, available at: *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/510k-program-evaluating-substantial-equivalence-premarket-notifications-510k.*

Dated: February 21, 2020.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2020–03945 Filed 2–26–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

National Vaccine Injury Compensation Program; List of Petitions Received

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: HRSA is publishing this notice of petitions received under the National Vaccine Injury Compensation Program (the Program), as required by Section 2112(b)(2) of the Public Health Service (PHS) Act, as amended. While the Secretary of HHS is named as the respondent in all proceedings brought by the filing of petitions for compensation under the Program, the United States Court of Federal Claims is charged by statute with responsibility for considering and acting upon the petitions.

FOR FURTHER INFORMATION CONTACT: For information about requirements for filing petitions, and the Program in general, contact Lisa L. Reyes, Clerk of Court, United States Court of Federal Claims, 717 Madison Place NW, Washington, DC 20005, (202) 357–6400. For information on HRSA's role in the Program, contact the Director, National Vaccine Injury Compensation Program, 5600 Fishers Lane, Room 08N146B, Rockville, Maryland 20857; (301) 443–6593, or visit our website at: *http://www.hrsa.gov/vaccinecompensation/index.html.*

SUPPLEMENTARY INFORMATION: The Program provides a system of no-fault compensation for certain individuals who have been injured by specified childhood vaccines. Subtitle 2 of Title XXI of the PHS Act, 42 U.S.C. 300aa–10 *et seq.,* provides that those seeking compensation are to file a petition with the United States Court of Federal Claims and to serve a copy of the petition to the Secretary of HHS, who is named as the respondent in each proceeding. The Secretary has delegated this responsibility under the Program to HRSA. The Court is directed by statute to appoint special masters who take evidence, conduct hearings as appropriate, and make initial decisions as to eligibility for, and amount of, compensation.

A petition may be filed with respect to injuries, disabilities, illnesses, conditions, and deaths resulting from vaccines described in the Vaccine Injury Table (the Table) set forth at 42 CFR 100.3. This Table lists for each covered childhood vaccine the conditions that may lead to compensation and, for each condition, the time period for occurrence of the first symptom or manifestation of onset or of significant aggravation after vaccine administration. Compensation may also be awarded for conditions not listed in the Table and for conditions that are manifested outside the time periods specified in the Table, but only if the petitioner shows that the condition was caused by one of the listed vaccines.

Section 2112(b)(2) of the PHS Act, 42 U.S.C. 300aa–12(b)(2), requires that ''[w]ithin 30 days after the Secretary receives service of any petition filed under section 2111 the Secretary shall publish notice of such petition in the **Federal Register**.'' Set forth below is a list of petitions received by HRSA on January 1, 2020, through January 31, 2020. This list provides the name of petitioner, city and state of vaccination

(if unknown then city and state of person or attorney filing claim), and case number. In cases where the Court has redacted the name of a petitioner and/or the case number, the list reflects such redaction.

Section 2112(b)(2) also provides that the special master ''shall afford all interested persons an opportunity to submit relevant, written information'' relating to the following:

1. The existence of evidence ''that there is not a preponderance of the evidence that the illness, disability, injury, condition, or death described in the petition is due to factors unrelated to the administration of the vaccine described in the petition,'' and

2. Any allegation in a petition that the petitioner either:

a. ''[S]ustained, or had significantly aggravated, any illness, disability, injury, or condition not set forth in the Vaccine Injury Table but which was caused by'' one of the vaccines referred to in the Table, or

b. ''[S]ustained, or had significantly aggravated, any illness, disability, injury, or condition set forth in the Vaccine Injury Table the first symptom or manifestation of the onset or significant aggravation of which did not occur within the time period set forth in the Table but which was caused by a vaccine'' referred to in the Table.

In accordance with Section 2112(b)(2), all interested persons may submit written information relevant to the issues described above in the case of the petitions listed below. Any person choosing to do so should file an original and three (3) copies of the information with the Clerk of the United States Court of Federal Claims at the address listed above (under the heading **FOR FURTHER INFORMATION CONTACT**), with a copy to HRSA addressed to Director, Division of Injury Compensation Programs, Healthcare Systems Bureau, 5600 Fishers Lane, 08N146B, Rockville, Maryland 20857. The Court's caption (*Petitioner's Name* v. *Secretary of HHS*) and the docket number assigned to the petition should be used as the caption for the written submission. Chapter 35 of title 44, United States Code, related to paperwork reduction, does not apply to information required for purposes of carrying out the Program.

Dated: February 20, 2020.

Thomas J. Engels,

Administrator.

List of Petitions Filed

1. Corey Silvers, Medora, Indiana, Court of Federal Claims No: 20–0001V
2. Kristi Austin, Grand Forks, North Dakota, Court of Federal Claims No: 20–0002V
3. Ruth B. Thompson on behalf of The Estate of Richard D. Thompson, Deceased, Washington, District of Columbia, Court of Federal Claims No: 20–0003V
4. Amy Turner, Englewood, New Jersey, Court of Federal Claims No: 20–0004V
5. Beverly Hathcock, Phoenix, Arizona, Court of Federal Claims No: 20–0005V
6. Elaine Vasilopoulos, Glen Oaks, New York, Court of Federal Claims No: 20–0006V
7. Nancy Clark, Washington, District of Columbia, Court of Federal Claims No: 20–0007V
8. Patricia C. Puccio, Prairieville, Louisiana, Court of Federal Claims No: 20–0008V
9. Jason Berberich, Fargo, North Dakota, Court of Federal Claims No: 20–0010V
10. Amanda Jacobs, Charleston, South Carolina, Court of Federal Claims No: 20–0011V
11. Ana Cruz De Jesus, Denver, Colorado, Court of Federal Claims No: 20–0013V
12. Frank Rosseter, Torrington, Connecticut, Court of Federal Claims No: 20–0014V
13. Nico Ghasemipor, Deceased, Waltham, Massachusetts, Court of Federal Claims No: 20–0017V
14. Loren Lynette Machuca on behalf of J.A.M., San Benito, Texas, Court of Federal Claims No: 20–0018V
15. Pamela Stewart, Louisville, Kentucky, Court of Federal Claims No: 20–0019V
16. Kevin Harris, Ada, Oklahoma, Court of Federal Claims No: 20–0020V
17. Keith Irish, Manchester, New Hampshire, Court of Federal Claims No: 20–0021V
18. Erica Stastny, Louisville, Kentucky, Court of Federal Claims No: 20–0022V
19. Megan Zynkian, San Diego, California, Court of Federal Claims No: 20–0023V
20. Paoshoua Vue, Stockton, California, Court of Federal Claims No: 20–0024V
21. Lexi Kestner, Chicago, Illinois, Court of Federal Claims No: 20–0025V
22. Jamar Simmons, Bagram Air Field, Afghanistan, Court of Federal Claims No: 20–0026V
23. Ron Richards and Samantha Richards on behalf of Caleb Lee/Carter Albert Hall-Richards, Ashtabula, Ohio, Court of Federal Claims No: 20–0028V
24. Sheri Boatwright, Sacramento, California, Court of Federal Claims No: 20–0029V
25. Paula Beyerl, Leesburg, Virginia, Court of Federal Claims No: 20–0032V
26. Loretta Franklin, Webster, New York, Court of Federal Claims No: 20–0033V
27. Stacey Cyrus, Boston, Massachusetts, Court of Federal Claims No: 20–0035V
28. Shavon Dickinson on behalf of Z.D., Sacramento, California, Court of Federal Claims No: 20–0038V
29. Terrance Finefrock, Tucson, Arizona, Court of Federal Claims No: 20–0042V
30. Margo Paluilis, Brattleboro, Vermont, Court of Federal Claims No: 20–0043V
31. Dania Pedraza on behalf of N.Q., Brownsville, Texas, Court of Federal Claims No: 20–0045V
32. Sherry Davis, Longview, Washington, Court of Federal Claims No: 20–0046V
33. John Hutton, Folsom, California, Court of Federal Claims No: 20–0049V
34. Deandrea Austin on behalf of D.F., Detroit, Michigan, Court of Federal Claims No: 20–0050V
35. Janet Jackson, Cerro Gordo, Illinois, Court of Federal Claims No: 20–0051V
36. Angelia Johnson, Winston Salem, North Carolina, Court of Federal Claims No: 20–0054V
37. Rhonda Rose, Berea, Kentucky, Court of Federal Claims No: 20–0056V
38. Josephine Inyang, Golden Valley, Minnesota, Court of Federal Claims No: 20–0057V
39. Racquel Deville, Boston, Massachusetts, Court of Federal Claims No: 20–0058V
40. Marlene Borman, Valley Stream, New York, Court of Federal Claims No: 20–0059V
41. Erin Harland, Franklin, Tennessee, Court of Federal Claims No: 20–0060V
42. Bruce A. Ling, Jr., Quincy, Florida, Court of Federal Claims No: 20–0061V
43. Laura Hamilton on behalf of D.H., Boston, Massachusetts, Court of Federal Claims No: 20–0062V
44. Karen J. Darling, Breese, Illinois, Court of Federal Claims No: 20–0063V
45. Caprice Angelica Marcum, Modesto, California, Court of Federal Claims No: 20–0065V
46. Karla Knox, Lewistown, Montana, Court of Federal Claims No: 20–0067V
47. Michelle Mott, Dallas, Texas, Court of Federal Claims No: 20–0068V
48. Mallyssa Day, Biddeford, Maine, Court of Federal Claims No: 20–0070V
49. Debra S. DeYoung, Richmond, Virginia, Court of Federal Claims No: 20–0072V
50. Richard Joseph Spahr, Mt. Pleasant, South Carolina, Court of Federal Claims No: 20–0074V
51. Mark Chase on behalf of Barbara Pauley-Chase, Deceased, Goodyear, Arizona, Court of Federal Claims No: 20–0076V
52. Henry Scott McClain, Boston, Massachusetts, Court of Federal Claims No: 20–0078V
53. Laurie A. Sutherland, Fayetteville, New York, Court of Federal Claims No: 20–0082V
54. Natalie Gorham, Memphis, Tennessee, Court of Federal Claims No: 20–0083V
55. Kenneth Leroy Collins, Jr., Fayetteville, North Carolina, Court of Federal Claims No: 20–0084V
56. Tamatha Kelly, Lakeland, Florida, Court of Federal Claims No: 20–0085V
57. Dwight Johnson, Lebanon, Pennsylvania, Court of Federal Claims No: 20–0088V
58. Jaclyn Russo on behalf of Carly Mann, Martinez, California, Court of Federal Claims No: 20–0089V
59. Jody Bidlack, Boston, Massachusetts, Court of Federal Claims No: 20–0093V
60. Jane Doe, Washington, District of Columbia, Court of Federal Claims No: 20–0094V
61. Joanna Villalobos on behalf of A.D., Harlingen, Texas, Court of Federal Claims No: 20–0096V
62. Patricia Snelson, Saint Charles, Missouri, Court of Federal Claims No: 20–0098V
63. Sharon Issertell, Roseville, California, Court of Federal Claims No: 20–0099V
64. Mazin Khayat, Plantation, Florida, Court of Federal Claims No: 20–0101V
65. Kenya Dixon, Jackson, Mississippi, Court of Federal Claims No: 20–0102V
66. Schantel Purvis, Orange Park, Florida, Court of Federal Claims No: 20–0103V

67. Brenda J. Underwood, Richmond, Virginia, Court of Federal Claims No: 20–0104V
68. Dennis Vivians, Bethesda, Maryland, Court of Federal Claims No: 20–0105V
69. Wesley Faske, Houston, Texas, Court of Federal Claims No: 20–0106V
70. Elissa DiPasquale, Commack, New York, Court of Federal Claims No: 20–0108V
71. Eva Gordon, Dallas, Texas, Court of Federal Claims No: 20–0109V
72. Tina Schaum-Hoey, Baltimore, Maryland, Court of Federal Claims No: 20–0110V
73. Camila Wagner, Lone Tree, Colorado, Court of Federal Claims No: 20–0111V
74. Angela Bulan Bogue, Youngsville, North Carolina, Court of Federal Claims No: 20–0112V
75. Angela Bulan Bogue, Youngsville, North Carolina, Court of Federal Claims No: 20–0113V
76. Teresa Washington-Jenkins, Lancaster, Pennsylvania, Court of Federal Claims No: 20–0114V

[FR Doc. 2020–03980 Filed 2–26–20; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Committee on Vital and Health Statistics: Meeting

Pursuant to the Federal Advisory Committee Act, the Department of Health and Human Services (HHS) announces the following advisory committee meeting.

NAME: National Committee on Vital and Health Statistics (NCVHS), Full Committee Meeting.

DATES AND TIMES:

Tuesday, March 24, 2020: 9:00 a.m.–5:30 p.m.

Wednesday, March 25, 2020: 8:30 a.m.–3:00 p.m.

PLACE: U.S. Department of Health and Human Services, Hubert H. Humphrey Building, 200 Independence Avenue SW, Rm. 505A, Washington, DC 20201.

STATUS: Open.

PURPOSE: At the March 24–25, 2020 meeting, the Committee will welcome four new NCVHS members, review and discuss a recent request received from the Designated Standard Maintenance Organizations (DSMO), receive briefings from HHS officials to inform discussion of the Committee's workplan, and hold discussions on several health data policy topics.

The Subcommittee on Standards will lead the Committee in a discussion of the most recent change request received from the DSMO taking into consideration input from stakeholders regarding costs and benefits of implementing the most recent version of the National Council for Prescription drug Programs (NCPDP) pharmacy standard (NCPDP F6).

The Health Insurance Portability and Accountability Act (HIPAA) of 1996, as amended,[1] gives statutory authority to the Secretary of Health & Human Services (HHS) to promulgate regulations adopting standards, code sets, and identifiers to support the exchange of electronic health information between covered entities. The standards are for retail pharmacy and medical transactions. New versions of the adopted standards may be brought forward to NCVHS by the standards development organizations (SDOs) or through the DSMO after completion of a consensus-based review and evaluation process.

The Committee's intent is to understand the changes in version F6 and whether there are substantive changes which need to be evaluated that would significantly change the Committee's recommendation to HHS submitted in 2018. There is no change to the Batch Standard Implementation Guide Version 15 and the Subrogation Implementation Guide for Batch Standard Version 10, which were included in the May 2018 NCVHS recommendation. The Committee requests input and comments from the public in advance of this meeting to inform its deliberations about the benefits or costs of changing to this new version. The change request letter and change log are available for review at *https://ncvhs.hhs.gov/Letter-to-NCVHS-DSMO-Change-Request-January-21-2020.* Please submit comments specific to the impact of the change from version F2 to F6 to *NCVHSmail@cdc.gov* by close of business Friday, March 13, 2020.

The Subcommittee on Standards will introduce a new project scoping statement for its work on convergence of administrative and clinical data standards using the prior authorization transaction as a use-case. The Subcommittee will also provide an update on its activities in collaboration with the Office of the National Coordinator for Health Information Technology (ONC) and the Health Information Technology Advisory Committee (HITAC) regarding the opportunity for burden reduction through convergence of administrative and clinical data standards using the prior authorization transaction as a use-case.

The Subcommittee on Privacy, Confidentiality and Security will lead a discussion of the full Committee to assess priority areas for focus and activity. HHS agencies will brief the Committee regarding recent and ongoing work to inform the Committee's discussion of the 2020 workplan.

There will be a public comment period on both meeting days. The times and topics are subject to change. Please refer to the posted agenda for any updates.

CONTACT PERSON FOR MORE INFORMATION: Substantive program information may be obtained from Rebecca Hines, MHS, Executive Secretary, NCVHS, National Center for Health Statistics, Centers for Disease Control and Prevention, 3311 Toledo Road, Hyattsville, Maryland 20782, telephone (301) 458–4715. Summaries of meetings and a roster of Committee members are available on the home page of the NCVHS website: *www.ncvhs.hhs.gov,* where further information including an agenda and instructions to access the broadcast of the meeting will also be posted.

Should you require reasonable accommodation, please contact the CDC Office of Equal Employment Opportunity on (770) 488–3210 as soon as possible.

Dated: February 20, 2020.

Sharon Arnold,

Associate Deputy Assistant Secretary for Planning and Evaluation, Science and Data Policy, Office of the Assistant Secretary for Planning and Evaluation.

[FR Doc. 2020–03981 Filed 2–26–20; 8:45 am]

BILLING CODE 4150–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special

[1] Along with Section 1104 (c) of the Affordable Care Act.

Emphasis Panel; NIAID Investigator Initiated Program Project Applications (P01).

Date: March 23, 2020.

Time: 9:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G41, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Tara Capece, Ph.D., Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G41, Rockville, MD 20852, 240–191–4281, *capecet2@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: February 21, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–03938 Filed 2–26–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director, National Institutes of Health; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Advisory Committee to the Director, National Institutes of Health.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Advisory Committee to the Director, National Institutes of Health.

Date: April 23, 2020.

Time: 11:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 1, One Center Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Gretchen Wood, Staff Assistant, National Institutes of Health, Office of the Director, One Center Drive, Building 1, Room 126, Bethesda, MD 20892, 301–496–4272, *Woodgs@od.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.14, Intramural Research Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds, National Institutes of Health, HHS)

Dated: February 21, 2020.

Natasha M. Copeland,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–03940 Filed 2–26–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel PAR Panel; Cancer Health Disparities.

Date: March 23–24, 2020.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Ola Mae Zack Howard, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4192, MSC 7806, Bethesda, MD 20892, 301–451–4467, *howardz@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business; Cancer Drug Development and Therapeutics.

Date: March 23–24, 2020.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Canopy by Hilton, 940 Rose Avenue, North Bethesda, MD 20852.

Contact Person: Lilia Topol, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6192, MSC 7804, Bethesda, MD 20892, 301–451–0131, *ltopol@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel PAR Panel; Alzheimer Disease Research.

Date: March 23, 2020.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Dr., Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Andrew Louden, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3137, Bethesda, MD 20817, 301–435–1985, *loudenan@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel PAR Panel; Mammalian Models for Translation Research.

Date: March 23, 2020.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Dr., Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Malaya Chatterjee, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6192, MSC 7804, Bethesda, MD 20892, 301–806–2515, *chatterm@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Perception and Cognition Research to Inform Cancer Image Interpretation.

Date: March 23, 2020.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Dr., Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Devon Rene Brost Oskvig, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3172, Bethesda, MD 20892, *brostd@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: February 21, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–03941 Filed 2–26–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Investigator Initiated Program Project Applications (P01).

Date: March 25, 2020.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5601 Fishers Lane, Room 3G41, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Tara Capece, Ph.D., Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G41, Rockville, MD 20852, 240–191–4281, *capecet2@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: February 21, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–03939 Filed 2–26–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2020–0002; Internal Agency Docket No. FEMA–B–2012]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, the FIRM and FIS report, once effective, will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents of those buildings.

DATES: Comments are to be submitted on or before May 27, 2020.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location *https://www.fema.gov/preliminaryfloodhazarddata* and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

You may submit comments, identified by Docket No. FEMA–B–2012, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Map Information eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP and are used to calculate the appropriate flood insurance premium rates for new buildings built after the FIRM and FIS report become effective.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at *https://www.floodsrp.org/pdfs/srp_overview.pdf.*

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location *https://www.fema.gov/preliminaryfloodhazarddata* and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be

identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Michael M. Grimm,

Assistant Administrator for Risk Management, Department of Homeland Security, Federal Emergency Management Agency.

Community	Community map repository address
Osceola County, Iowa and Incorporated Areas Project: 16–07–2357S Preliminary Date: June 26, 2019	
City of Ashton	City Hall, 3029 3rd Street, Ashton, IA 51232.
City of Harris	Mayor's Office, 117 West Osceola Avenue, Harris, IA 51345.
City of Ocheyedan	City Hall, 869 Main Street, Ocheyedan, IA 51354.
City of Sibley	Sibley Municipal Offices, 808 3rd Avenue, Sibley, IA 51249.
Unincorporated Areas of Osceola County	Osceola County Courthouse, 300 7th Street, Sibley, IA 51249.
Nemaha County, Nebraska and Incorporated Areas Project: 16–07–2345S Preliminary Date: August 2, 2019	
City of Auburn	Auburn City Hall, 1101 J Street, Auburn, NE 68035.
City of Peru	Peru City Hall, 614 5th Street, Oakland, NE 68421.
Unincorporated Areas of Nemaha County	Register of Deeds, Nemaha County Courthouse, 1824 North Street, Suite 201, Auburn, NE 68305.
Village of Brock	Community Building/Fire Hall, 705 Main Street, Brock, NE 68320.
Village of Brownville	Brownville City Hall, 309 Water Street, Brownville, NE 68321.
Village of Julian	Community Building/Fire Hall, 104 West Street, Julian, NE 68379.
Village of Nemaha	Nemaha Village Office, 404 1st Street, Nemaha, NE 68414.
Richardson County, Nebraska and Incorporated Areas Project: 16–07–2358S Preliminary Date: August 2, 2019	
City of Falls City	City Clerk's Office, 2307 Barada Street, Falls City, NE 68355.
City of Humboldt	City Clerk's Office, 618 3rd Street, Humboldt, NE 68376.
Iowa Tribe of Kansas and Nebraska	Iowa Tribal Office, 3345 B Thrasher Road, White Cloud, KS 66094.
Sac & Fox Nation of Missouri, Kansas and Nebraska	Sac & Fox Tribal Office, 305 Main Street, Reserve, KS 66434.
Unincorporated Areas of Richardson County	Richardson County Clerk, 1700 Stone Street, Falls City, NE 68355.
Village of Dawson	Village Clerk's Office, 921 Ridge Street, Dawson, NE 68337.
Village of Preston	Village of Preston Clerk's Office, 70448 656 Boulevard, Falls City, NE 68355.
Village of Rulo	Village Office, 414 Martin Street, Rulo, NE 68431.
Village of Salem	Community Building, 205 East Main Street, Salem, NE 68433.
Village of Stella	Community Building, 204 North Main Street, Stella, NE 68442.
Village of Verdon	Village Clerk's Office, 314 Main Street, Verdon, NE 68457.

[FR Doc. 2020–03899 Filed 2–26–20; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2020–0002]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: New or modified Base (1-percent annual chance) Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, and/or regulatory floodways (hereinafter referred to as flood hazard determinations) as shown on the indicated Letter of Map Revision (LOMR) for each of the communities listed in the table below are finalized. Each LOMR revises the Flood Insurance Rate Maps (FIRMs), and in some cases the Flood Insurance Study (FIS) reports, currently in effect for the listed communities. The flood hazard determinations modified by each LOMR will be used to calculate flood insurance premium rates for new buildings and their contents.

DATES: Each LOMR was finalized as in the table below.

ADDRESSES: Each LOMR is available for inspection at both the respective Community Map Repository address listed in the table below and online through the FEMA Map Service Center at *https://msc.fema.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Map Information eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final flood hazard determinations as shown in the LOMRs for each community listed in the table below. Notice of these modified flood hazard determinations has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Insurance

and Mitigation has resolved any appeals resulting from this notification.

The modified flood hazard determinations are made pursuant to section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The new or modified flood hazard information is the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to remain qualified for participation in the National Flood Insurance Program (NFIP).

This new or modified flood hazard information, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities.

This new or modified flood hazard determinations are used to meet the floodplain management requirements of the NFIP and are used to calculate the appropriate flood insurance premium rates for new buildings, and for the contents in those buildings. The changes in flood hazard determinations are in accordance with 44 CFR 65.4.

Interested lessees and owners of real property are encouraged to review the final flood hazard information available at the address cited below for each community or online through the FEMA Map Service Center at *https://msc.fema.gov.*

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Michael M. Grimm,

Assistant Administrator for Risk Management, Department of Homeland Security, Federal Emergency Management Agency.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Alabama: Mobile (FEMA Docket No.: B–1970).	Unincorporated areas of Mobile County (19–04–3563P).	The Honorable Connie Hudson, President, Mobile County Commission, 205 Government Street, 10th Floor, South Tower, Mobile, AL 36644.	Mobile County Government Plaza, 205 Government Street, 6th Floor, South Tower, Mobile, AL 36644.	Jan. 27, 2020	015008
Colorado:					
Adams (FEMA Docket No.: B–1970).	Unincorporated areas of Adams County (19–08–0428P).	The Honorable Mary Hodge, Chair, Adams County Board of Commissioners, 4430 South Adams County Parkway, Suite C5000A, Brighton, CO 80601.	Adams County Public Works Department, 4430 South Adams County Parkway, Brighton, CO 80601.	Jan. 24, 2020	080001
Arapahoe (FEMA Docket No.: B–1970).	City of Aurora (19–08–0428P).	The Honorable Bob LeGare, Mayor, City of Aurora, 15151 East Alameda Parkway, Aurora, CO 80012.	Engineering Department, 15151 East Alameda Parkway, Aurora, CO 80012.	Jan. 24, 2020	080002
Archuleta (FEMA Docket No.: B–1970).	Town of Pagosa Springs (19–08–0182P).	The Honorable Don Volger, Mayor, Town of Pagosa Springs, P.O. Box 1859, Pagosa Springs, CO 81147.	Town Hall, 551 Hot Springs Boulevard, Pagosa Springs, CO 81147.	Jan. 31, 2020	080019
Archuleta (FEMA Docket No.: B–1970).	Unincorporated areas of Archuleta County (19–08–0182P).	Mr. Scott Wall, Archuleta County Administrator, P.O. Box 1507, Pagosa Springs, CO 81147.	Archuleta County Planning Department, 1122 Highway 84, Pagosa Springs, CO 81147.	Jan. 31, 2020	080273
Boulder (FEMA Docket No.: B–1970).	City of Boulder (19–08–0401P).	The Honorable Suzanne Jones, Mayor, City of Boulder, 1777 Broadway, Boulder, CO 80302.	Planning and Development Services Department, 1739 Broadway, Boulder, CO 80302.	Jan. 22, 2020	080024
El Paso (FEMA Docket No.: B–1970).	City of Colorado Springs (19–08–0304P).	The Honorable John Suthers, Mayor, City of Colorado Springs, 30 South Nevada Avenue, Suite 601, Colorado Springs, CO 80903.	Pikes Peak Regional Development Center, 2880 International Circle, Colorado Springs, CO 80910.	Feb. 3, 2020	080060
Florida:					
Charlotte (FEMA Docket No.: B–1970).	Unincorporated areas of Charlotte County (18–04–3990P).	The Honorable Ken Doherty, Chairman, Charlotte County Board of Commissioners, 18500 Murdock Circle, Suite 536, Port Charlotte, FL 33948.	Charlotte County Community Development Department, 18400 Murdock Circle, Port Charlotte, FL 33948.	Dec. 31, 2019	120061
Lake (FEMA Docket No.: B–1970).	City of Clermont (19–04–1054P).	The Honorable Gail L. Ash, Mayor, City of Clermont, 685 West Montrose Street, Clermont, FL 34711.	Engineering Department, 400 12th Street, Clermont, FL 34711.	Jan. 28, 2020	120133
Lake (FEMA Docket No.: B–1970).	Town of Howey in the Hills (19–04–2449P).	The Honorable David Nebel, Mayor, Town of Howey in the Hills, 101 North Palm Avenue, Howey in the Hills, FL 34737.	Town Hall, 101 North Palm Avenue, Howey in the Hills, FL 34737.	Jan. 30, 2020	120585
Lake (FEMA Docket No.: B–1970).	Unincorporated areas of Lake County (19–04–1054P).	Mr. Jeff Cole, Lake County Manager, 315 West Main Street, Tavares, FL 32778.	Lake County Public Works Department, 323 North Sinclair Avenue, Tavares, FL 32778.	Jan. 28, 2020	120421
Lake (FEMA Docket No.: B–1970).	Unincorporated areas of Lake County (19–04–2449P).	Mr. Jeff Cole, Lake County Manager, 315 West Main Street, Tavares, FL 32778.	Lake County Public Works Department, 323 North Sinclair Avenue, Tavares, FL 32778.	Jan. 30, 2020	120421
Lee (FEMA Docket No.: B–1974).	City of Bonita Springs (19–04–5151P).	The Honorable Peter Simmons, Mayor, City of Bonita Springs, 9101 Bonita Beach Road, Bonita Springs, FL 34135.	Community Development Department, 9220 Bonita Beach Road, Bonita Springs, FL 34135.	Jan. 28, 2020	120680

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Lee (FEMA Docket No.: B–1970).	Town of Fort Myers Beach (19–04–4050P).	The Honorable Anita Cereceda, Mayor, Town of Fort Myers Beach, 2525 Estero Boulevard, Fort Myers Beach, FL 33931.	Community Development Department, 2525 Estero Boulevard, Fort Myers Beach, FL 33931.	Jan. 23, 2020	120673
Lee (FEMA Docket No.: B–1970).	Town of Fort Myers Beach (19–04–5110P).	The Honorable Anita Cereceda, Mayor, Town of Fort Myers Beach, 2525 Estero Boulevard, Fort Myers Beach, FL 33931.	Community Development Department, 2525 Estero Boulevard, Fort Myers Beach, FL 33931.	Jan. 27, 2020	120673
Lee (FEMA Docket No.: B–1970).	Unincorporated areas of Lee County (18–04–3990P).	Mr. Roger Desjarlais, Lee County Manager, 2115 2nd Street, Fort Myers, FL 33901.	Lee County Building Department, 1500 Monroe Street, Fort Myers, FL 33901.	Dec. 31, 2019	125124
Lee (FEMA Docket No.: B–1970).	Unincorporated areas of Lee County (19–04–0766P).	Mr. Roger Desjarlais, Lee County Manager, 2115 2nd Street, Fort Myers, FL 33901.	Lee County Building Department, 1500 Monroe Street, Fort Myers, FL 33901.	Jan. 29, 2020	125124
Monroe (FEMA Docket No.: B–1970).	City of Marathon (19–04–5677P).	The Honorable John Bartus, Mayor, City of Marathon, 9805 Overseas Highway, Marathon, FL 33050.	Planning Department, 9805 Overseas Highway, Marathon, FL 33050.	Jan. 29, 2020	120681
Monroe (FEMA Docket No.: B–1970).	Unincorporated areas of Monroe County (19–04–3460P).	The Honorable Sylvia Murphy, Mayor, Monroe County Board of Commissioners, 102050 Overseas Highway, Suite 234, Key Largo, FL 33037.	Monroe County Building Department, 2798 Overseas Highway, Suite 300, Marathon, FL 33050.	Jan. 22, 2020	125129
Monroe (FEMA Docket No.: B–1970).	Unincorporated areas of Monroe County (19–04–5713P).	The Honorable Sylvia Murphy, Mayor, Monroe County Board of Commissioners, 102050 Overseas Highway, Suite 234, Key Largo, FL 33037.	Monroe County Building Department, 2798 Overseas Highway, Suite 300, Marathon, FL 33050.	Jan. 29, 2020	125129
Orange (FEMA Docket No.: B–1974).	City of Orlando (19–04–5111P).	The Honorable Buddy W. Dyer, Mayor, City of Orlando, P.O. Box 4990, Orlando, FL 32802.	Public Works Department, Engineering Division, 400 South Orange Avenue, 8th Floor, Orlando, FL 32801.	Jan. 28, 2020	120186
Polk (FEMA Docket No.: B–1974).	Unincorporated areas of Polk County (19–04–0781P).	The Honorable George Lindsey III, Chairman, Polk County Board of Commissioners, P.O. Box 9005, Drawer BC01, Bartow, FL 33831.	Polk County Land Development Division, 330 West Church Street, Bartow, FL 33830.	Jan. 30, 2020	120261
Louisiana: Lincoln (FEMA Docket No.: B–1970).	City of Ruston (19–06–2114P).	The Honorable Ronny Walker, Mayor, City of Ruston, P.O. Box 2069, Ruston, LA 71273.	Department of Public Works, 701 East Tennessee Avenue, Ruston, LA 71273.	Dec. 26, 2019	220347
North Carolina:					
Cherokee (FEMA Docket No.: B–1981).	Unincorporated areas of Cherokee County (18–04–7507P).	The Honorable Dan Eichenbaum, Chairman, Cherokee County Board of Commissioners, 75 Peachtree Street, Murphy, NC 28906.	Cherokee County, GIS Mapping Department, 75 Peachtree Street, Murphy, NC 28906.	Feb. 6, 2020	370059
Orange (FEMA Docket No.: B–1974).	Town of Carrboro (19–04–0720P).	The Honorable Lydia Lavelle, Mayor, Town of Carrboro, 301 West Main Street, Carrboro, NC 27510.	Planning Department, 301 West Main Street, Carrboro, NC 27510.	Feb. 4, 2020	370275
South Carolina: Horry (FEMA Docket No.: B–1970).	City of North Myrtle Beach (19–04–5172P).	Mr. Mike Mahaney, City of North Myrtle Beach Manager, 1018 2nd Avenue South, North Myrtle Beach, SC 29582.	Building Department, 1018 2nd Avenue South, North Myrtle Beach, SC 29582.	Jan. 27, 2020	450110
Texas:					
Bexar (FEMA Docket No.: B–1970).	City of San Antonio (19–06–1449P).	The Honorable Ron Nirenberg, Mayor, City of San Antonio, P.O. Box 839966, San Antonio, TX 78283.	Transportation and Capitol Improvements Department, Storm Water Division, San Antonio, TX 78204.	Dec. 30, 2019	480045
Collin (FEMA Docket No.: B–1974).	City of Frisco (19–06–1915P).	The Honorable Jeff Cheney, Mayor, City of Frisco, 6101 Frisco Square Boulevard, Frisco, TX 75034.	Engineering Services Department, 6101 Frisco Square Boulevard, Frisco, TX 75034.	Feb. 3, 2020	480134
Collin (FEMA Docket No.: B–1970).	City of Princeton (19–06–0798P).	The Honorable John Mark Caldwell, Mayor, City of Princeton, 123 West Princeton Drive, Princeton, TX 75407.	Development Services Department, 123 West Princeton Drive, Princeton, TX 75407.	Feb. 3, 2020	480757
Collin (FEMA Docket No.: B–1970).	Unincorporated areas of Collin County (19–06–0798P).	The Honorable Chris Hill, Collin County Judge, 2300 Bloomdale Road, Suite 4192, McKinney, TX 75071.	Collin County Engineering Department, 4690 Community Avenue, Suite 200, McKinney, TX 75071.	Feb. 3, 2020	480130
Denton (FEMA Docket No.: B–1974).	City of Highland Village (19–06–0868P).	Mr. Michael Leavitt, City of Highland Village Manager, 1000 Highland Village Road, Highland Village, TX 75077.	City Hall, 1000 Highland Village Road, Highland Village, TX 75077.	Jan. 31, 2020	481105
Harris (FEMA Docket No.: B–1974).	Unincorporated areas of Harris County (19–06–0834P).	The Honorable Lina Hidalgo, Harris County Judge, 1001 Preston Street, Suite 911, Houston, TX 77002.	Harris County Engineering Department, Permits Division, 10555 Northwest Freeway, Suite 120, Houston, TX 77092.	Jan. 27, 2020	480287
Montgomery (FEMA Docket No.: B–1974).	Unincorporated areas of Montgomery County (19–06–0834P).	The Honorable Mark J. Keough, Montgomery County Judge, 501 North Thompson Street, Suite 401, Conroe, TX 77301.	Montgomery County Alan B. Sadler Commissioners Court Building, 501 North Thompson Street, Suite 100, Conroe, TX 77301.	Jan. 27, 2020	480483
Tarrant (FEMA Docket No.: B–1970).	City of Fort Worth (19–06–0340P).	The Honorable Betsy Price, Mayor, City of Fort Worth, 200 Texas Street, Fort Worth, TX 76102.	Transportation and Public Works Department, 200 Texas Street, Fort Worth, TX 76102.	Jan. 27, 2020	480596

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Travis (FEMA Docket No.: B–1967).	City of Lakeway (19–06–0745P).	Mr. Steven Jones, Manager, City of Lakeway, 1102 Lohmans Crossing Road, Lakeway, TX 78734.	City Hall, 1102 Lohmans Crossing Road, Lakeway, TX 78734.	Jan. 23, 2020	481303

[FR Doc. 2020–03898 Filed 2–26–20; 8:45 am]
BILLING CODE 9110–12–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–6115–N–02]

Economic Growth, Regulatory Relief, and Consumer Protection Act: Initial Guidance on Property Inspections and Environmental Reviews

AGENCY: Office of the Assistant Secretary for Public and Indian Housing (PIH), Department of Housing and Urban Development (HUD).

ACTION: Notice.

SUMMARY: Section 209 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (the ''Economic Growth Act'') added section 38 to the United States Housing Act of 1937 and makes several amendments pertaining to small public housing agencies (PHAs). This notice explains how HUD designates small PHAs and implements section 209 provisions that reduce regulatory burden on small PHAs by reducing the number of inspections required for units with section 8(o) voucher assistance, and providing an exemption from environmental review requirements for development and modernization projects that have a total cost of not more than $100,000. This notice also identifies the small PHAs that are eligible for this section 209 regulatory relief.

DATES: February 27, 2020.

FOR FURTHER INFORMATION CONTACT: If you have any questions, please contact the following people in HUD's Office of Public and Indian Housing (none of the phone numbers are toll-free): Harold Katsura, (202) 402–3042, for general questions; and Justin Gray, (202) 402–3721, for questions regarding the environmental review exemption. The address for both individuals is: Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410. Persons with hearing or speech impairments may access these numbers through TTY by calling the Federal Relay at 800–877–8339 (this is a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

On May 24, 2018, President Trump signed into law the Economic Growth Act (Pub. L. 115–174, 132 Stat. 1296).[1] The purpose of the Economic Growth Act is to promote economic growth, provide tailored regulatory relief, and enhance consumer protections. Section 209 of the Economic Growth Act added section 38 to the United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*) and made several amendments pertaining to small PHAs, which for the purposes of section 38, are PHAs that administer 550 or fewer combined public housing units and vouchers under section 8(o), and predominantly operate in a rural area as described in 12 CFR 1026.35(b)(2)(iv)(A). These provisions streamline certain requirements related to program inspections and evaluations, corrective action requirements, environmental reviews, and energy conservation funding and financing requirements. Certain statutory amendments made by section 209 became effective 60 days after enactment (July 23, 2018). However, while effective, some of the provisions require rulemaking or guidance for implementation.

HUD published a notice in the **Federal Register** on February 14, 2019, entitled ''Section 209 of the Economic Growth, Regulatory Relief, and Consumer Protection Act: Initial Guidance'' which, read together with the statutory language, was intended to aid HUD program participants and the public in understanding the reasons for deferred action with respect to specific statutory provisions. See 84 FR 4097. HUD also used the notice as an opportunity to seek public comment on the implementation of the section 209 provisions, including the definition of a small PHA.

II. Public Comments Regarding the Small PHA Definition

Clarification of ''predominantly operates in a rural area.'' Commenters responded to several options. A PHA could be deemed to predominantly operate in a rural area if one or more of the following conditions apply: (1) The physical address of the PHA's main administrative office is in a rural area (a PHA-based definition); (2) more than 50 percent of the buildings occupied by voucher beneficiaries and public housing residents are in rural areas (a building-based definition); or (3) more than 50 percent of the tenants served live in rural areas (a household-based definition). One commenter recommended that the term be interpreted to mean an agency where at least 50 percent of households assisted through public housing and voucher programs live in rural areas. The commenter preferred this household-based definition because a PHA-based definition would conflict with the meaning of ''predominantly operates'' and a building-based definition would give the same weight to a building regardless of whether it contained one or many voucher holders.

Two commenters stated that HUD should interpret this statement as broadly as possible and utilize all three definitions, so that as many PHAs as possible can take advantage of administrative streamlining. One of these commenters continued by stating that if HUD could not implement this definition, it should adopt a definition using the location of an agency's address, which would be easy to implement and would not change frequently.

Response. HUD's interpretation of the statutory language is consistent with the commenters' desire for an expansive definition that considers both the physical location of the agency's administrative office (a PHA-based definition) and the location of the tenants it serves (a household-based definition).

Unit Counts. One commenter recommended that HUD should exclude special purpose vouchers in the unit count, as well as units converted to Project-Based Rental Assistance (PBRA) through the Rental Assistance Demonstration (RAD) program.

Response. HUD agrees that units that have converted to section 8 PBRA through the RAD program should not be included because this assistance is not covered by section 8(o) of the United States Housing Act of 1937. However, HUD is including special purpose vouchers in the unit count as they are funded under the tenant-based rental

[1] The text of the Economic Growth Act, along with a summary prepared by the Congressional Research Service, can be found at *https://www.congress.gov/bill/115th-congress/senate-bill/2155*.

assistance account and are generally governed by section 8(o) requirements.

Periodic reassessment of a PHA's small PHA status. One commenter noted that reassessments need to be balanced, stating that if they are too frequent, they would be disruptive, while failing to make reassessments frequently enough could lead to widely inaccurate designations. The commenter suggested conducting reassessments every five years.

Another commenter suggested that HUD reassess the rural nature of each PHA regularly and reasonably based on how often the national data is updated, and that PHAs should be allowed to reassess the status of their own agencies based on updated data from the Office of Management and Budget, the U.S. Census Bureau, the U.S. Department of Agriculture's Economic Research Service, as well as updated unit data at the individual agency level.

Two commenters further suggested that PHAs which gain ''small agency'' status should be able to retain that definition indefinitely, so that the number of small agencies would only increase at each reassessment, never decrease. One of these commenters stated that alternatively the designations should be reassessed every ten years. This commenter also proposed sample regulatory language that would base the small PHA designation on all three criteria that were offered as examples in the notice and make the designations permanent.

Response. HUD appreciates the public's input on this topic. The method for reassessing a PHA's small PHA status will be determined through rulemaking. The small PHA designations announced in this notice will remain in effect until a reassessment procedure is implemented.

General comment. One commenter stated that HUD should consider consistency among similarly sized nearby agencies rather than strict adherence to meeting the rural requirement when determining small PHA eligibility. Doing so would ensure that similarly sized nearby agencies would receive consistent treatment and significantly expand the streamlining provisions to many more agencies.

Response. HUD understands that the size of a PHA's operations can be more significant than the rural nature of the PHA's operations as this relates to the need for burden relief. Congress, however, decided to not extend relief based on program size alone and, instead, produced statutory language requiring a focus on rural areas.

III. Definition of Small Public Housing Agencies

Section 38 defines the term ''small public housing agency'' as a public housing agency ''for which the sum of the number of public housing dwelling units administered by the agency and the number of vouchers under section 8(o) administered by the agency is 550 or fewer'' and ''that predominantly operates in a rural area, as described in section 1026.35(b)(2)(iv)(A) of title 12, Code of Federal Regulations.'' After consideration of the public comments discussed above, HUD is interpreting ''predominantly operates in a rural area'' to mean a small PHA that:

(1) Has a primary administrative building with a physical address in a rural area as described in 12 CFR 1026.35(b)(2)(iv)(A); or

(2) more than 50 percent of its combined public housing units and voucher units under section 8(o) are in rural areas as described in 12 CFR 1026.35(b)(2)(iv)(A). HUD also clarifies that voucher units under section 8(o) include those in the tenant-based Housing Choice Voucher (HCV) program and the Project-Based Voucher (PBV) program.

To avoid confusion with other small PHA definitions that HUD uses, small PHAs for purposes of section 38 will be referred to as ''small rural PHAs'' in the remainder of this notice. HUD will post a list of PHAs meeting the small rural PHA definition at: *https://www.hud.gov/program_offices/public_indian_housing/pha/lists*. The list is based on data that was available to HUD on January 14, 2020.

Small rural PHAs may receive the inspection and environmental review administrative relief provided by section 38.[2] As noted in its February 14, 2019 **Federal Register** notice, HUD will be undertaking rulemaking for the full implementation of section 38. Included in that rulemaking will be the definition of small rural PHA.

IV. Small Rural PHA Designation Methodology

The process for identifying small rural PHAs consists of two main steps: (1) Identifying the number of PHAs that meet the size criteria based on the number of public housing units and the number of vouchers they administer; and (2) applying the rural definition to this population. Small rural PHAs are PHAs that administer 550 or fewer combined public housing units and vouchers under section 8(o), and predominantly operate in a rural area. A small rural PHA may be a public housing-only PHA or a voucher-only PHA so long as it does not administer more than a total of 550 units.

HUD determined the size of a small rural PHA using the same methodology that it uses to identify unit counts for a ''qualified public housing agency'' under the Housing and Economic Recovery Act of 2008 (HERA).[3] Like a small rural PHA, a qualified PHA under HERA is a PHA that administers 550 or fewer combined public housing units and vouchers under section 8(o). The public housing and voucher unit counts come from HUD's Inventory Management System/PIH Information Center (IMS/PIC).

The Economic Growth Act directs HUD to use an existing definition for a rural area. This definition is contained in the regulations governing the Consumer Financial Protection Bureau (CFPB) at 12 CFR 1026.35(b)(2)(iv)(A). An area is considered rural during a calendar year if it is:

(1) A county that is neither in a metropolitan statistical area nor in a micropolitan statistical area that is adjacent to a metropolitan statistical area, as those terms are defined by the U.S. Office of Management and Budget and as they are applied under currently applicable Urban Influence Codes (UICs), established by the United States

[2] The burden-reducing provisions covering the frequency of inspections for units with voucher housing assistance as described in section 38(c)(2), and the exemption from environmental review requirements as described in section 38(d)(1), are self-implementing in nature. The statutory language covering inspection frequency (*i.e.,* at least once every 3 years for voucher units) does not provide HUD with discretion. Congress explicitly stated the need for rulemaking for section 38(d)(2) which establishes streamlined procedures for environmental reviews of development and modernization projects having a total cost of more than $100,000. In contrast, Congress did not state there was a need for rulemaking for section 38(d)(1), which provides an exemption from environmental review requirements for development or modernization projects having a total cost of not more than $100,000. HUD believes this difference in statutory language makes section 38(d)(1) self-implementing.

[3] For the purposes of section 5A(b)(3) of the United States Housing Act of 1937, section 2702 of the Housing and Economic Recovery Act of 2008 (Pub. L. 110–289) defined a ''qualified public housing agency'' as a public housing agency that meets the following requirements: (1) The sum of the number of public housing dwelling units administered by the agency and the number of vouchers under section 8(o) of the United States Housing Act of 1937 (42 U.S.C. 1437f(o)) administered by the agency, is 550 or fewer; and (2) the agency is not designated under section 6(j)(2) as a troubled PHA, and does not have a failing score under the section 8 Management Assessment Program (SEMAP) during the prior 12 months. The small PHA definition for section 38 does not use the second part of the qualified PHA definition pertaining to troubled status or having a failing SEMAP score.

Department of Agriculture's Economic Research Service (USDA–ERS); or

(2) a census block that is not in an urban area, as defined by the U.S. Census Bureau using the latest decennial census of the United States.[4]

CFPB provides an updated list of rural counties on its website each year. HUD used this list along with census block data to identify which areas are rural.

To determine which PHAs predominantly operate in rural areas, HUD matched geo-coded office locations, geo-coded public housing unit locations, and geo-coded addresses of voucher units with the rural county and census block data. Based on the definition provided in this notice, a PHA predominantly serves rural areas if:

(1) The physical address of the PHA's primary administrative building is in a rural county or census block; or

(2) the PHA's physical address is in a non-rural county or census block, but more than 50 percent of its public housing units and voucher units are in rural counties or census blocks.

The over 50 percent threshold applies to the combined total of public housing units and voucher units. The list of PHAs meeting the small rural PHA definition is available at: *https://www.hud.gov/program_offices/public_indian_housing/pha/lists*. HUD is making the designations based on the most recent data available on January 14, 2020.

V. Appeals

A PHA may appeal its designation or non-designation as a small rural PHA. Only appeals for technical reasons are allowed. A technical reason involves computation mistakes, missing data, or incorrect data. HUD may not consider data that was missing or incorrect due to a PHA's lack of compliance with data submission policies, nor will HUD consider PHA-submitted data that is different from what HUD used to make the designations because the data refers to a different time period. Appeals should be submitted to: U.S. Department of Housing and Urban Development/PIH/REAC, Attn: Technical Assistance Center, 550 12th Street SW, Suite 100, Washington, DC 20410.

[4] The CFPB regulations contain a third rural criteria that is no longer in effect: ''(3) A county or a census block that has been designated as rural by the Bureau pursuant to the application process established under section 89002 of the Helping Expand Lending Practices in Rural Communities Act, Public Law 114–94, title LXXXIX (2015). The provisions of this paragraph (b)(2)(iv)(A)(3) shall cease to have any force or effect on December 4, 2017.''

VI. Inspection Frequency for Section 8(o) Voucher Units

As of the effective date of this notice, small rural PHAs administering voucher rental assistance under section 8(o) must make periodic physical inspections of dwelling units at least once every three years.[5] This flexibility is applicable only to periodic unit inspections conducted during the period a participant lives in a unit. A PHA is still required to conduct initial and interim inspections in accordance with 24 CFR 982.405.[6] For project-based vouchers, 24 CFR 983.103 provisions, as modified by the Housing Opportunity Through Modernization Act of 2016, continue to apply except that the random sample inspection requirement at 24 CFR 983.103(d) applies every three years instead of every two years.

Small rural PHAs cannot begin using a three-year inspection interval until after the next currently scheduled inspection is carried out. For example, if a unit is currently subject to a two-year inspection regime, and one year has passed since its last inspection, its next inspection will still take place next year. After that inspection is completed, the next periodic inspection of the unit may occur up to three years in the future.

HUD or PHAs must continue to conduct lead safety inspections when applicable in accordance with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4822). These provisions emphasize following existing requirements and therefore do not require further action for implementation.[7]

VII. Reduction of Administrative Burdens—Environmental Review Exemption

The Economic Growth Act creates a new section 38(d)(1) which exempts small rural PHAs from any environmental review requirements with respect to development or modernization projects costing no more than $100,000. As required in section 38(d)(2), HUD will undertake rulemaking to establish streamlined procedures for environmental reviews for projects costing more than $100,000. This notice implements only the section 38(d)(1) statutory exemption from environmental review. This statutory exemption from environmental review applies to any section 9(d) Capital Fund, section 9(e) Operating Fund or section 8(o)(13) Project Based Voucher (PBV) eligible work activity by a small rural PHA at a project site with a project cost of $100,000 or less.

Environmental reviews are processed for compliance with the National Environmental Policy Act (NEPA) and related laws and authorities. The level of review varies depending on the scope of work and the conditions of the property. Environmental review requirements for PHAs are explained in PIH Notice 2016–22. Many routine activities carried out by small rural PHAs are already determined not subject to environmental review and did not require environmental review prior to this statutory exemption. The tenant-based HCV program and many routine administrative and operational activities are already categorically excluded not subject to further environmental review.

When PHA activities require environmental review, the reviews are under either 24 CFR part 58 (''Part 58 Reviews'') or under 24 CFR part 50 (''Part 50 Reviews''). Part 58 applies when a Responsible Entity (RE) conducts the environmental review, and Part 50 applies when HUD conducts the environmental review. A unit of general local government or state that performs environmental reviews is referred to as the RE and holds jurisdictional authority for the community in which the PHA project site is located. The role of REs and agreements between PHAs and REs are explained in PIH Notice 2013–07. PHA activities are generally reviewed under Part 58 by an RE. For the section 38(d)(1) exempt activities, eligible PHAs may carry out activities without a request for an environmental review or determination from an RE or HUD.

An environmental review is conducted at a project site level. A project site consists of buildings or other improvements and parcels of land that logically group together as a single and cohesive setting. Since environmental conditions vary from one geographic area to the next, each separate public housing project site is subject to a separate environmental review. An asset management project (AMP) development can include a single environmental review project site or multiple environmental review project

[5] This supersedes previous guidance provided in PIH Notice 2016–5 that allowed biennial inspections. The Section 8 Management Assessment Program (SEMAP) module will now accept inspection dates up to three years since the last inspection.

[6] Interim inspections include those required when a participant family or government official reports a condition that is life-threatening (where the PHA must inspect the unit within 24 hours of notification) or not life-threatening (where the PHA must inspect the unit within 15 days of notification).

[7] Safety inspection requirements under the Lead-Based Paint Poisoning Prevention Act can be found at: *https://www.gpo.gov/fdsys/pkg/USCODE-2009-title42/html/USCODE-2009-title42-chap63-subchapIII-sec4822.htm.*

sites if the AMP properties do not all logically group together based on proximity. Project aggregation and grouping of scattered sites are explained in PIH Notice 2016–22 as well as 24 CFR 58.32 and 24 CFR 50.21. The project cost threshold of $100,000 or less for the exemption is measured at the environmental project site level and includes the total cost of the project.

An activity is an action the PHA puts forth as part of an assisted or to be assisted project. The most common activities involve section 9(d) Capital Fund and section 9(e) Operating Fund formula assistance. A small portion of the PHAs identified as eligible in this notice operate only a Section 8(o) voucher program, and a more limited segment of the eligible small and rural PHAs administer a PBV program. For a PHA that only operates a tenant-based HCV program, these activities are already categorically excluded and not subject to further environmental review, and section 38(d) offers no additional regulatory or administrative burden relief. PBV activities are the only section 8(o) activities that require an environmental review. The environmental review of PBV activities is a one-time review required before the PBV housing is approved to be placed under a Housing Assistance Payments Contract (HAP). After the one-time review for placement of PBV, there is no requirement for continued environmental reviews for ongoing activities at PBV properties. The section 38(d)(1) exempt PBV activities are infrequent and limited to PBV housing placement with a project cost of $100,000 or less prior to being placed under a HAP contract.

Small rural PHAs eligible for the statutory exemption that also have less than 250 public housing units have full flexibility of use of Capital Funds and Operating Funds as explained in PIH Notice 2016–18. The environmental statutory exemption is not based on the funding source and applies to all eligible Capital Fund, Operating Fund and PBV activities with a total project cost of $100,000 or less.

The statutory exemption from environmental review applies to any section 9(d) Capital Fund, section 9(e) Operating Fund or section 8(o)(13) PBV eligible work activity by a small rural PHA at a project site with a project cost of $100,000 or less. The environmental statutory exemption provided by section 38(d)(1) exempts this work activity from NEPA and related laws and authorities. The flood insurance requirements of the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4001), and the funding prohibitions of the Coastal Barrier Resources Act, as amended (16 U.S.C. 3501), remain applicable. The exemption is available as of the effective date of this notice.

Dated: February 13, 2020.

R. Hunter Kurtz,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 2020–04004 Filed 2–26–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[201A2100DD/AAKC001030/A0A501010.999253G; OMB Control Number 1076–0100]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Acquisition of Trust Land

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the Bureau of Indian Affairs (BIA), are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before March 30, 2020.

ADDRESSES: Send written comments on this information collection request (ICR) to the Office of Management and Budget's Desk Officer for the Department of the Interior by email at *OIRA_Submission@omb.eop.gov;* or via facsimile to (202) 395–5806. Please provide a copy of your comments to Ms. Sharlene Round Face, Bureau of Indian Affairs, Division of Real Estate Services, 1001 Indian School Road NW, Mailbox #44, Albuquerque, NM 87104; or by email to *Sharlene.RoundFace@bia.gov.* Please reference OMB Control Number 1076–0100 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Ms. Sharlene Round Face by email at *Sharlene.RoundFace@bia.gov* or by telephone at (505) 563–3132. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995, we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on December 27, 2019 (84 FR 71452). No comments were received.

We are again soliciting comments on the proposed ICR that is described below. We are especially interested in public comment addressing the following issues: (1) Is the collection necessary to the proper functions of the BIA; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the BIA enhance the quality, utility, and clarity of the information to be collected; and (5) how might the BIA minimize the burden of this collection on the respondents, including through the use of information technology.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: Section 5 of the Indian Reorganization Act of June 18, 1934 (25 U.S.C. 5108) and the Indian Land Consolidation Act of January 12, 1983 (25 U.S.C. 2202) authorize the Secretary of the Interior (Secretary), in his/her discretion, to acquire lands through purchase, relinquishment, gift, exchange, or assignment within or without existing reservations for the purpose of providing land for Indian Tribes. Other specific laws also authorize the Secretary to acquire lands for individual Indians and Tribes. Regulations implementing the acquisition authority are at 25 CFR 151. In order for the Secretary to acquire land on behalf of individual Indians and Tribes, the BIA must collect certain information to identify the party(ies) involved and to describe the land in question. The Secretary also solicits additional information deemed necessary to make a determination to

accept or reject an application to take land into trust for the individual Indian or Tribe, as set out in 25 CFR 151. This information collection allows the BIA to review applications for compliance with regulatory and statutory requirements. No specific form is used.

Title of Collection: Acquisition of Trust Land.

OMB Control Number: 1076–0100.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Individual Indians and Federally Recognized Indian Tribes seeking acquisition of land into trust status.

Total Estimated Number of Annual Respondents: 500.

Total Estimated Number of Annual Responses: 500.

Estimated Completion Time per Response: Ranges from 100 to 150 hours.

Total Estimated Number of Annual Burden Hours: 55,000.

Respondent's Obligation: Required to Obtain or Retain a Benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: $0.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq*).

Elizabeth K. Appel,

Director, Office of Regulatory Affairs and Collaborative Action—Indian Affairs.

[FR Doc. 2020–03955 Filed 2–26–20; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[F–21901–33, F–21901–34, F–21901–35, F–21901–71, F–21904–39, F–21904–40, F–21904–42, F–21904–43, F–21904–44, F–21904–46, F–21904–47, F–21904–48, F–21904–76, F–21904–77, F–21904–78, F–21904–83, F–21904–93, F–21905–62, F–21905–74, F–21905–76, F–21905–78, F–21905–79; 20X–LLAK–944000–L14100000–HY0000–P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of modified decision approving lands for conveyance.

SUMMARY: The Bureau of Land Management hereby provides constructive notice that the decision approving lands for conveyance to Doyon, Limited, notice of which was published in the **Federal Register** on March 11, 2009, will be modified to add two easement reservations and modify an existing easement reservation.

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, Alaska 99513–7504.

FOR FURTHER INFORMATION CONTACT: Bettie J. Shelby, BLM Alaska State Office, at 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 decision approving lands for conveyance to Doyon, Limited, notice of which was published in the **Federal Register** on March 11, 2009 (74 FR 10609), will be modified to include two additional easements and an amended easement to be reserved to the United States. Section 17(b)(1) of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. 1616(b)(1), requires the Secretary to evaluate public access to Federal land and waters on lands to be conveyed to ANCSA corporations. Identification of public easements to be reserved to the United States is an inherent part of the ANCSA conveyance process and is guided by the regulations at 43 CFR 2650.4–7. Notice of the modified decision will also be published once a week for four consecutive weeks in the ''Fairbanks Daily News-Miner''.

Any party claiming a property interest in the lands affected by the changes made in the modified 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 30, 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. Except as modified, the decision of March 11, 2009, notice of which was given March 11, 2009, is final.

Bettie J. Shelby,

Land Law Examiner, Adjudication Section.

[FR Doc. 2020–03972 Filed 2–26–20; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[19X.LLAK930100 L510100000.ER0000]

Notice of Extension of Time To Prepare the Ambler Road Environmental Impact Statement, Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of extension of time.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended, and the Federal Land Policy and Management Act of 1976, as amended, the Bureau of Land Management (BLM) is preparing the Final Environmental Impact Statement (EIS) for the proposed Ambler Road project. By this notice, BLM is announcing an extension of time to complete the Final EIS in accordance with Alaska National Interest Lands Conservation Act (ANILCA) section 1104(e).

DATES: Completion of the Final EIS for the Ambler Road Project is extended, to occur no later than March 31, 2020.

FOR FURTHER INFORMATION CONTACT: Tina McMaster-Goering, Ambler Road EIS Project Manager, telephone: 907–271–1310; address: 222 West 7th Avenue, #13, Anchorage, AK 99513. You may also request to be added to the mailing list for the EIS. Documents pertaining to the EIS may be examined at *https://www.blm.gov/AmblerRoadEIS.*

Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question with the

above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The Alaska Industrial Development and Export Authority (AIDEA), a public corporation of the State of Alaska, submitted an application for an industrial road right-of-way (ROW) in north-central Alaska across federal public lands and other lands. The road would run from the existing Dalton Highway to the Ambler Mining District. The area involved lies south of the Brooks Range, north of the Yukon River, west of the Dalton Highway and east of the Purcell Mountains. The BLM is the lead Federal agency in the preparation of the EIS. According to ANILCA Section 1104(e), Federal agencies have one-year from Notice of Intent to complete the EIS.

The Notice of Intent published in the **Federal Register** on February 28, 2017, initiating a 90-day public scoping period and indicating a completion date for the Final EIS of December 30, 2019. On April 7, 2017, the BLM extended the public scoping period through January 31, 2018 to accommodate subsistence activities in rural Alaska.

The Notice of Availability for the Draft EIS was published in the **Federal Register** on August 30, 2019, initiating a comment period, which closed on Oct. 29, 2019. The BLM held public hearings on subsistence resources and activities in conjunction with the public meetings on the Draft EIS in 19 affected rural Alaskan communities. In order to thoroughly review and respond to the public comments and prepare the Final EIS, a time extension through March 31, 2020, is necessary.

Authority: 40 CFR 1506.6(b).

Chad B. Padgett,

State Director, Alaska.

[FR Doc. 2020–03971 Filed 2–26–20; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[F–14856–A; F–14856–A2; 20X.LLAK9440000.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 Emmonak Corporation, for the Native village of Emmonak, 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 Emmonak Corporation.

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: Eileen Ford, BLM Alaska State Office, 907–271–5715, or *eford@blm.gov.* The BLM Alaska State Office may also be contacted via Telecommunications Device for the Deaf (TDD) through the Federal Relay Service (FRS) at 1–800–877–8339. The FRS 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 Emmonak Corporation. 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 Emmonak Corporation. The lands are located in the vicinity of Emmonak, Alaska, and are described as:

Seward Meridian, Alaska

T. 31 N., R. 79 W.,
Secs. 31 and 32.
Containing 44.97 acres.

T. 31 N., R. 80 W.,
Secs. 3, 6, 7, and 10;
Secs. 16, 21, and 31.
Containing 13.29 acres.

T. 33 N., R. 80 W.,
Secs. 19 and 20.
Containing 29.82 acres.

T. 32 N., R. 81 W.,
Sec. 5.
Containing 1.19 acres.

T. 33 N., R. 81 W.,
Secs. 14 and 35.
Containing 615.33 acres.
Aggregating 704.60 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 notice of the decision once a week for four consecutive weeks in *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 30, 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.

Eileen Ford,

Land Transfer Resolution Specialist, Adjudication Section.

[FR Doc. 2020–03974 Filed 2–26–20; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AA–10809, AA–10981, AA–10992, AA–11056, AA–11063, AA–11064, AA–11081, AA–11082, AA–11084, AA–12437, AA–12546, AA–12549, AA–12554, AA–12555, 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 Chugach Alaska Corporation, an Alaska Native regional corporation, pursuant to the Alaska Native Claims Settlement Act of 1971 (ANCSA), as amended.

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 J. 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 (FRS) 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 Chugach Alaska Corporation. The decision approves conveyance of the surface and subsurface estates in certain lands pursuant to ANCSA (43 U.S.C. 1601, *et seq.*), as amended.

The lands are located in the vicinity of Prince William Sound, and aggregate 79.66 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 30, 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. 2020–03975 Filed 2–26–20; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–DTS#–29754; PPWOCRADI0, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The National Park Service is soliciting comments on the significance of properties nominated before February 1, 2020, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted by March 13, 2020.

ADDRESSES: Comments may be sent via U.S. Postal Service and all other carriers to the National Register of Historic Places, National Park Service, 1849 C St. NW, MS 7228, Washington, DC 20240.

SUPPLEMENTARY INFORMATION: The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before February 1, 2020. Pursuant to Section 60.13 of 36 CFR part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Nominations submitted by State or Tribal Historic Preservation Officers:

ARIZONA

Maricopa County

McCornack, Colonel Willard H., House, 85 North Country Club Dr., Phoenix, SG100005074

FLORIDA

Duval County

Mt. Calvary Baptist Church, (African American Architects in Segregated Jacksonville, 1865–1965 MPS), 301 Spruce St., Jacksonville, MP100005087

Durkee Gardens Historic District, (African American Architects in Segregated Jacksonville, 1865–1965 MPS), Bound by Myrtle Ave., 13th St. West, Payne Ave., Wilcox St. and 8th St. West, Jacksonville, MP100005088

ILLINOIS

Kane County

International Harvester Showroom and Warehouse, 6–12 North River, Aurora, SG100005050

MASSACHUSETTS

Bristol County

Somerset Village Historic District, Avon St., Borland Ave., Cherry St., Church St., Clark St., Dublin St., High St., Main St., Maple St., Marsh St., Old Colony Ave., Palmer St., Peterson St., Pierce Ln., Pleasant St., School St., Simms Ave., and South St., Somerset, SG100005075

Brayton Homestead, 159 Brayton Ave., Somerset, SG100005077

Hampden County

Thompson, Jacob, House, 7 Main St., Monson, SG100005078

Worcester County

Rural Glen Cemetery, Worcester Rd., Hubbardston, SG100005076

MICHIGAN

Wayne County

Great Lakes Manor, 457 East Kirby St., Detroit, SG100005085

NEBRASKA

Cass County

Plattsmouth High School, (School Buildings in Nebraska MPS), 814 Main St., Plattsmouth, MP100005052

Knox County

Winnetoon Public School, (School Buildings in Nebraska MPS), 308 Jones St., Winnetoon, MP100005053

Lancaster County

Robber's Cave, 925 Robbers Cave Rd., Lincoln, SG100005055

Valley County

Arcadia Township Carnegie Library, (Carnegie Libraries in Nebraska MPS AD), 100 South Reynolds St., Arcadia, MP100005056

OKLAHOMA

Muskogee County

Founders' Place Historic District, Bounded by West Martin Luther King Jr. Blvd., east side of North 12th St., Court St. and east side of North 17th St., Muskogee, SG100005081

Oklahoma County

Capitol Hill General Hospital, 2400 South Harvey Ave., Oklahoma City, SG100005082

Pottawatomie County

State National Bank Building, 2 East Main St., Shawnee, SG100005083

Tulsa County

Fire Station No. 13, 3924 Charles Page Blvd., Tulsa, SG100005084

SOUTH CAROLINA

Charleston County

Brown, Dianna, Antique Shop, 62 Queen St., Charleston, SG100005045

Greenville County

Piedmont Mill Stores Building, 2–8 Main St., Piedmont, SG100005071

Horry County

Sun Fun Motel, 2305 Withers Dr., Myrtle Beach, SG100005046

Laurens County

Clinton Commercial Historic District (Boundary Increase and Decrease), 209–225 West Main St., Clinton, BC100005072

Union County

Clinton Chapel AME Zion Church, (Union MPS), 108 South Enterprise St., Union, MP100005047

VERMONT

Windsor County

Meeting House Farm, (Agricultural Resources of Vermont MPS), 128 Union Village Rd., Norwich, MP100005061

Maple Hill Farm, (Agricultural Resources of Vermont MPS), 65 Maple Hill Rd., Norwich, MP100005062

Fire District No. 2 Firehouse, (Fire Stations of Vermont MPS), 716 Depot St., Chester, MP100005063

A request for removal has been made for the following resources:

NEBRASKA

Custer County

Sargent Bridge, (Highway Bridges in Nebraska MPS), Dawson St. over the Middle Loup R., 1 mi. south of Sargent, Sargent vicinity, OT92000740

Franklin County

Franklin Bridge, (Highway Bridges in Nebraska MPS), NE 10 over the Republican R., 1 mi. south of Franklin, Franklin vicinity, OT92000764

Sarpy County

McCarty-Lilley House, West of Bellevue on Quail Dr., Bellevue vicinity, OT78001712

Additional documentation has been received for the following resources:

ARIZONA

Pima County

West University Historic District (Additional Documentation), Roughly bounded by Speedway Blvd., 6th St., Park and Stone Aves., Tucson, AD80004240

ARKANSAS

Pulaski County

Dunbar, Paul Laurence, School Neighborhood Historic District (Additional Documentation), (Historically Black Properties in Little Rock's Dunbar School Neighborhood MPS), Roughly bounded by Wright Ave., South Chester, South Ringo and West 24th Sts., Little Rock, AD13000789

Central High School Neighborhood Historic District (Boundary Increase 2) (Additional Documentation), Roughly bounded by West 17th St., Dr. Martin Luther King Jr. Dr., Wright Ave., South Summit St. and South Battery St., Little Rock, AD12000320

Union County

El Dorado Commercial Historic District (Additional Documentation), Courthouse Square, portions of Main, Jefferson, Washington, Jackson, Cedar and Locust Sts., El Dorado, AD03000773

MASSACHUSETTS

Essex County

Downtown Salem Historic District (Additional Documentation), (Downtown Salem MRA), Roughly bounded by Church, Central, New Derby, and Washington Sts., Salem, AD83003969

NEBRASKA

Hooker County

Humphrey Archeological Site (Additional Documentation), Address Restricted, Mullen vicinity, AD74001122

NEW YORK

New York County

Church of the Holy Apostles (Additional Documentation), 296–300 9th Ave., New York, AD72000867

TENNESSEE

Greene County

Andrew Johnson National Historic Site (Additional Documentation), Depot and College Sts., Greeneville, AD66000073

VERMONT

Windham County

Canal Street Schoolhouse (Additional Documentation), Canal St., Brattleboro, AD77000103

WEST VIRGINIA

Lewis County

Bennett, Jonathan M., House (Additional Documentation), Court Ave., Weston, AD78002804

(Authority: Section 60.13 of 36 CFR part 60)

Dated: February 6, 2020.

Julie H. Ernstein,

Supervisory Archeologist, National Register of Historic Places/National Historic Landmarks Program.

[FR Doc. 2020–03951 Filed 2–26–20; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–DTS#–29816; PPWOCRADI0, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The National Park Service is soliciting comments on the significance of properties nominated before February 8, 2020, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted by March 13, 2020.

ADDRESSES: Comments may be sent via U.S. Postal Service and all other carriers to the National Register of Historic Places, National Park Service, 1849 C St. NW, MS 7228, Washington, DC 20240.

SUPPLEMENTARY INFORMATION: The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before February 8, 2020. Pursuant to Section 60.13 of 36 CFR part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Nominations submitted by State or Tribal Historic Preservation Officers:

GEORGIA

Fulton County

English Avenue School, 627 English Ave. NW, Atlanta, SG100005101

LOUISIANA

East Baton Rouge Parish

Borden Dairy, 4743 Florida Blvd., Baton Rouge, SG100005100

Sabine Parish

Sabine High School, 850 Highland Ave., Many, SG100005099

MAINE

Androscoggin County

West Auburn School, 740 West Auburn Rd., Auburn, SG100005097

Hancock County

Surry Village School, 7 Toddy Pond Rd., Surry, SG100005098

Knox County

Dunn & Elliot Sail Loft, 54 Water St., Thomaston, SG100005096

MICHIGAN

Wayne County

Warren Motor Car Company Building, 1331 Holden St., Detroit, SG100005108

MONTANA

Deer Lodge County

Glenn's Dam Historic District, North Cable Rd., less than ¼ mi. north of northwest end of town, Anaconda vicinity, SG100005107

NEW JERSEY

Atlantic County

Liberty Hotel, 1519 Baltic Ave., Atlantic City, SG100005102

VIRGINIA

Albemarle County

Gardner House, 3137 Shiffletts Mill Rd., Crozet vicinity, SG100005103

Henrico County

Dabbs House, 3812 Nine Mile Rd., Henrico, SG100005104

Southampton County

Courtland Historic District, Roughly bounded by North and South Main, Rochelle, Linden, Aurora, and Bateman Sts., and Woodland Park Cir., Courtland, SG100005105

WISCONSIN

Milwaukee County

West Center-North 32nd Industrial Historic District, 2727, 2748, 2769 & 2784 North 32nd St.; 2758 North 33rd St.; and 3212 West Center St., Milwaukee, SG100005095

Additional documentation has been received for the following resources:

ARKANSAS

Benton County

Pinkston-Mays Store Building (Additional Documentation), (Benton County MRA), 211 Jackson St., Lowell, AD87002367

Ouachita County

Green Cemetery (Additional Documentation), West of Cty. Rd. 1, Stephens vicinity, AD16000653

Nomination submitted by Federal Preservation Officer:

The State Historic Preservation Officer reviewed the following nomination(s) and responded to the Federal Preservation Officer within 45 days of receipt of the nomination(s) and supports listing the properties in the National Register of Historic Places.

MONTANA

Jefferson County

Whitetail Airway Beacon, (Sentinels of the Airways: Montana's Airway Beacon System, 1934–1979 MPS), 16 miles north of Whitehall, Whitehall vicinity, MP100005094

(Authority: Section 60.13 of 36 CFR part 60)

Dated: February 10, 2020.

Julie H. Ernstein,

Supervisory Archeologist, National Register of Historic Places/National Historic Landmarks Program.

[FR Doc. 2020–03950 Filed 2–26–20; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[RR04093000.20XR0680GB.RX.N5570007.3000000]

Call for Nominations for the Glen Canyon Dam Adaptive Management Work Group Federal Advisory Committee

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of call for nominations.

SUMMARY: The U.S. Department of the Interior proposes to appoint members to the Glen Canyon Dam Adaptive Management Work Group (AMWG). The Secretary of the Interior, acting as administrative lead, is soliciting nominations for qualified persons to serve as members of the AMWG.

DATES: Nominations must be postmarked by March 30, 2020.

ADDRESSES: Nominations should be sent to Mr. Brent Esplin, Regional Director, Bureau of Reclamation, 125 S. State Street, Room 8100, Salt Lake City, UT 84138, or submitted via email to *bor-sha-ucr-gcdamp@usbr.gov.*

FOR FURTHER INFORMATION CONTACT: Lee Traynham, Chief, Adaptive Management Group, Resources Management Division, at (801) 524–3752, fax: (801) 524–5499, or by email at *ltraynham@usbr.gov.*

SUPPLEMENTARY INFORMATION:

Advisory Committee Scope and Objectives

The Grand Canyon Protection Act (Act) of October 30, 1992, Public Law 102–575; and the Federal Advisory Committee Act, as amended, 5 U.S.C. Appendix 2 authorized creation of the AMWG to provide recommendations to the Secretary of the Department of the Interior in carrying out the responsibilities of the Act to protect, mitigate adverse impacts to, and improve the values for which Grand Canyon National Park and Glen Canyon National Recreation Area were established, including but not limited to, natural and cultural resources and visitor use.

The duties or roles and functions of the AMWG are in an advisory capacity only. They are to: (1) Establish AMWG operating procedures, (2) advise the Secretary in meeting environmental and cultural commitments including those contained in the Record of Decision for the Glen Canyon Dam Long-Term Experimental and Management Plan Final Environmental Impact Statement and subsequent related decisions, (3) recommend resource management objectives for development and implementation of a long-term monitoring plan, and any necessary research and studies required to determine the effect of the operation of Glen Canyon Dam on the values for which Grand Canyon National Park and Glen Canyon Dam National Recreation Area were established, including but not limited to, natural and cultural resources, and visitor use, (4) review and provide input on the report identified in the Act to the Secretary, the Congress, and the Governors of the Colorado River Basin States, (5) annually review long-term monitoring data to provide advice on the status of resources and whether the Adaptive Management Program (AMP) goals and objectives are being met, and (6) review and provide input on all AMP activities undertaken to comply with applicable laws, including permitting requirements.

Membership Criteria

Prospective members of AMWG need to have a strong capacity for advising individuals in leadership positions, team work, project management, tracking relevant Federal government programs and policy making procedures, and networking with and representing their stakeholder group. Membership from a wide range of disciplines and professional sectors is encouraged.

Members of the AMWG are appointed by the Secretary of the Interior (Secretary) and are comprised of:

a. The Secretary's Designee, who serves as Chairperson for the AMWG.

b. One representative each from the following entities: The Secretary of Energy (Western Area Power Administration), Arizona Game and Fish Department, Hopi Tribe, Hualapai Tribe, Navajo Nation, San Juan Southern

Paiute Tribe, Southern Paiute Consortium, Pueblo of Zuni.

c. One representative each from the Governors from the seven basin States: Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming.

d. Representatives from the general public as follows: Two from environmental organizations, two from the recreation industry, and two from contractors who purchase Federal power from Glen Canyon Powerplant.

e. One representative from each of the following Department of the Interior (Interior) agencies as ex-officio non-voting members: Bureau of Reclamation, Bureau of Indian Affairs, U.S. Fish and Wildlife Service, and National Park Service.

At this time, we are particularly interested in applications from representatives of the following:

(a) One each from the basin states of Utah, Nevada, and New Mexico;

(b) one each from the Native American Tribes of Hopi, Navajo Nation, Southern Paiute Consortium, San Juan Southern Paiute and Pueblo of Zuni; and

(c) two from environmental organizations.

After consultation, the Secretary will appoint members to the AMWG. Members will be selected based on their individual qualifications, as well as the overall need to achieve a balanced representation of viewpoints, subject matter expertise, regional knowledge, and representation of communities of interest. AMWG member terms are limited to three (3) years from their date of appointment. Following completion of their first term, an AMWG member may request consideration for reappointment to an additional term. Reappointment is not guaranteed.

Typically, AMWG will hold two in-person meetings and one webinar meeting per fiscal year. Between meetings, AMWG members are expected to participate in committee work via conference calls and email exchanges. Members of the AMWG and its subcommittees serve without pay. However, while away from their homes or regular places of business in the performance of services of the AMWG, members may be reimbursed for travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the government service, as authorized by 5 U.S.C. 5703.

Nominations should include a resume that provides an adequate description of the nominee's qualifications, particularly information that will enable Interior to evaluate the nominee's potential to meet the membership requirements of the AMWG and permit the Department of the Interior to contact a potential member. Please refer to the membership criteria stated in this notice.

Any interested person or entity may nominate one or more qualified individuals for membership on the AMWG. Nominations from the seven basin states, as identified in this notice, need to be submitted by the respective Governors of those states, or by a state representative formally designated by the Governor. Persons or entities submitting nomination packages on the behalf of others must confirm that the individual(s) is/are aware of their nomination. Nominations must be postmarked no later than March 30, 2020 and sent to Mr. Brent Esplin, Regional Director, U.S. Bureau of Reclamation, 125 S. State Street, Room 8100, Salt Lake City, UT 84138.

Before including any address, phone number, email address, or other personal identifying information in your application, nominees should be aware that this information may be made publicly available at any time. While the nominee can ask to withhold the personal identifying information from public review, we cannot guarantee that we will be able to do so.

(Authority: 5 U.S.C. Appendix 2)

Brent Esplin,

Regional Director, Interior Region 7: Upper Colorado Basin, Bureau of Reclamation.

[FR Doc. 2020–03913 Filed 2–26–20; 8:45 am]

BILLING CODE 4332–90–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain High-Density Fiber Optic Equipment and Components Thereof, DN 3436;* the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing pursuant to the Commission's Rules of Practice and Procedure.

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov,* and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its internet server at United States International Trade Commission (USITC) at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of Corning Optical Communications LLC on February 21, 2020. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain high-density fiber optic equipment and components thereof. The complaint names as respondents: AFL Telecommunications Holdings LLC d/b/a AFL of Duncan, SC; FS.com Inc. of New Castle, DE; Huber+Suhner AG of Switzerland; Huber+Suhner, Inc. of Charlotte, NC; Legrand North America, LLC of West Hartford, CT; Leviton Manufacturing Co., Inc. of Melville, NY; Panduit Corporation of Tinley, IL; Shanghai TARLUZ Telecom Tech. Co., Ltd. d/b/a TARLUZ of China; Shenzhen Anfkom Telecom Co., Ltd. d/b/a Anfkom Telecom of China; The LAN Wirewerks Research Laboratories Inc. d/b/a Wirewerks of Canada; The Siemon Company of Watertown, CT; Total Cable Solutions, Inc. of Springboro, OH; and Wulei Technology Co., Ltd. d/b/a Bonelinks of China. The complainant requests that the Commission issue a general exclusion order or in the alternative, a limited exclusion order, and a cease desist order and impose a bond upon respondents' alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions on the public interest must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation. Any written submissions on other issues must also be filed by no later than the close of business, eight calendar days after publication of this notice in the **Federal Register**. Complainant may file replies to any written submissions no later than three calendar days after the date on which any initial submissions were due. Any submissions and replies filed in response to this Notice are limited to five (5) pages in length, inclusive of attachments.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to § 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the docket number (''Docket No. 3436'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, Electronic Filing Procedures [1]). Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,[2] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.[3]

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: February 24, 2020.

William Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2020–03994 Filed 2–26–20; 8:45 am]

BILLING CODE 7020–02–P

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*

[2] All contract personnel will sign appropriate nondisclosure agreements.

[3] Electronic Document Information System (EDIS): *https://edis.usitc.gov.*

INTERNATIONAL TRADE COMMISSION

[USITC SE–20–008]

Sunshine Act Meetings

Agency Holding the Meeting: United States International Trade Commission.

TIME AND DATE: March 5, 2020 at 11:00 a.m.

PLACE: Room 101, 500 E Street SW, Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. *Agendas for future meetings:* None.
2. Minutes.
3. Ratification List.
4. Vote on Inv. No. 731–TA–1472 (Preliminary)(Difluoromethane (R–32) from China). The Commission is currently scheduled to complete and file its determination on March 9, 2020; views of the Commission are currently scheduled to be completed and filed on March 16, 2020.
5. *Outstanding action jackets:* None.

CONTACT PERSON FOR MORE INFORMATION: William Bishop, Supervisory Hearings and Information Officer, 202–205–2595.

The Commission is holding the meeting under the Government in the Sunshine Act, 5 U.S.C. 552(b). In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: February 24, 2020.

William Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2020–04117 Filed 2–25–20; 4:15 pm]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–636 and 731–TA–1469–1470 (Preliminary)]

Wood Mouldings and Millwork Products From Brazil and China

Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that there is a reasonable indication that an industry in the United States is

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

materially injured by reason of imports of wood mouldings and millwork products from Brazil and China that are alleged to be sold in the United States at less than fair value (''LTFV'') and imports of wood mouldings and millwork products from China that are allegedly subsidized by the government of China.[2] [3] The products subject to these investigations are primarily provided for in subheadings 4409.10.40, 4409.10.45, 4409.10.50, 4409.22.40, 4409.22.50, 4409.29.41, and 4409.29.51 of the Harmonized Tariff Schedule of the United States (''HTS'').

Commencement of Final Phase Investigations

Pursuant to section 207.18 of the Commission's rules, the Commission also gives notice of the commencement of the final phase of its investigations. The Commission will issue a final phase notice of scheduling, which will be published in the **Federal Register** as provided in section 207.21 of the Commission's rules, upon notice from the U.S. Department of Commerce (''Commerce'') of affirmative preliminary determinations in the investigations under sections 703(b) or 733(b) of the Act, or, if the preliminary determinations are negative, upon notice of affirmative final determinations in those investigations under sections 705(a) or 735(a) of the Act. Parties that filed entries of appearance in the preliminary phase of the investigations need not enter a separate appearance for the final phase of the investigations. Industrial users, and, if the merchandise under investigation is sold at the retail level, representative consumer organizations have the right to appear as parties in Commission antidumping and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

Background

On January 8, 2020, the Coalition of American Millwork Producers [4] filed petitions with the Commission and Commerce, alleging that an industry in the United States is materially injured or threatened with material injury by reason of subsidized imports of wood mouldings and millwork products from China and LTFV imports of wood mouldings and millwork products from Brazil and China. Accordingly, effective January 8, 2020, the Commission instituted countervailing duty investigation No. 701–TA–636 and antidumping duty investigation Nos. 731–TA–1469–1470 (Preliminary).

Notice of the institution of the Commission's investigations and of a public conference 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 January 15, 2020 (85 FR 2438). The conference was held in Washington, DC, on January 29, 2020, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission made these determinations pursuant to sections 703(a) and 733(a) of the Act (19 U.S.C. 1671b(a) and 1673b(a)). It completed and filed its determinations in these investigations on February 24, 2020. The views of the Commission are contained in USITC Publication 5030 (March 2020), entitled *Wood Mouldings and Millwork Products from Brazil and China: Investigation Nos. 701–TA–636 and 731–TA–1469–1470 (Preliminary).*

By order of the Commission.

Issued: February 24, 2020.

William Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2020–04010 Filed 2–26–20; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–20–007]

Sunshine Act Meetings

Agency Holding the Meeting: United States International Trade Commission.

TIME AND DATE: March 4, 2020 at 11:00 a.m.

PLACE: Room 101, 500 E Street SW, Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. *Agendas for future meetings:* None.
2. Minutes.
3. Ratification List.
4. Vote on Inv. No. 731–TA–1143 (Second Review)(Small Diameter Graphite Electrodes from China). The Commission is currently scheduled to complete and file its determination and views of the Commission by March 23, 2020.
5. *Outstanding action jackets:* None.

CONTACT PERSON FOR MORE INFORMATION: William Bishop, Supervisory Hearings and Information Officer, 202–205–2595.

The Commission is holding the meeting under the Government in the Sunshine Act, 5 U.S.C. 552(b). In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: February 24, 2020.

William Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2020–04124 Filed 2–25–20; 4:15 pm]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Cooperative Research Goup on Consortium for NASGRO Development and Support

Notice is hereby given that, on February 6, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Southwest Research Institute: Cooperative Research Group on Consortium for NASGRO Development and Support (''NASGRO'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Spirit Aerosystems Inc., Wichita, KS, and Triumph Aerostructures, LLC, Arlington, TX, have been added as parties to this venture.

Also, Arconic, Inc., Alcoa Canter, PA, has withdrawn as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and NASGRO

[2] *Wood Mouldings and Millwork Products from Brazil and the People's Republic of China: Initiation of Less-Than-Fair-Value Investigations,* 85 FR 6502 (February 5, 2020); *Wood Mouldings and Millwork Products from the People's Republic of China: Initiation of Countervailing Duty Investigation,* 85 FR 6513 (February 5, 2020).

[3] Commissioner Stayin not participating.

[4] The Coalition of American Millwork Producers is comprised of Bright Wood Corporation, Madras, Oregon; Cascade Wood Products, Inc., White City, Oregon; Endura Products, Inc., Colfax, North Carolina; Sierra Pacific Industries, Red Bluff, California; Sunset Moulding, Live Oak, California; Woodgrain Millwork Inc., Fruitland, Idaho; and Yuba River Moulding, Yuba City, California.

intends to file additional written notifications disclosing all changes in membership.

On October 3, 2001, NASGRO filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published, a notice in the **Federal Register** pursuant to Section 6(b) of the Act on January 22, 2002 (67 FR 2910).

The last notification was filed with the Department on February 24, 2017. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on April 4, 2017 (82 FR 16419).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2020–04000 Filed 2–26–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Cooperative Research Group on ROS-Industrial Consortium Americas

Notice is hereby given that, on February 6, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Southwest Research Institute—Cooperative Research Group on ROS-Industrial Consortium-Americas (''RIC-Americas'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Object Computing, Inc. (OCI), St. Louis, MO, and Steel Founder's Society of America (SFSA), Crystal Lake, IL, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and RIC-Americas intends to file additional written notifications disclosing all changes in membership.

On April 30, 2014, RIC-Americas filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 9, 2014 (79 FR 32999).

The last notification was filed with the Department on December 30, 2019. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on January 31, 2020 (85 FR 5720).

Suzanne Morris,

Chief, Premerger and Division Statistics Unit, Antitrust Division.

[FR Doc. 2020–03988 Filed 2–26–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Consortium for Execution of Rendezvous and Servicing Operations

Notice is hereby given that, on February 3, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Consortium for Execution of Rendezvous and Servicing Operations (''CONFERS'') filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Parabilis Space Technologies, Inc., San Marcos, CA and Thornton Tomasetti, Inc., Washington, DC, have been added as parties to this venture.

Also, Colorado Center for Astrodynamics Research, Boulder, CO, has withdrawn as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and CONFERS intends to file additional written notifications disclosing all changes in membership.

On September 10, 2018, CONFERS filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on October 19, 2018 (83 FR 53106).

The last notification was filed with the Department on November 11, 2019. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on December 5, 2019 (84 FR 66695).

Suzanne Morris,

Chief, Premerger and Division Statistics Unit, Antitrust Division.

[FR Doc. 2020–04015 Filed 2–26–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Space Enterprise Consortium

Notice is hereby given that, on January 31, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Space Enterprise Consortium (''SpEC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, A.T. Kearney Public Sector and Defense Services, LLC, Arlington, VA; AGILE Space Propulsion Company, Durango, CO; Blue Origin, LLC, Kent, WA; C3.ai dba C3 IoT, Redwood City, CA; CesiumAstro, Austin, TX; CNF Technologies Corporation, San Antonio, TX; COLSA Corporation, Huntsville, AL; Columbus Technologies and Services, Inc., El Segundo, CA; E3 Federal Solutions, McLean, VA; Eikon Research, Inc., Huntsville, AL; FEDITC, LLC, Rockville, MD; Grey Matters Defense Solutions, LLC, Castle Rock, CO;, Infinity Technology Services, Colorado Springs, CO; Iron Bow Technologies, LLC, Herndon, VA; Lynntech, Inc., College Station, TX; Lynx Strategy Group, LLC, Alexandria, VA; MCR Federal, LLC, McLean, VA; Momentus, Inc., Santa Clara, CA; mPower Technology, Albuquerque, NM; Northstrat, Incorporated, Sterling, VA; Radiant Mission Solutions, Inc. (previously MDA), Chantilly, VA; Red River Technology, LLC, Claremont, NH; Rocket Propulsion Systems, LLC, Renton, WA; SAP National Security Services, Inc., Newton Square, PA; Serv1Tech, Woodbridge, VA; Shipcom Federal Solutions, Belcamp, MD; Splunk, Inc., San Francisco, CA; Strategic Mission Elements, Chantilly, VA; The Systems Security Engineering Group, LLC, Albuquerque, NM; Trace Systems, Inc., Vienna, VA; and World

Wide Technology, Maryland Heights, MO, have been added as parties to this venture.

Also, Composite Technology Development, Lafayette, CO; Linear Space Technology, LLC, Hamilton, NJ; MDA Information Systems, Gaithersburg, MD; New Frontier Aerospace, Livermore, CA; P3 Technologies, Jupiter, FL; PreTalen, Ltd., Beavercreek, OH; and Visionary Products, Inc., Draper, UT, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and SpEC intends to file additional written notifications disclosing all changes in membership.

On August 23, 2018, SpEC filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on October 2, 2018 (83 FR 49576).

The last notification was filed with the Department on November 7, 2019. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on December 5, 2019 (84 FR 66696).

Suzanne Morris,

Chief, Premerger and Division Statistics Unit, Antitrust Division.

[FR Doc. 2020–03983 Filed 2–26–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—ASTM International Standards

Notice is hereby given that on February 10, 2020 pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), ASTM International (''ASTM'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing additions or changes to its standards development activities. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, ASTM has provided an updated list of current, ongoing ASTM activities originating between December 5, 2019 and February 10, 2020, designated as Work Items. A complete listing of ASTM Work Items, along with a brief description of each, is available at *http://www.astm.org.*

On September 15, 2004, ASTM filed its original notification pursuant to Section 6(a) of the Act.

The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on November 10, 2004 (69 FR 65226).

The last notification with the Department was filed on December 11, 2019. A notice was filed in the **Federal Register** on January 9, 2020 (85 FR 1184).

Suzanne Morris,

Chief, Premerger and Division Statistics Unit, Antitrust Division.

[FR Doc. 2020–03985 Filed 2–26–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Cooperative Research Group on Hedge IV

Notice is hereby given that, on January 28, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Southwest Research Institute—Cooperative Research Group on HEDGE IV (''HEDGE IV'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Hanon Systems USA, LLC, Van Buren Twp., MI, has withdrawn as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open and HEDGE IV intends to file additional written notifications disclosing all changes in membership.

On February 14, 2017, HEDGE IV, filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on March 27, 2017 (82 FR 15238).

The last notification was filed with the Department on April 25, 2019. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on July 10, 2019 (84 FR 32950).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2020–04013 Filed 2–26–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Chede–8

Notice is hereby given that, on February 6, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), CHEDE–8 (''CHEDE–8'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Gamma Technologies, Westmont, IL, and Jacobs Vehicle Systems, Bloomfield, CT, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and CHEDE–8 intends to file additional written notifications disclosing all changes in membership.

On December 4, 2019, CHEDE–8 filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on December 30, 2019 (84 FR 71977).

The last notification was filed with the Department on January 7, 2020. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on January 30, 2020, (85 FR 5477).

Suzanne Morris,

Chief, Premerger and Division Statistics Unit, Antitrust Division.

[FR Doc. 2020–03998 Filed 2–26–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—National Spectrum Consortium

Notice is hereby given that, on January 21, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), National Spectrum Consortium (''NSC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Rutgers, The State University of New Jersey, North Brunswick, NJ; NewEdge Signal Solutions LLC, Ayer, MA; Stratom, Inc., Boulder, CO; Whitney Strategic Services, LLC, New York, NY; Jacobs Technology, Tullahoma, TN; AECOM Management Services, Germantown, MD; University of Texas at San Antonio, San Antonio, TX; Wireless Research Center of North Carolina, Wake Forest, NC; Q Networks, LLC, Menlo Park, CA; Associated Universities, Inc., Washington, DC; IOMAXIS, LLC, Lorton, VA; ReFirm Labs, Inc., Fulton, MD; Ultra Communications, Inc., Vista, CA; Sprint Solutions, Inc., Overland Park, KS; Signal Point Systems, Inc., Kennesaw, GA; BlackHorse Solutions Incorporated, Herndon, VA; Bridge 12 Technologies, Framingham, MA; Power Fingerprinting Inc., Vienna, VA; Two Six Labs, LLC, Arlington, VA; Sentrana, Arlington, VA; Pi Radio Inc., Brooklyn, NY; George Mason University, Fairfax, VA; Deloitte Consulting, LLP, Arlington, VA; DTC Communications, Inc., Herndon, VA; Spectral Labs Incorporated, San Diego, CA; The University of Texas at Dallas, Richardson, TX; MW Ventures LLC, DBA Social Mobile, Miami, FL; Riverside Research Institute, New York, NY; KPMG LLP, McLean, VA; Omnispace, Tysons, VA; Florida Atlantic University, Boca Raton, FL; University of South Carolina, Columbia, SC; Parallel Wireless, Inc., Nashua, NH; Concurrent Technologies Corporation, Johnstown, PA; Aether Argus Inc., Atlanta, GA; Selex Galileo Inc., Arlington, VA; NEC Corporation of America, Irving, TX; AiRANACULUS, Chelmsford, MA; and The Kenjya-Trusant Group, LLC, Columbia, MD, have been added as parties to this venture.

Also, Stryke Industries, LLC, Fort Wayne, IN; Vision Engineering Solutions, Inc., Merritt Island, FL; Agile Communications, Inc., El Segundo, CA; and Avionics Test & Analysis Corporation, Niceville, FL, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and NSC intends to file additional written notifications disclosing all changes in membership.

On September 24, 2014, NSC filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on November 4, 2014 (79 FR 65424).

The last notification was filed with the Department on October 23, 2019. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on November 13, 2019 (84 FR 61657).

Suzanne Morris,

Chief, Premerger and Division Statistics Unit, Antitrust Division.

[FR Doc. 2020–03986 Filed 2–26–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—R Consortium, Inc.

Notice is hereby given that, on February 4, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), R Consortium, Inc. (''R Consortium'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, ThinkR, Aubervilliers, FRANCE; and Merck & Co. Inc., Kenilworth, NJ, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open and R Consortium intends to file additional written notifications disclosing all changes in membership.

On September 15, 2015, R Consortium filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on October 2, 2015 (80 FR 59815).

The last notification was filed with the Department on August 6, 2019. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on August 16, 2019 (84 FR 42012).

Suzanne Morris,

Chief, Premerger and Division Statistics Unit Antitrust Division.

[FR Doc. 2020–04011 Filed 2–26–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—The Open Group, L.L.C.

Notice is hereby given that, on February 14, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), The Open Group, L.L.C. (''TOG'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Acuity Risk Management LLP, London, UNITED KINGDOM; AppTik BVBA, Kraainem, BELGIUM; Beijing Sky Management Consulting Co., Ltd, Beijing, PEOPLE'S REPUBLIC OF CHINA; Belmont Technology Inc., Houston, TX; Beniva Consulting Group, Houston, TX; CEGAL AS, Stavanger, NORWAY; Department of Defense—System Engineering, Fort Meade, MD; Digital India Corporation, New Delhi, INDIA; Elasticsearch,Inc., Mountain View, CA; Encana Corporation, Calgary, CANADA; Epiq Design Solutions, Schaumburg, IL; geoLOGIC Systems Limited, Calgary, CANADA; Getech Group plc, Leeds, UNITED KINGDOM; Hawaiian Electric Company, Honolulu, HI; Integrated Geochemical Interpretation Limited, Bideford, UNITED KINGDOM; Iraya Energies SDN BHD, Kuala Lumpur, MALAYSIA; Japan Oil, Gas and Metals National Corporation, Tokyo, JAPAN; Logtek AS, Stavanger, NORWAY; Lundin Norway

AS, Lysaker, NORWAY; MongoDB, New York NY; National Institute for Smart Government, Hyderabad, INDIA; Neptune Energy Norge AS, Sandnes, NORWAY; NetApp, Inc., Sunnyvale, CA; Nippon Telegraph & Telephone Corporation, Chiyoda-ku, JAPAN; NVIDIA, Santa Clara, CA; OMV Exploration & Production GmbH, Vienna, AUSTRIA; Optic Earth Limited, Aberdeen, SCOTLAND; Petrolink Technical Services, INC., Houston, TX; Professional Petroleum Data Management Association, Calgary, CANADA; PTT Exploration and Production, Bangkok, THAILAND; QRC Technologies, LLC, Fredericksburg, VA; Quint Technology, B.V., Amstelveen, THE NETHERLANDS; Rapita Systems, Inc., Novi, MI; Resoptima AS, Oslo, NORWAY; Riversand Technology, Houston, TX; RoQC Data Management AS, Sandnes, NORWAY; Shenzhen Tecsoon Information Technology Co. Ltd., People's Republic of China; SunDrill Energy Services, Houston, TX; SUPCON, Hangzhou, PEOPLE'S REPUBLIC OF CHINA; Tachyus Corporation, Berkeley, CA; TIBCO Software, Inc., Palo Alto, CA; Vedantas Limited (Cairn Oil & Gas), Gurgaon, INDIA; Visible Systems Corporation, Boston, MA; and Wittij Consulting, Smithfield, RI, have been added as parties to this venture.

Also, Alternatives Technology Co., Riyadh, SAUDI ARABIA; Anurag Group of Institutions, Hyderabad, INDIA; ARISE Consulting (SuZhou) Pte. Ltd., Shanghai, PEOPLE'S REPUBLIC OF CHINA; Australian Postal Corporation, Melbourne, AUSTRALIA; BASF Corporation, Florham Park, NJ; BMT Hi-Q Sigma Ltd, Bath, UNITED KINGDOM; EA Dynamics United Kingdom Ltd., Pontyclun, UNITED KINGDOM; EPFL/LICP, Lausanne, SWITZERLAND; Government of Andhra Pradesh, Vijayawada, INDIA; Holonix Srl, Milan, ITALY; HSBC, London, UNITED KINGDOM, JPrakash Consulting, Chennai, INDIA; LGS Innovatioins, Westminster, CO; Metaplexity Associates LLC, Bloomington, MN; Process Systems Enterprise Ltd., London, UNITED KINGDOM; Red Hat (R), Inc., Mountain View, CA; Relcom, Forest Grove, OR; Rogerson Kratos, Irvine, CA; Sanofi S.A., Bridgewater, NJ; Shenzhen Expressway Engineering Consultants Co. Ltd, Shenzhen, PEOPLE'S REPUBLIC OF CHINA; Shift Technologies LLC, Dubai, UNITED ARAB EMIRATES; SimVentions, Fredericksburg, VA; Symbiosis Institute of Telecom Management, Lavale, INDIA; University of Idaho, Center for Secure and Dependable Systems, Davis, CA; University of Wisconsin—Madison, Madison, WI; UTC Aerospace Systems, Westford, MA; XLENT IT Consulting, Sundsvall, SWEDEN; and Yash Consulting, Pvt. Ltd., Indore, INDIA, have withdrawn as parties to this venture.

In addition, L3 Technologies Inc. has changed its name to L3Harris Technologies, Inc., Melbourne, FL; and Anadarko Petroleum Corporation to Occidental Petroleum Corporation, The Woodlands, TX.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open and ''TOG'' intends to file additional written notifications disclosing all changes in membership.

On April 21, 1997, ''TOG'' filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 13, 1997 (62 FR 32371).

The last notification was filed with the Department on November 12, 2019. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on December 5, 2019 (84 FR 66696).

Suzanne Morris,

Chief, Premerger and Division Statistics Unit, Antitrust Division.

[FR Doc. 2020–03979 Filed 2–26–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Border Security Technology Consortium

Notice is hereby given that, on January 23, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Border Security Technology Consortium (''BSTC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, The University of Southern Mississippi, Hattiesburg, MS; Robotic Research, LLC, Gaithersburg, MD; Hamilton Sundstrand Corporation, San Dimas, CA; Tyto Athene, LLC, Herndon, VA; videoNEXT Federal, Inc., Reston, VA; Sev1Tech, LLC, Woodbridge, VA; and DRS Sustainment Systems, Inc., St. Louis, MO; have been added as parties to this venture.

Also, Verizon Business Network Services Inc., Ashburn, VA; Integration Innovation, Inc. (i3), Huntsville, AL; Echodyne Corp., Kirkland, WA; Applied Research Associates, Inc. (ARA), Albuquerque, NM; BEI Communications, Inc. DBA BEI Security, San Antonio, TX; Cambridge International Systems, Inc., Arlington, VA; Adelos, Inc., Polson, MT; DRS Tactical Systems, Inc., Mebourne, FL; SRI International, Menlo Park, CA; Thruvision Inc., Ashburn, VA; MRIGlobal, Kansas City, MO; videoNEXT Federal, Inc., Reston, VA; Kratos Defense & Rocket Support Services, Inc., Huntsville, AL; and Aventura Technologies, Inc., Hauppauge, NY; have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open and BSTC intends to file additional written notifications disclosing all changes in membership.

On May 30, 2012, BSTC filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 18, 2012 (77 FR 36292).

The last notification was filed with the Department on November 11, 2019. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on December 5, 2019 (84 FR 66696).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2020–04027 Filed 2–26–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Institute of Electrical and Electronics Engineers

Notice is hereby given that, on February 6, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), the Institute of Electrical and Electronics Engineers (''IEEE'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing additions or changes to its standards development

activities. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, 30 new standards have been initiated and 18 existing standards are being revised. More detail regarding these changes can be found at: *https://standards.ieee.org/about/sasb/sba/sept2019.html*.

On February 8, 2015, the IEEE Board of Directors approved an update of the IEEE patent policy for standards development, which became effective on 15 March 2015. The updated policy is available at *http://standards.ieee.org/develop/policies/bylaws/approved-changes.pdf* and, from the effective date, will be available at *http://standards.ieee.org/develop/policies/bylaws/sect6-7.html*.

On September 17, 2004, IEEE filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on November 3, 2004 (69 FR 64105).

The last notification was filed with the Department on September 10, 2019. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on October 30, 2019 (84 FR 58172).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2020–03978 Filed 2–26–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Pistoia Alliance, Inc.

Notice is hereby given that, on February 6, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. Section 4301 seq. (the ''Act''), Pistoia Alliance, Inc. filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Molecule One sp.z 0.0., Warszawa, POLAND; Innoplexus AG, Eschborn, GERMANY; Tom Flores (individual member), Cambridgeshire, UNITED KINGDOM; Vyasa Analytics, Newburyport, MA; Ataxia UK, London, UNITED KINGDOM; The Institute of Cancer Research, Sutton, UNITED KINGDOM; Glyn Williams (individual member), Guildford, UNITED KINGDOM; CSL Behring, Parkville, AUSTRALIA; and John Conway (individual member), Hereford, PA have been added as parties to this venture. Also, grit42, Copenhagen, DENMARK has withdrawn as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Pistoia Alliance, Inc. intends to file additional written notifications disclosing all changes in membership.

On May 28, 2009, Pistoia Alliance, Inc. filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on July 15, 2009 (74 FR 34364).

The last notification was filed with the Department on November 29, 2019. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on January 9, 2020 (85 FR 1183).

Suzanne Morris,

Chief, Premerger and Division Statistics Unit, Antitrust Division.

[FR Doc. 2020–03973 Filed 2–26–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Undersea Technology Innovation Consortium

Notice is hereby given that, on January 21, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Undersea Technology Innovation Consortium (''UTIC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, AVL Powertrain Engineering, Inc., Plymouth, MI; CAMX Power LLC, Lexington, MA; Embry-Riddle Aeronautical University, Daytona Beach, FL; Graphene Composites USA, Inc., Providence, RI; I Square Systems, LLC, Middletown, RI; Klein Marine Systems, Inc., Salem, NH; Systima Technologies, Inc., Kirkland, WA; Triumph Enterprises, Inc., Vienna, VA; University of South Carolina (U.S.C.), Columbia, SC; W R Systems, Ltd., Fairfax, VA; and Xilectric Inc., Fall River, MA have been added as parties to this venture.

Also, Cydecor, Inc., Arlington, VA; Global Foundation for Ocean Exploration, West Redding, CT; GLX Power Systems Inc., Cleveland, OH; Linden Photonics Inc., Westford, MA; MACSEA Ltd., Stonington, CT; Northeastern University, Burlington, MA; Prescient Edge Corporation, McLean, VA; Psionic, LLC, Hampton, VA; QuickFlex Inc., San Antonio, TX; TDI Technologies, Inc., King of Prussia, PA; and Tethers Unlimited, Inc., Bothell, WA have withdrawn as parties from this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and UTIC intends to file additional written notifications disclosing all changes in membership.

On October 9, 2018, UTIC filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on November 2, 2018 (83 FR 55203).

The last notification was filed with the Department on October 15, 2019. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on November 12, 2019 (84 FR 61070).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2020–04014 Filed 2–26–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

Proposed Extension of Existing Collection; Comment Request; Administration of the Longshore and Harbor Workers' Compensation Act

AGENCY: Division of Longshore and Harbor Worker's Compensation, Office of Workers' Compensation Program, Department of Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is soliciting comments concerning a proposed extension for the authority to conduct the information collection request (ICR) titled, ''Administration of the Longshore and

Harbor Workers' Compensation Act.'' This comment request is part of continuing Departmental efforts to reduce paperwork and respondent burden in accordance with the Paperwork Reduction Act of 1995 (PRA).

DATES: Consideration will be given to all written comments received by April 27, 2020. Please note that this collection contains the request for approval of one additional form, LS–272—Application to Write Longshore Insurance.

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 for free by contacting Anjanette Suggs by telephone at 202–354–9660 or by email at *suggs.anjanette@dol.gov.*

Submit written comments about this ICR by mail or courier to the U.S. Department of Labor, Office of Workers' Compensation Programs, Room S3323, 200 Constitution Avenue NW, Washington, DC 20210; or by email at *suggs.anjanette@dol.gov.* Please note that comments submitted after the comment period will not be considered.

FOR FURTHER INFORMATION CONTACT: Anjanette Suggs by telephone at 202–354–9660 or by email at *suggs.anjanette@dol.gov.*

SUPPLEMENTARY INFORMATION: The DOL, as part of continuing efforts to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies an opportunity to comment on proposed and/or continuing collections of information before submitting them to the OMB for final approval. This program helps to ensure 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 can be properly assessed.

The Office of Workers' Compensation Programs (OWCP) administers the Longshore and Harbor Workers' Compensation Act (LHWCA). LHWCA provides benefits to workers injured in maritime employment on the navigable waters of the United States or in an adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel. In addition, several Acts extend the Longshore Act's coverage to certain other employees.

The Secretary of Labor has authority to make rules and regulations to establish procedures which are necessary or appropriate to carry out the provisions of the Act. 33 U.S.C. 939, 944. The Secretary has delegated that authority to the Director, Office of Workers' Compensation Programs. Secretary's Order 10–2009; Public Law 111–5 § 803, 123 Stat. 115, 187 (2009).

A claimant's social security number may be requested pursuant to Public Law 103–112 and the regulations at 20 CFR 702.202 and 702.221. 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.

Interested parties are encouraged to provide comments to the contact shown in the **ADDRESSES** section. Written comments will receive consideration, and summarized and included in the request for OMB approval of the final ICR. In order to help ensure appropriate consideration, comments should mention OMB No. 1240–0014.

Submitted comments will also be a matter of public record for this ICR and posted on the internet, without redaction. The DOL encourages commenters not to include personally identifiable information, confidential business data, or other sensitive statements/information in any comments.

The DOL 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—Office of Workers' Compensation Programs.

Type of Review: Revision.

Title of Collection: Regulations governing the administration of the Longshore and Harbor Workers' Compensation Act.

Form:

LS–200 (20 CFR 702.285)
20 CFR 702.162 (Liens)
20 CFR 702.174 (Certifications)
20 CFR 702.175 (Reinstatements)
20 CFR 702.242 (Settlement Applications)
20 CFR 702.321 (Section 8(f) Payments)
ESA–100 (20 CFR 702.201)
LS–271 (Application for Self-Insurance)
LS–272 (Application to Write Longshore Insurance)
LS–274 (Report of Injury Experience of Insurance Carrier or Self-Insured Employer)
LS–201 (Notice of Employee's Injury or Death)
LS–513 (Report of Payments)
LS–267 (Claimant's Statement)
LS–203 (Employee's Claim for Compensation)
LS–204 (Attending Physician's Supplementary Report)
LS–262 (Claim for Death Benefits)

OMB Control Number: 1240–0014.

Affected Public: Private Sector.

Estimated Number of Respondents: 53,842.

Frequency: On occasion.

Total Estimated Annual Responses: 53,842.

Estimated Average Time per Response: 1.11 hours.

Estimated Total Annual Burden Hours:

Burden summary	Hours
LS–200 (20 CFR 702.285)	349
20 CFR 702.162 (Liens)	5
20 CFR 702.174 (Certifications)	4
20 CFR 702.175 (Reinstatements)	1
20 CFR 702.242 (Settlement Applications	4,080
20 CFR 702.321 (Section 8(f) Payments)	2,900

Burden summary	Hours
ESA–100 (20 SFR 702.201)	840
LS–271 (Self Insurance Application)	27
LS–272 (Application to write Longshore Insurance)	30
LS–274 (Injury Report of Insurance Carrier and Self-Insured Employer)	552
LS–201 (Injury or Death Notice)	250
LS–513 (Payment Report)	271
LS–267 (Claimant's Statement)	25
LS–203 (Employee Comp. Claim)	1,148
LS–204 (Medical Report)	10,200
LS–262 (Claim for Death Benefits)	70
Total Burden Hours	20,752

Total Estimated Annual Other Cost Burden: $9,524.76.

(Authority: 44 U.S.C. 3506(c)(2)(A))

Anjanette Suggs,

Agency Clearance Officer.

[FR Doc. 2020–03910 Filed 2–26–20; 8:45 am]

BILLING CODE P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (20–019)]

NASA Advisory Council; Human Explorations and Operations Committee; Meeting

AGENCY: National Aeronautics and Space Administration

ACTION: Notice of meeting postponement.

SUMMARY: In accordance with the Federal Advisory Committee Act, the National Aeronautics and Space Administration (NASA) announces that the planned meeting on March 3–4, 2020, of the Human Exploration and Operations Committee of the NASA Advisory Council (NAC) is being postponed until further notice.

SUPPLEMENTARY INFORMATION: This meeting was announced in the **Federal Register** on February 14, 2020 (REF: **Federal Register**/Vol. 85, No. 31/Friday, February 14, 2020/Notices; page 8613). The postponement of this meeting is due to NASA programmatic priorities and scheduling conflicts. NASA will announce the new dates for this meeting in a future **Federal Register** notice.

Patricia Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2020–04025 Filed 2–26–20; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL TRANSPORTATION SAFETY BOARD

Sunshine Act Meeting

The National Transportation Safety Board is holding this meeting under the Government in the Sunshine Act, 5 U.S.C. 552(b).

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: 85 FR 7610 (February 10, 2020).

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: 9:30 a.m., Tuesday, February 25, 2020.

CHANGES TO THE MEETING (TIME): 1:00 p.m., Tuesday, February 25, 2020.

CONTACT PERSON FOR MORE INFORMATION: Candi Bing at (202) 314–6403 or by email at *bingc@ntsb.gov*.

Dated: Thursday, February 24, 2020.

LaSean R McCray,

Alternate Federal Register Liaison Officer.

[FR Doc. 2020–04070 Filed 2–25–20; 11:15 am]

BILLING CODE 7533–01–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: 3206–0141, Health Benefits Election Form, OPM 2809

AGENCY: Office of Personnel Management.

ACTION: 30-Day notice and request for comments.

SUMMARY: The Healthcare & Insurance/ Federal Employee Insurance Operations (FEIO) offers the general public and other federal agencies the opportunity to comment on a revised information collection request OPM 2809, Health Benefits Election Form.

DATES: Comments are encouraged and will be accepted until March 30, 2020.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503, Attention: Desk Officer for the Office of Personnel Management or sent via electronic mail to: *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of this information collection, with applicable supporting documentation, may be obtained by contacting the Retirement Services Publications Team, Office of Personnel Management, 1900 E Street NW, Room 3316–L, Washington, DC 20415, Attention: Cyrus S. Benson, or sent via electronic mail to *Cyrus.Benson@opm.gov* or faxed to (202) 606–0910 or via telephone at (202) 606–4808.

SUPPLEMENTARY INFORMATION: As required by the Paperwork Reduction Act of 1995 OPM is soliciting comments for this collection. The information collection (OMB No. 3206–0141) was previously published in the **Federal Register** on August 20, 2019 at 84 FR 43191, allowing for a 60-day public comment period. No comments were received for this collection. The purpose of this notice is to allow an additional 30 days for public comments. The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or

other forms of information technology, *e.g.,* permitting electronic submissions of responses.

OPM 2809, Health Benefits Election form, is used by annuitants and former spouses to elect, cancel, suspend, or change health benefits enrollment during periods other than open season.

Analysis

Agency: Retirement Operations, Retirement Services, Office of Personnel Management.

Title: Health Benefits Election Form.

OMB Number: 3206–0141.

Frequency: On Occasion.

Affected Public: Individuals or Households.

Number of Respondents: 30,000.

Estimated Time per Respondent: 30 minutes.

Total Burden Hours: 11,667.

Office of Personnel Management.

Alexys Stanley,

Regulatory Affairs Analyst.

[FR Doc. 2020–03937 Filed 2–26–20; 8:45 am]

BILLING CODE 6325–38–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2020–96 and CP2020–98; CP2020–99]

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:* March 2, 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).:* MC2020–96 and CP2020–98; *Filing Title:* USPS Request to Add Priority Mail Contract 594 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* February 21, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3020.30 *et seq.,* and 39 CFR 3015.5; *Public Representative:* Christopher C. Mohr; *Comments Due:* March 2, 2020.

2. *Docket No(s).:* CP2020–99; *Filing Title:* Notice of United States Postal Service of Filing a Functionally Equivalent Global Expedited Package Services 10 Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal; *Filing Acceptance Date:* February 21, 2020; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Curtis E. Kidd; *Comments Due:* March 2, 2020.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2020–04036 Filed 2–26–20; 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).

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* February 27, 2020.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on February 21, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 594 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–96, CP2020–98.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–03897 Filed 2–26–20; 8:45 am]

BILLING CODE 7710–12–P

RAILROAD RETIREMENT BOARD

Notice of Guidance Portal

AGENCY: Railroad Retirement Board.

ACTION: Establishment of portal to guidance documents.

SUMMARY: The Railroad Retirement Board has established a guidance portal on the agency website at *https://rrb.gov/guidance,* from which all agency guidance documents may be accessed.

FOR FURTHER INFORMATION CONTACT: Marguerite P. Dadabo, Assistant General

Counsel, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611–1275, (312) 751–4945, (TTD) (312) 751–4701.

SUPPLEMENTARY INFORMATION: Executive Order 13891, issued October 9, 2019, and OMB Memorandum 20–02, issued October 31, 2019, require each agency by February 28, 2020 to establish a single, searchable, indexed website that contains, or links to, all of the agencies' guidance documents currently in effect. The Railroad Retirement Board has established the required guidance portal on its website, *https://rrb.gov/guidance.*

Dated: February 24, 2020.

Stephanie Hillyard,

Secretary to the Board.

[FR Doc. 2020–04030 Filed 2–26–20; 8:45 am]

BILLING CODE P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88262; File No. SR–FICC–2019–007]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Order Approving a Proposed Rule Change Regarding the Close-Out and Funds-Only Settlement Processes Associated With the Sponsoring Member/ Sponsored Member Service

February 21, 2020.

I. Introduction

On December 27, 2019, Fixed Income Clearing Corporation (''FICC'') 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] proposed rule change SR–FICC–2019–007. The proposed rule change was published for comment in the **Federal Register** on January 10, 2020.[3] The Commission did not receive any comment letters on the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description of the Proposed Rule Change

FICC proposes to modify its Government Securities Division (''GSD'') Rulebook (''Rules'')[4] in order to facilitate the submission of repurchase transactions (''repos'') with a scheduled final settlement date beyond the next Business Day after the initial settlement date (''term repo activity'') through the Sponsoring Member/ Sponsored Member Service (''Service'')[5] by: (1) Providing a mechanism by which a Sponsoring Member may cause the termination and liquidation of a Sponsored Member's positions arising from trades between the Sponsoring Member and its Sponsored Member that have been novated to FICC; and (2) revising how FICC calculates the funds-only settlement obligations of Sponsored Members and Sponsoring Members with respect to Sponsored Member Trades that have haircuts[6] in order to ensure that the calculation does not result in a return of the haircuts until final settlement. In addition, FICC proposes to make several clarifying and technical changes to the Rules.

A. Background

FICC operates two divisions, GSD and the Mortgage Backed Securities Division (''MBSD''). GSD provides trade comparison, netting, risk management, settlement, and central counterparty services for the U.S. Government securities market. MBSD provides the same services for the U.S. mortgage-backed securities market. GSD and MBSD maintain separate sets of rules, margin models, and clearing funds. The proposed rule change relates solely to GSD.

Under the GSD Rules, certain FICC members are permitted to act as ''Sponsoring Members'' to sponsor into FICC membership qualified institutional buyers as defined by Rule 144A[7] under the Securities Act of 1933, as amended (''Securities Act''),[8] and certain legal entities that, although not organized as entities specifically listed in paragraph (a)(1)(i) of Rule 144A under the Securities Act, satisfy the financial requirements necessary to be qualified institutional buyers as specified in that paragraph (''Sponsored Members'').[9]

A Sponsoring Member is permitted to submit to FICC, for comparison, novation, and netting, certain types of eligible securities transactions between itself and its Sponsored Members (''Sponsored Member Trades'').[10] The Sponsoring Member is required to establish an omnibus account at FICC for its Sponsored Members' positions arising from such Sponsored Member Trades (''Sponsoring Member Omnibus Account''),[11] which is separate from the Sponsoring Member's regular netting accounts. For operational and administrative purposes, FICC interacts solely with the Sponsoring Member as agent for purposes of the day-to-day satisfaction of its Sponsored Members' obligations to or from FICC, including their securities and funds-only settlement obligations.[12] Additionally, for operational convenience, FICC calculates a single Net Settlement Obligation and Fail Net Settlement Obligation in each CUSIP for the Sponsoring Member Omnibus Account and associated Deliver Obligations and Receive Obligations.[13] Such calculations do not affect the Sponsored Member's obligations, which are calculated in a manner that is generally consistent with how FICC calculates the obligations of its other members.[14]

Sponsoring Members are also responsible for providing FICC with a Sponsoring Member Guaranty, whereby the Sponsoring Member guarantees to FICC the payment and performance by its Sponsored Members of their obligations under the Rules.[15] Although Sponsored Members are principally liable to FICC for their own settlement obligations under the Rules, the Sponsoring Member Guaranty requires the Sponsoring Member to satisfy those settlement obligations on behalf of a Sponsored Member if the Sponsored

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 87896 (January 6, 2020), 85 FR 1354 (January 10, 2020) (SR–FICC–2019–007) (''Notice'').

[4] Capitalized terms not defined herein are defined in the Rules, *available at http://www.dtcc.com/legal/rules-and-procedures.*

[5] The Service is primarily governed by Rule 3A, *supra* note 4.

[6] As used herein, the term ''haircut'' refers to the amount of collateral in excess of the value of the cash due to the Sponsored Member client at the close leg of the Sponsored Member Trade.

[7] 17 CFR 230.144A.

[8] 15 U.S.C. 77a *et seq.*

[9] Rule 3A (Sponsoring Members and Sponsored Members), *supra* note 4.

[10] Rule 1, definition of ''Sponsored Member Trade''; Rule 3A, Sections 6(b) and 7(a), *supra* note 4. Securities Exchange Act Release No. 85470 (March 29, 2019), 84 FR 13328 (April 4, 2019) (SR–FICC–2018–013) expanded the definition of ''Sponsored Member Trade'' to include certain types of eligible securities transactions between a Sponsored Member and a FICC member other than the Sponsoring Member. However, this proposed rule change applies only to Sponsored Member Trades between the Sponsoring Member and its Sponsored Member.

[11] Rule 1, definition of ''Sponsoring Member Omnibus Account,'' *supra* note 4.

[12] Rule 3A, Sections 5, 6, 7, 8, and 9, *supra* note 4.

[13] Rule 3A, Section 8(b), *supra* note 4. *See also* Rule 3A, Section 7(a), *supra* note 4.

[14] Rule 3A, Section 7, *supra* note 4.

[15] Section 2(c) of Rule 3A states: ''Each Netting Member to become a Sponsoring Member shall also sign and deliver to [FICC] a Sponsoring Member Guaranty. . . .'' A ''Sponsoring Member Guaranty'' is defined in Rule 1 as ''a guaranty . . . that a Sponsoring Member delivers to [FICC] whereby the Sponsoring Member guarantees to [FICC] the payment and performance by its Sponsored Members of their obligations under [the] Rules, including, without limitation, all of the securities and funds-only settlement obligations of its Sponsored Members under [the] Rules.'' Rule 1; Rule 3A, Section 2(c), *supra* note 4.

Member defaults and fails to perform its settlement obligations.[16]

Although the Rules currently permit Sponsoring Members to submit term repo activity within the Service,[17] most of the Sponsored Member Trades submitted to FICC by Sponsoring Members have a scheduled settlement date of the next Business Day after the initial settlement date (*i.e.,* overnight repo). FICC believes that certain provisions of the Rules discourage the submission of term repo activity within the Service, as discussed more fully below.

B. Termination and Liquidation of Defaulting Sponsored Member Positions

The Rules governing the termination and liquidation of a defaulting member provide that if FICC ceases to act for a member (including a Sponsored Member), FICC will close-out the defaulting member's positions by (i) establishing a Final Net Settlement Position for each Eligible Netting Security with a distinct CUSIP equal to the net of all outstanding Deliver Obligations and Receive Obligations of the member in respect of the security, and (ii) taking market action to liquidate such Final Net Settlement Position.[18]

The Rules require a Sponsoring Member to advise FICC of circumstances that would require FICC to cease to act for a Sponsored Member.[19] Under the current Rules, FICC has the exclusive ability to terminate and liquidate a Sponsored Member's positions, even though the relevant Sponsoring Member is responsible for the Sponsored Member's payment and performance in respect of such positions.[20] The current Rules do not allow a Sponsoring Member to terminate or liquidate any Sponsored Member Trades.[21] FICC states that the inability of Sponsoring Members to terminate and liquidate Sponsored Member Trades is inconsistent with comparable intermediated relationships.[22] FICC states that in the context of such other intermediated relationships, the intermediary is typically permitted to terminate and liquidate the positions of a client that the intermediary guarantees if an event of default or other similar circumstance occurs under the agreement between the intermediary and the client.[23] In such scenarios, the intermediary's ability to terminate and liquidate its client's positions is not dependent on a third party's determination that a certain circumstance or event has occurred.[24] Instead, the intermediary and the client bilaterally agree to the circumstances and events that give rise to an event of default allowing the intermediary to terminate or liquidate the guaranteed positions.[25]

FICC states that the inability of a Sponsoring Member to terminate and liquidate its defaulting Sponsored Member's positions discourages term repo activity within the Service.[26] Specifically, under the current Rules, when a Sponsored Member defaults, FICC currently controls the termination and liquidation of the Sponsored Member's positions.[27] As such, during the time it would take FICC to terminate and liquidate the Sponsored Member's positions, the Sponsoring Member would effectively be forced to extend credit to the defaulting Sponsored Member under the Sponsored Member Guaranty if the positions involved term repo activity. Such a scenario could cause the Sponsoring Member to incur additional capital requirements until such time as FICC terminates and liquidates the Sponsored Member's positions.[28] Additionally, since FICC currently controls the termination and liquidation of the Sponsored Member's positions, FICC sets the applicable price, timing, and types of liquidation or hedging transactions. However, the Sponsoring Member would also likely enter into one or more transactions with third parties to hedge its own performance obligations under the Sponsoring Member Guaranty. Therefore, the Sponsoring Member would be exposed to potential risks associated with pricing and timing differences between its actions and those taken by FICC in the aftermath of a Sponsored Member default. FICC believes that these circumstances discourage Sponsoring Members from engaging in term repo activity within the Service.[29]

In order to encourage and facilitate term repo activity within the Service, FICC proposes to amend the Rules to allow a Sponsoring Member to terminate and liquidate a defaulting Sponsored Member's positions arising from Sponsored Member Trades.[30] Specifically, in the event (i) a Sponsoring Member triggers the termination of a Sponsored Member's positions, or (ii) FICC ceases to act for the Sponsored Member and the Sponsoring Member does not continue to perform the obligations of the Sponsored Member, both the Sponsored Member's positions and the Sponsoring Member's corresponding positions arising from the Sponsored Member Trades would be terminated. The Sponsoring Member would calculate a net liquidation value of such terminated positions (*i.e.,* Final Net Settlement Positions), whose liquidation values would be paid either to or by the Sponsored Member by or to the Sponsoring Member.[31] The Final Net Settlement Position would equal the net of all outstanding Deliver Obligations and Receive Obligations of the Sponsored Member or Sponsoring Member with respect to each security with a distinct CUSIP number.

The Sponsoring Member would liquidate the Final Net Settlement Positions by establishing a ''Sponsored Member Liquidation Amount'' and a ''Sponsoring Member Liquidation Amount,'' which would be identical to, but in the opposite direction of, each other.[32] If a Sponsored Member Liquidation Amount is due to FICC, the Sponsoring Member would be obligated to pay such Sponsored Member Liquidation Amount to FICC under the Sponsoring Member Guaranty, and this obligation would automatically be set off against the obligation of FICC to pay the corresponding Sponsoring Member Liquidation Amount to the Sponsoring Member. By virtue of such setoff, the Sponsored Member's obligation to FICC would be discharged, as would FICC's obligation to the Sponsoring Member. The Sponsoring Member may, however, have a reimbursement claim against the Sponsored Member in an amount equal

[16] *Id.*

[17] Rule 3A, Section 5, *supra* note 4.

[18] Rule 22A, Section 2(b); Rule 3A, Sections 13(c) and 15(b), *supra* note 4.

[19] Rule 3A, Section 15(a), *supra* note 4.

[20] Rule 3A, Section 13(c) and 15(b), *supra* note 4.

[21] *Id.*

[22] Notice, *supra* note 3 at 1355.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] Rule 3A, Section 13(c) and 15(b), *supra* note 4.

[28] *Id.*

[29] Notice, *supra* note 3 at 1355–56.

[30] The proposal would only cover Sponsored Member Trades between a Sponsored Member and its Sponsoring Member. *See supra* note 9. Additionally, the proposal would not cover scenarios in which FICC has ceased to act for the relevant Sponsoring Member or in the event of a FICC default. Such scenarios would be governed by current Rules 22A and 22B, respectively. Notice, *supra* note 3 at 1356–57.

[31] FICC intended that the proposal for the Sponsoring Member to establish the Final Net Settlement Position would align with current Rule 22A, which provides for FICC to establish the Final Net Settlement Position when it ceases to act for a member.

[32] Therefore, if FICC were to owe the Sponsored Member Liquidation Amount to the Sponsored Member, the Sponsoring Member would owe the Sponsoring Member Liquidation Amount to FICC. By the same token, if the Sponsored Member were to owe the Sponsored Member Liquidation Amount to FICC, FICC would owe the Sponsoring Member the Sponsoring Member Liquidation Amount. In all instances, FICC would owe and be owed the same amount of money. Notice, *supra* note 3 at 1357.

to the Sponsored Member Liquidation Amount.[33]

If a Sponsored Member Liquidation Amount were owed by FICC to the Sponsored Member, the Sponsoring Member would satisfy that obligation by transferring the Sponsored Member Liquidation Amount to the account at the Funds-Only Settling Member Bank at which the Sponsoring Member maintains Funds-Only Settlement Amounts related to its Sponsored Member Omnibus Account. To the extent the Sponsoring Member makes such a transfer, it would discharge FICC's obligation to transfer the Sponsored Member Liquidation Amount to the Sponsored Member and the Sponsoring Member's corresponding obligation to transfer the Sponsoring Member Liquidation Amount to FICC. FICC would not, as a practical matter, be involved in the settlement of the foregoing liquidating transactions (*i.e.,* FICC would not need to take any market action), because the termination of the Sponsored Member's positions and the corresponding Sponsoring Member's positions would leave FICC flat.

The proposal also provides that the Sponsoring Member would indemnify FICC for any claim by a Sponsored Member arising out of the Sponsoring Member's calculation of the net liquidation value. Finally, the proposal includes a provision that a Sponsoring Member may take a security interest in FICC's obligations to the Sponsored Member. Such security interest would not impose new obligations on FICC, but could allow the Sponsoring Member to direct FICC to submit payments due to the Sponsored Member to the Sponsoring Member, so that the Sponsoring Member can apply such amounts to the Sponsored Member's unsatisfied obligations to the Sponsoring Member. The proposal would also provide that FICC's security interest in the Sponsored Member's assets [34] would be subordinated to the Sponsoring Member's security interest. However, as noted above, if a Sponsored Member Liquidation Amount is due to FICC, the Sponsoring Member would be obligated to pay such Sponsored Member Liquidation Amount to FICC under the Sponsoring Member Guaranty, and this obligation would automatically be set off against the obligation of FICC to pay the corresponding Sponsoring Member Liquidation Amount to the Sponsoring Member. As such, the Sponsored Member's obligation to FICC would be discharged (as would FICC's obligation to the Sponsoring Member), and FICC would not need to look to the Sponsored Member or its assets for performance in respect of the terminated positions.

FICC believes that the proposal to provide Sponsoring Members with the ability to terminate and liquidate a defaulting Sponsored Member's positions would remove the potential risks to Sponsoring Members described above stemming from the exclusive ability of FICC to terminate and liquidate the Sponsored Member's positions under the current Rules. With this new ability, in the context of a Sponsored Member default involving term repo activity, the Sponsoring Member would control the termination and liquidation of the Sponsored Member's positions. In contrast to the current Rules, the Sponsoring Member would not be compelled to shoulder risks and extend credit to its defaulting Sponsored Member during the time it would otherwise take FICC to terminate and liquidate the Sponsored Member's positions. Therefore, FICC believes that the proposal would encourage and facilitate term repo activity within the Service.[35]

C. Haircuts on Sponsored Member Trades

In some Sponsored Member Trades, a Sponsoring Member may choose to post to its Sponsored Member client a haircut. Similarly in some circumstances, a Sponsoring Member may choose to collect a haircut from its Sponsored Member client to mitigate the Sponsoring Member's exposure under the Sponsoring Member Guaranty. In both scenarios, the intent of the parties is for the haircut recipient to retain the haircut for the duration of the Sponsored Member Trade, which, in the context of term repo activity, would be the scheduled final settlement date beyond the next Business Day after the initial settlement date. FICC states that Sponsoring Members and Sponsored Members might have accounting considerations that would favor facilitating the posting of haircuts through FICC's systems.[36] However, under the current Rules regarding FICC's funds-only settlement process, a Sponsored Member or Sponsoring Member that received a haircut at the Start Leg of a Sponsored Member Trade would be required to transfer an amount of cash equal to the haircut (plus or minus any interim mark-to-market movements) on the next Business Day after the Start Leg has settled.[37] Specifically, FICC's standard funds-only settlement process involves marking to market twice each Business Day all positions associated with term repo activity, including any Sponsored Member Trade with a Close Leg that is scheduled to occur two or more Business Days after the settlement of the Start Leg.[38] FICC calculates a ''Collateral Mark'' equal to the absolute value of the difference between (i) a Sponsored Member Trade's Contract Value (*i.e.,* the dollar value at which it is due to finally settle), and (ii) its Market Value (*i.e.,* FICC's system price of the securities underlying the transaction). This Collateral Mark is incorporated into the calculation of certain of the Funds-Only Settlement Amounts payable.[39] When the Market Value exceeds the Contract Value, the Collateral Mark is negative for, and thus payable by, the party with a Net Short Position (*i.e.,* the party required to deliver securities at final settlement). Therefore, the purpose of the haircut would be frustrated because if the haircut is returned before final settlement of a Sponsored Member Trade, the party that was supposed to retain the haircut for the duration of that trade would cease to be over-collateralized, thus defeating the contractual intent of the parties.

FICC proposes to amend the Rules to ensure that haircuts in the scenario described above are not returned until final settlement. Specifically, FICC would amend Section 9(a) of Rule 3A to provide that, if the parties to a Sponsored Member Trade agree for such Sponsored Member Trade to have a haircut, then any Funds-Only Settlement Amount applicable to such Sponsored Member Trade that includes a Collateral Mark would be calculated without regard for the Collateral Mark. Such Collateral Mark would be replaced by either a ''Haircut Deficit'' or ''Haircut Surplus.'' A Haircut Deficit would exist if the amount by which the Market Value as of the settlement date of the Start Leg exceeded the Contract Value of the Close Leg (the ''Initial Haircut'') is

[33] Such reimbursement claim would not be governed by the Rules, but instead, would be subject to the terms of the bilateral agreement between the Sponsoring Member and Sponsored Member. *Id.*

[34] Under the current Rules, each Sponsored Member grants to FICC a security interest in all assets and property placed by the Sponsored Member in the possession of FICC in order to secure the obligations of the Sponsored Member to FICC. Rule 3A, Section 8(g), *supra* note 4. This security interest provides FICC with credit support in the event that it must terminate and liquidate the Sponsored Member's positions and assert a claim against the Sponsored Member. Notice, *supra* note 3 at 1358.

[35] Notice, *supra* note 3 at 1356.

[36] Notice, *supra* note 3 at 1358.

[37] Rule 13, *supra* note 4.

[38] *Id.*

[39] *Id.*

greater than the amount by which the Market Value as of the time of measurement exceeds the Contract Value of the Close Leg (the ''Current Haircut''). Any Haircut Deficit would be payable by the party with a Net Long Position. A ''Haircut Surplus'' would exist if the Current Haircut exceeds the Initial Haircut, and any Haircut Surplus would be payable by the party with a Net Short Position. FICC would also amend Section 9(a) of Rule 3A to make clear that any Initial Haircut would be as agreed between the parties to the Sponsored Member Trade, and that FICC would not be under any obligation to verify the parties' agreement with respect to any Initial Haircut, and its calculation of the Initial Haircut would be conclusive and binding on the parties.

FICC believes that the proposed changes described above would enable a Sponsoring Member and its Sponsored Member who intend for one of those two parties to remain over-collateralized for the duration of a Sponsored Member Trade to transfer a haircut between each other and allow such haircut to remain with the intended party until final settlement of the Sponsored Member Trade.[40] As such, the proposal would encourage and facilitate term repo activity within the Service.

D. Clarifications and Technical Changes

FICC proposes to make several clarifications and technical changes to Rule 3A. First, FICC would add a parenthetical to Section 8(c) to clarify that the operational netting provisions of Section 8(b) do not substantively modify a Sponsored Member's obligations to FICC. Section 8(b) provides that, for operational convenience, FICC calculates a single Net Settlement Position and Fail Net Settlement Position in each CUSIP for the Sponsoring Member's Sponsoring Member Omnibus Account.[41] Section 8(c), in turn, provides that each Sponsored Member shall satisfy its allocable portion of the Deliver Obligations and Receive Obligations established for the Sponsoring Member Omnibus Account.[42] Neither Section 8(b) nor Section 8(c) modifies the obligations of any Sponsored Member; rather, those provisions are simply designed for operational convenience. Each Sponsored Member still remains responsible for its Deliver Obligations Receive Obligations to and from FICC, which are calculated in accordance with Rule 3A, Section 7.[43] The Sponsored Member's allocable portion of the Deliver Obligations and Receive Obligations of the Sponsoring Member Omnibus Account will always equal its Deliver Obligations and Receive Obligations to and from FICC, as calculated under Rule 3A, Section 7.[44] Therefore, in order to eliminate doubt regarding the extent of the Sponsored Member's obligations upon a termination and liquidation of a Sponsored Member's positions under the proposed rule change, FICC proposes to add a parenthetical to Section 8(c) to clarify that a Sponsored Member's allocable portion of the obligations established for the Sponsoring Member Omnibus Account are the obligations of the Sponsored Member, as calculated in Rule 3A, Section 7.

Second, FICC would add language at the end of Sections 8(c) and 9(b) to clarify that, if a Sponsoring Member satisfies the net Deliver Obligations and Receive Obligations or the net Funds-Only Settlement Amount obligations of its Sponsoring Member Omnibus Account (including through the proposed setoff described above) before the Sponsoring Member receives corresponding performance from the Sponsored Member, such satisfaction would constitute performance by the Sponsoring Member under the Sponsoring Member Guaranty with respect to the relevant Sponsored Member's allocable portion of the Sponsoring Member Omnibus Account Deliver Obligations and Receive Obligations or Funds-Only Settlement Amount obligations. If a termination and liquidation were to occur, the Sponsoring Member would be required to perform on behalf of the Sponsored Member under the Sponsoring Member Guaranty. The added language at the end of Sections 8(c) and 9(b) is designed to ensure that, when the Sponsoring Member effects such performance, it would be entitled to reimbursement from the Sponsored Member.

Third, in connection with the proposed changes to Rule 3A, Section 9 regarding haircuts, FICC would make certain re-lettering and grammatical changes for clarity and readability. Finally, FICC would revise proposed Rule 3A, Section 9(c) to clarify that the Sponsored Member is responsible for satisfying the allocable portion of the Funds-Only Settlement Amount calculated for the Sponsoring Member Omnibus Account.

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act[45] 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 rules and regulations thereunder applicable to such organization. After carefully considering the proposed rule change, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to FICC. In particular, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act,[46] and Rule 17Ad–22(e)(21) promulgated under the Act,[47] for the reasons described below.

A. Consistency With Section 17A(b)(3)(F) of the Act

Section 17A(b)(3)(F) of the Act requires, in part, that the Rules of a clearing agency, such as FICC, be ''designed to promote the prompt and accurate clearance and settlement of securities transactions. . . .''[48]

As stated above in Section II.B., under the current Rules, FICC has the exclusive ability to terminate and liquidate a defaulting Sponsored Member's positions; the current Rules do not allow a Sponsoring Member to terminate and liquidate any Sponsored Member Trades. The inability on the part of Sponsoring Members to terminate and liquidate its defaulting Sponsored Member's positions discourages term repo activity within the Service because during the time it would take FICC to terminate and liquidate the Sponsored Member's positions, the Sponsoring Member would effectively be forced to extend credit to the defaulting Sponsored Member under the Sponsored Member Guaranty. In such a scenario, the Sponsoring Member could incur additional capital requirements until FICC completes the termination and liquidation of the Sponsored Member's positions. Additionally, since under the current Rules, FICC sets the applicable price, timing, and types of liquidation or hedging transactions, the Sponsoring Member would be exposed to potential risks associated with pricing and timing differences between its own hedging transactions and those taken by FICC in the aftermath of a Sponsored Member default. To avoid exposing Sponsoring

[40] Notice, *supra* note 3 at 1359.

[41] Rule 3A, Section 8(b), *supra* note 4.

[42] Rule 3A, Section 8(c), *supra* note 4.

[43] Rule 3A, Section 7, *supra* note 4.

[44] *Id.*

[45] 15 U.S.C. 78s(b)(2)(C).

[46] 15 U.S.C. 78q–1(b)(3)(F).

[47] 17 CFR 240.17Ad–22(e)(21).

[48] 15 U.S.C. 78q–1(b)(3)(F).

Members to the foregoing risks, FICC proposes to amend the Rules to provide a mechanism whereby Sponsoring Members would control the termination and liquidation of their defaulting Sponsored Members' positions. By providing Sponsoring Members with greater ability to manage their risks associated with Sponsored Member Trades, the proposal would encourage Sponsoring Members to submit more term repo Sponsored Member Trades to FICC within the Service. Increasing the number of trades centrally-cleared by FICC would promote the prompt and accurate clearance and settlement of securities transactions because securities transactions that might otherwise be conducted bilaterally would benefit from FICC's risk management and guarantee of settlement. Accordingly, the Commission finds that FICC's proposal to provide a mechanism for Sponsoring Members to terminate and liquidate their defaulting Sponsored Members' positions should promote the prompt and accurate clearance and settlement of securities transactions, consistent with Section 17A(b)(3)(F) of the Act.[49]

As stated above in Section II.C., Sponsored Member Trades may involve a haircut from either the Sponsoring Member or the Sponsored Member. In the context of term repo activity, the intent of both the Sponsoring Member and the Sponsored Member is for the haircut recipient to retain the haircut until the scheduled final settlement date. However, the current Rules require the haircut to be returned before final settlement of the Sponsored Member Trade, which creates inefficiencies that discourage term repo activity within the Service. FICC proposes to amend the Rules to ensure that such haircuts are not returned until final settlement. As a result, the proposal would encourage and facilitate more term repo activity within the Service. Increasing the number of trades centrally-cleared by FICC would promote the prompt and accurate clearance and settlement of securities transactions because securities transactions that might otherwise be conducted bilaterally would benefit from FICC's risk management and guarantee of settlement. Accordingly, the Commission finds that FICC's proposal to ensure that such haircuts with respect to Sponsored Member Trades are not returned until final settlement should promote the prompt and accurate clearance and settlement of securities transactions, consistent with Section 17A(b)(3)(F) of the Act.[50]

As stated above in Section II.D., FICC proposes several clarifications and technical changes to Rule 3A. FICC states that these changes are designed to enhance clarity and transparency regarding the Service.[51] Having transparent and clear Rule provisions regarding the Service should enable members to better understand the operation of the Service, and should also provide members with increased predictability and certainty regarding their rights and obligations. Such increased predictability and certainty regarding their rights and obligations may encourage Sponsoring Members to submit a greater number of securities transactions to be centrally-cleared by FICC. Increasing the number of trades centrally-cleared by FICC would promote the prompt and accurate clearance and settlement of securities transactions because securities transactions that might otherwise be conducted bilaterally would benefit from FICC's risk management and guarantee of settlement. Accordingly, the Commission finds that FICC's proposed clarifications and technical changes should promote the prompt and accurate clearance and settlement of securities transactions, consistent with Section 17A(b)(3)(F) of the Act.[52]

B. Consistency With Rule 17Ad–22(e)(21) Under the Act

Rule 17Ad–22(e)(21) under the Act requires that each covered clearing agency, such as FICC, ''establish, implement, maintain and enforce written policies and procedures reasonably designed to . . . be efficient and effective in meeting the requirements of its participants and the markets it serves. . . .'' [53]

As stated above in Section II.B., the current Rules do not allow a Sponsoring Member to terminate and liquidate any Sponsored Member Trades. The inability on the part of Sponsoring Members to terminate and liquidate its defaulting Sponsored Member's positions discourages term repo activity within the Service because during the time it would take FICC to terminate and liquidate the Sponsored Member's positions, the Sponsoring Member would effectively be forced to extend credit to the defaulting Sponsored Member under the Sponsored Member Guaranty. In such a scenario, the Sponsoring Member could incur additional capital requirements until FICC completes the termination and liquidation of the Sponsored Member's positions. Additionally, since under the current Rules, FICC sets the applicable price, timing, and types of liquidation or hedging transactions, the Sponsoring Member would be exposed to potential risks associated with pricing and timing differences between its own hedging transactions and those taken by FICC in the aftermath of a Sponsored Member default. To avoid exposing Sponsoring Members to the foregoing risks, FICC proposes to amend the Rules to provide a mechanism whereby Sponsoring Members would control the termination and liquidation of their defaulting Sponsored Members' positions. By providing Sponsoring Members with greater ability to manage their risks associated with Sponsored Member Trades, the proposal would enhance FICC's Rules in a manner that meets the needs of Sponsoring Members and Sponsored Members.

Additionally, as stated above in Section II.C., the current Rules require haircuts with respect to term repo Sponsored Member Trades to be returned before final settlement, which discourages term repo activity within the Service. FICC proposes to amend the Rules to ensure that such haircuts are not returned until final settlement. As a result, the proposal would encourage and facilitate term repo activity within the Service by ensuring that haircuts with respect to Sponsored Member Trades are not returned until final settlement in a manner consistent with the intent of the Sponsoring Member and Sponsored Member. For the reasons described in this Section III.B., the Commission finds FICC's proposals to (i) provide a mechanism for Sponsoring Members to terminate and liquidate their defaulting Sponsored Members' positions, and (ii) ensure that haircuts with respect to term repo Sponsored Member Trades are not returned until final settlement would constitute policies and procedures reasonably designed to be efficient and effective in meeting the requirements of FICC's members and the relevant markets FICC serves, consistent with Rule 17Ad–22(e)(21) under the Act.[54]

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and, in particular, with the requirements of

[49] *Id.*

[50] *Id.*

[51] Notice, *supra* note 3 at 1360.

[52] 15 U.S.C. 78q–1(b)(3)(F).

[53] 17 CFR 240.17Ad–22(e)(21).

[54] *Id.*

Section 17A of the Act[55] and the rules and regulations promulgated thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act[56] that proposed rule change SR–FICC–2019–007, be, and hereby is, *approved.*[57]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[58]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2020–03914 Filed 2–26–20; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88264; File No. SR–CboeEDGX–2020–009]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Regarding Solicitation Auction Mechanism (SAM) Fees, Qualified Contingent Cross (QCC) Order Rebates, and Automated Improvement Mechanism (AIM) Fees

February 21, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 11, 2020, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX Options'') proposes to amend its Fee Schedule in connection with its recently adopted Solicitation Auction Mechanism (''SAM'' or ''SAM Auction'') and with Qualified Contingent Cross (''QCC'') orders, as well as make certain clarifications in connection with AIM fees. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/edgx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify the Fee Schedule to adopt fees for its recently adopted SAM Auction and tiered pricing in connection with certain QCC and SAM orders, effective February 3, 2020.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 options venues to which market participants may direct their order flow. Based on publicly available information, no single options exchange has more than 22% of the market share.[3] Thus, in such a low-concentrated and highly competitive market, no single options exchange possesses significant pricing power in the execution of option order flow. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain the Exchange's transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. In response to the competitive environment, the Exchange offers specific rates and credits in its fees schedule, like that of other options exchanges' fees schedules, which the Exchange believes provide incentive to Members to increase order flow of certain qualifying orders.

SAM Overview

SAM is the Exchange's recently adopted solicited order mechanism for larger-sized orders.[4] By way of background, SAM will provide an additional method for market participants to effect orders in a price improvement auction for larger-sized orders. SAM includes functionality in which a Member (an ''Initiating Member'') may electronically submit for execution an order it represents as agent on behalf of a customer,[5] broker dealer, or any other person or entity (''Agency Order'')[6] against any other order it represents as agent (an ''Initiating Order'', or ''Contra Order''), provided it submits the Agency Order for electronic execution into the SAM Auction pursuant to Rule 21.21 (SAM Auction for simple orders) or Rule 21.22 (SAM Auction for complex orders). The Exchange may designate any class of options traded on EDGX Options as eligible for SAM. The Exchange notes that all Users, other than the Initiating Member, may submit responses to a SAM Auction (''Response Orders''). SAM Auctions take into account SAM Responses as well as contra interest resting on the EDGX Options Book at the conclusion of the SAM Auction (''unrelated orders''), regardless of whether such unrelated orders were already present on the Book when the Agency Order was received by the Exchange or were received after the

[55] 15 U.S.C. 78q–1.

[56] 15 U.S.C. 78s(b)(2).

[57] In approving the proposed rule change, the Commission considered the proposals' impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[58] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Cboe Global Markets U.S. Options Market Monthly Volume Summary (January 22, 2020), available at *https://markets.cboe.com/us/options/market_statistics/.*

[4] *See* Securities Exchange Act Release No. 87692 (December 9, 2019), 84 FR 68231 (December 13, 2019) (Order Approving a Proposed Rule Change To Adopt Rule 21.23 (Complex Solicitation Auction Mechanism)) (SR–CboeEDGX–2019–064).

[5] The term ''Priority Customer'' means any person or entity that is not: (A) A broker or dealer in securities; or (B) a Professional. The term ''Priority Customer Order'' means an order for the account of a Priority Customer. *See* Rule 16.1(a)(45). A ''Professional'' is any person or entity that: (A) Is not a broker or dealer in securities; and (B) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). All Professional orders shall be appropriately marked by Options Members. *See* Rule 16.1(a)(46).

[6] The Agency Order must be for at least the minimum size designated by the Exchange (which may not be less than 500 standard option contracts or 5,000 mini-option contracts). The Initiating Member must designate each Agency Order as all-or-none (''AON''). *See* Rule 21.21(a)(3).

Exchange commenced the SAM Auction. If contracts remain from one or more unrelated orders at the time the Auction ends, they are considered for participation in the SAM order allocation process.

SAM Definitions

In connection with the proposed SAM-related fees, the Exchange proposes to adopt definitions necessary for SAM pricing. First, the Exchange proposes to adopt the terms ''SAM'' and ''SAM Auction'' to refer to the Solicitation Auction Mechanism. Second, the Exchange proposes to adopt the term ''SAM Agency Order'', defined as an order represented as agent by a Member on behalf of another party and submitted to SAM for potential price improvement pursuant to Rule 21.21 and Rule 21.23. Third, the Exchange proposes to adopt the terms ''SAM Contra Order'' or ''Initiating Order'', defined as an order submitted by a Member entering a SAM Agency Order for execution within SAM that will potentially execute against the SAM Agency Order pursuant to Rule 21.21 and 21.23. Finally, the Exchange proposes to adopt the term ''SAM Response Order'', to include any order submitted in response to and specifically designated to participate in a SAM Auction as well as unrelated orders that are received by the Exchange after a SAM Auction has begun.

AIM Clarifications

The Exchange also proposes to update the term ''AIM Responder'' order throughout in the Fee Schedule to provide instead for ''AIM Response'' orders, as this is more consistent with the term used in Rule 5.37(c)(5), which governs Automatic Improvement Mechanism (''AIM' [sic] or ''AIM Auction'') Responses, as well as add ''Rule 21.22'' (Complex AIM) under the definitions of ''AIM Agency Order'' and ''AIM Contra Order'' or ''Initiating Order'', in order to clarify that these currently include orders submitted into Complex AIM.

SAM Pricing

The Exchange proposes to adopt six new fee codes in connection with SAM into the Fee Codes and Associated Fees table of the Fee Schedule. The Exchange proposes to adopt two fee codes for SAM Agency Orders, fee code SA and fee code SC, which will apply to Non-Customer and Customer Agency orders, respectively. As proposed, fee code SA will apply to Non-Customer SAM Agency Orders that are executed in a SAM Auction and will be assessed a fee of $0.20 per contract. Fee code SC will apply to Customer SAM Agency Orders that are executed in a SAM Auction and will be assessed no charge. Next, the Exchange proposes to adopt two fee codes for SAM Contra Orders, fee code SF and fee code SB, which will apply to Non-Customer and Customer Contra orders, respectively. Fee code SF will apply to Non-Customer SAM Contra Orders executed in an SAM Auction and will be assessed a fee of $0.20. Fee code SB will apply to Customer SAM Agency Orders executed in a SAM Auction and will be assessed no charge. The Exchange also proposes to adopt fee codes SD and SE, which will apply to SAM Response Orders in Penny Pilot securities and Non-Penny Pilot securities, respectively. As proposed, fee code SD will apply to a SAM Response Order that is executed in a SAM Auction in a Penny Pilot security, and will be assessed a fee of $0.50. Likewise, fee code SE will apply to a SAM Response Order that is executed in a SAM Auction in a Non-Penny Pilot security, and will be assessed a fee of $1.05.

In addition, the Exchange proposes to amend footnote 6, which currently summarizes pricing for another Exchange auction mechanism, AIM, which is substantially similar to that of the SAM Auction. Particularly, the Exchange proposes to rename footnote 6 from ''Automated Improvement Mechanism (''AIM'') Pricing'' to ''AIM and SAM Mechanism Pricing'' and incorporate a summary of SAM fees and rebates into the existing structure of the table that currently summarizes AIM fees and rebates for the same types of auction-related orders. This pricing table is intended to provide clarity to Members by summarizing in table form the different types of orders submitted into an auction and their corresponding fee codes and rates. The Exchange also proposes to amend the table footnote appended to the single asterisk, which currently states that when an AIM Agency Order executes against one or more resting orders that were already on the Exchange's order book when the AIM Agency Order was received by the Exchange, the AIM Agency Order and the resting order(s) will receive the Standard Fee Rates. The proposed change would remove specific references to AIM, thereby amending it to refer to only ''Agency Order'', as this footnote is applicable in the same manner to both AIM and SAM Agency Orders [7] and makes it clear that for SAM, like AIM currently, the fee structure for such an execution would not be altered and instead the Exchange would charge a fee or provide a rebate to each side of the transaction as if it were a transaction occurring on the Exchange's order book pursuant to the Exchange's normal order handling methodology and not in in an auction. This is distinguished from SAM Response Orders (like current AIM Response Orders), which, as defined, include unrelated orders that are received by the Exchange after a SAM Auction has begun and which would be charged or provided rebates based specifically on SAM pricing.

SAM Agency Orders and Designated Give Up

Footnote 5 of the Fee Schedule currently specifies that when an order is submitted with a Designated Give Up, as defined in Rule 21.12(b)(1), the applicable rebates for such orders when executed on the Exchange (yielding fee code BC, NC, PC, QA or QM) are provided to the Member who routed the order to the Exchange. Pursuant to Rule 21.12, which specifies the process to submit an order with a Designated Give Up, a Member acting as an options routing firm on behalf of one or more other Exchange Members (a ''Routing Firm'') is able to route orders to the Exchange and to immediately give up the party (a party other than the Routing Firm itself or the Routing Firm's own clearing firm) who accepts and clears any resulting transaction. Because the Routing Firm is responsible for the decision to route the order to the Exchange, the Exchange currently provides such Member with the rebate when orders that yield fee code BC, NC, PC, QA or CM are executed. In connection with the adoption of SAM-related fees, the Exchange proposes to add new fee code SC (SAM Agency Customer Order) to the lead-in sentence of footnote 5 and to append footnote 5 to fee code SC in the Fee Codes and Associated Fees table of the Fee Schedule.

SAM Agency Orders and Break-Up Credits

In addition, the Exchange also proposes to amend the provision regarding Break-Up Credits located under the AIM and SAM Pricing table in footnote 6. Specifically, it proposes to rename this provision from ''AIM Break-Up Credits'' to ''AIM and SAM Break-Up Credits'' and remove references to ''AIM'' within the provision as it will apply to agency orders submitted in either the AIM (as it does currently) or SAM auction that trades with a response order in the respective auction. As

[7] The Exchange notes that Customer-to-Customer Immediate Cross is not applicable to SAM Auctions.

proposed, the Break-Up Credits will apply to the Member that submitted an Agency Order (*i.e.,* either an AIM or SAM Agency Order), including a Member who routed an order to the Exchange with a Designated Give Up, when the Agency Order trades with a Response Order (*i.e.,* an AIM or SAM Response Order, as applicable). The Exchange proposes to adopt a Break-Up Credit for qualifying SAM Agency Order of $0.15 per contract in both Penny Pilot and Non-Penny Pilot securities.

Marketing Fees and SAM Pricing

The Fee Schedule currently contains a section entitled ''Marketing Fees'', which specifies that marketing fees are charged to all Market Makers who are counterparties to a trade with a Customer, with certain exceptions, including the exclusion of AIM Pricing set forth in footnote 6. The Exchange proposes to extend the marketing exclusion to orders subject to SAM Pricing set forth in footnote 6.

QCC Initiator Rebate Overview

The Exchange currently provides functionality that allows for participants on the Exchange to submit QCC orders to the Exchange and its Fee Schedule correspondingly provides for various fee codes and rates in connection with different types of QCC orders. Specifically, footnote 7 currently provides for the QCC Initiator Rebate and provides a rebate of $0.05 to a Member that submits a QCC Agency Order to the Exchange when at least one side of the transaction is of Non-Customer capacity. The QCC Initiator Rebate is currently provided to all Members submitting QCC Agency Orders, yielding either fee code QA [8] or fee code QM, [9] to the Exchange, including a Member who routed an order to the Exchange with a Designated Give Up (as discussed above). Also as discussed in detail above, the Exchange operates in a highly-competitive market by which competitive forces constrain the Exchange's transaction fees and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. In response to the competitive environment, the Exchange offers, among other things, tiered pricing which provides Members opportunities to qualify for higher rebates or reduced fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for Members to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying increasingly more stringent criteria. For example, the Exchange currently offers various Customer volume tiers under footnote 1 which provide enhanced rebates for qualifying Customer orders that meet certain add liquidity thresholds, as well as eight Market Maker volume tiers under footnote 2 which provide reduced fees for qualifying Market Maker order that meet certain add liquidity thresholds.

QCC Initiator/Solicitation Rebate Tiers

The Exchange proposes to modify the QCC Initiator Rebate, as well as provide a ''Solicitation'' Rebate, to apply per tier of incrementally increasing volume thresholds. First, the Exchange notes that it proposes to add the fee codes appended to SAM Agency orders, SA and SC, to the list of fee codes (*i.e.,* QA and QM [10]) currently eligible for the rebate provided under footnote 7. Accordingly, it also proposes to update the name of the table under footnote 7 and the description therein to refer to the ''QCC Initiator/Solicitation Rebate''. Next, the Exchange proposes to remove the single rebate rate of $0.05 per contract in all securities and replace it with six new tiers that correspond to increasingly higher volume thresholds and increasingly higher rebates. Particularly, the Exchange proposes to add: Tier 1, which will provide no rebates for Members that submit qualifying orders (*i.e.,* QA, QM, SA and SC) totaling 0 to 99,999 contracts per month; Tier 2, which will provide a rebate of $0.05 per contract for Members that submit qualifying orders totaling 100,000 to 199,999 contracts per month; Tier 3, which will provide a rebate of $0.07 per contract for Members that submit qualifying orders totaling 200,000 to 499,999 contracts per month; Tier 4, which will provide a rebate of $0.09 per contract for Members that submit qualifying orders totaling 500,000 to 749,999 contracts per month; Tier 5, which will provide a rebate of $0.10 per contract for Members that submit qualifying orders totaling 750,000 to 999,999 contracts per month; and Tier 6, which will provide a rebate of $0.11 per contract for Members that submit qualifying orders totaling 1,000,000 or more contracts per month.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act,[11] in general, and furthers the requirements of Section 6(b)(4),[12] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

As stated above, the Exchange operates in a highly-competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The Exchange is only one of several options venues to which market participants may direct their order flow, and it represents a small percentage of the overall market. The proposed fee changes reflect a competitive pricing structure designed to incentivize market participants to direct their order flow to the Exchange's price improvement auction and/or their QCC order flow, which the Exchange believes would enhance market quality to the benefit of all Members. Overall, the Exchange believes that its proposed adoption of fees in connection with the SAM Auction, and volume-based tiers for QCC and SAM Agency Orders is consistent with Section 6(b)(4) of the Act in that the proposed fees are reasonable, equitable and not unfairly discriminatory. The Exchange believes that the proposed fees are reasonable, equitable, and not unfairly discriminatory in that competing options exchanges, including the Exchange's affiliated options exchanges or the Exchange itself, offer substantially the same fees and credits in connection with similar price improvement auctions,[13] as well as

[8] Appended to QCC Customer Agency orders and assessed no charge.

[9] Appended to QCC non-Customer Agency orders and assessed a standard fee of $0.08.

[10] QA is appended to a QCC Customer Agency Order and assessed no charge and QM is appended to a QCC Non-Customer Agency order and assessed a fee of $0.08.

[11] 15 U.S.C. 78f.

[12] 15 U.S.C. 78f(b)(4).

[13] *See* MIAX Options Fee Schedule, Section 1(a)(v), ''MIAX Price Improvement Mechanism (''PRIME'') Fees, which provides for comparable rates for similar response, contra, and agency type orders submitted into its PRIME auctions. For example, it assesses a fee of $0.50 (Penny Classes) and $0.99 (non-Penny Classes) for PRIME responses, and offers a break-up credit of $0.25 (Penny Classes) and $0.60 (non-Penny Classes) for PRIME Agency orders; NYSE American Options Fee Schedule, Section I(G), ''CUBE Auction Fees and Credits'', which assesses a fee of $0.50 (Penny Classes) and $0.99 (non-Penny Classes) for CUBE (its Customer Best Execution Auction) responses, and offers a break-up credit of $0.25 (Penny Classes) and $0.60 (non-Penny Classes) for PRIME Agency orders, and an Initiating Participant Credit (akin to an Agency Order) of $0.30 (Penny Pilot) and $0.70 (non-Penny Pilot); *and* Nasdaq ISE Rules, Options 7 Pricing Schedule, Section 3, which provides a Facilitation and Solicitation Break-Up Rebate of $0.15, the same as proposed herein. *See generally*

volume-based incentives in connection with QCC and/or Solicitation orders,[14] as the Exchange now proposes.

SAM Definitions and AIM Clarifications

The Exchange believes that the proposed SAM-related definitions are reasonable and equitable as they are consistent with the corresponding Exchange Rules that govern the SAM Auction as well as consistent, to the extent possible, with the corresponding AIM-related definitions currently in the Fee Schedule. Also, the proposed update to ''AIM Response'' orders is reasonably designed to be more consistent with the term used in Rule 21.19(c)(5), which governs AIM Auction Responses.

SAM Pricing

The Exchange's proposal establishes fees and rebates regarding SAM, which promotes price improvement to the benefit of market participants. The Exchange believes that the adoption of the SAM Auction on the Exchange will encourage market participants, and in particular liquidity providers on the Exchange, to compete to provide opportunities for price improvement for large-sized orders in a competitive auction process. The Exchange believes that its proposal is reasonable designed to allow the Exchange to recoup the costs associated with implementing and maintaining SAM while also incentivizing its use, which benefits all market participants. The Exchange notes that the proposed SAM fees and pricing structure is reasonable and equitable as it is comparable to the fees and structure currently in place for the same type of orders submitted into the Exchange's AIM Auction (*i.e.,* Response, Contra, and Agency, distinguished between Customer and Non-Customer and Penny Pilot and Non-Penny Pilot securities). In particular, the proposed fees and rebate structure in relation to SAM orders are designed to promote order flow through SAM and, in particular, to attract Customer liquidity, which benefits all market participants by providing additional trading opportunities at improved prices. This, in turn, attracts increased large-order flow from liquidity providers which facilitates tighter spreads and potentially triggers a corresponding increase in order flow originating from other market participants.

The Exchange further notes that, generally, the proposed fee and rebate schedule is reasonably designed because it is within the range of fees and rebates assessed by other exchanges employing similar fee structures for price improvement mechanisms.[15] Other competing exchanges offer different fees and rebates for agency orders, contra-side orders, and responder orders to the auction in a manner similar to the proposal. Other competing exchanges also charge different rates for transactions in their price improvement mechanisms for customers versus their non-customers in a manner similar to the proposal. The Exchange believes the fee and rebate schedule as proposed continues to reflect differentiation among different market participants typically found in options fee and rebate schedules.

In particular, the Exchange believes that charging market participants, other than Customers, a higher effective rate for certain SAM transactions is reasonable, equitable, and not unfairly discriminatory because these types of market participants are more sophisticated and have higher levels of order flow activity and system usage. Facilitating this level of trading activity requires a greater amount of Exchange system resources than that of Customers, and thus, generates greater ongoing operational costs for the Exchange. Therefore, the Exchange believes that the proposed fees for SAM Non-Customer Agency and Contra Orders are reasonably designed to provide associated revenue to allow the Exchange to promote and maintain SAM and continue to enhance its services, which is beneficial to all market participants. Also, the Exchange believes that the proposed fee for SAM Non-Customer Agency and Contra orders ($0.20 per contract) is reasonable because it encourages participation in SAM by offering a rate that is equivalent to or better than most other price improvement auctions offered by other options exchanges as well as the Exchange itself.[16]

The Exchange believes that the SAM Customer Agency and Contra Orders are reasonable because Customer volume is important as it attracts continuous liquidity, including from Market Makers to the Exchange, which benefits all market participants by providing more trading opportunities. An increase in Market Maker activity, in turn, may facilitate tighter spreads, which may cause an additional corresponding increase in order flow from other market participants, contributing to increased price discovery and a more robust marketplace. The Exchange also notes that the options industry has a long history of providing preferential pricing to Customer orders in order to incentivize increased, and important, Customer order flow through a fee and rebate schedule in order to attract professional liquidity providers. The Exchange's current Fee Schedule currently does so in many places, particularly in relation to its similar auction, AIM, as do the fees structures in relation to auctions of multiple other exchanges.[17] Indeed, the proposed new fees and rebates for SAM are generally intended to encourage greater Customer trade volume to the Exchange in line with industry practice.

Moreover, the Exchange believes that assessing no charge on SAM Customer Agency and Contra Orders and assessing a fee of $0.20 for SAM Non-Customer Agency and Contra Orders is equitable and not unfairly discriminatory. First, the Exchange notes that the respective fees will apply the same to all similarly situated participants. Second, the Exchange again notes that not assessing a fee on SAM Customer orders while assessing a fee on SAM Non-Customer orders is in line with an industry practice intended to increase in Customer order flow in order to attract greater volume and liquidity and provide for tighter spreads and more trading opportunities at improve prices to the benefit of all market participants.

Regarding the proposed fees for SAM Response Orders, the Exchange believes

EDGX Options Exchange Fee Schedule, ''Fee Codes and Associated Fees'', which provide the same or comparable rates for corresponding response, contra, and agency orders in AIM; *see also* ''AIM Break-Up Credits'', which offers a credit of $0.25 for AIM Agency Orders in Penny Pilot securities and $0.60 for such orders in non-Penny Pilot securities.

[14] *See* Nasdaq ISE Rules, Options 7 Pricing Schedule, Section 6A, ''QCC and Solicitation Rebate'', which currently assesses the same rebate amounts for the same increasing increments of contracts, as proposed herein, for qualified QCC and/or other solicited crossing orders; *and* Nasdaq Phlx Rules, Options 7 Pricing Schedule, Section 4, ''QCC Rebate Schedule'', which currently assesses the same rebate amounts for the same increasing increments of contracts, as proposed herein, for qualified QCC orders. *See also* Cboe Options Fees Schedule, ''QCC Rate Table'', which assesses a flat credit of $0.10 per contract (which is on the higher-end of the range of tiered rebates proposed herein) for QCC Initiators.

[15] *See supra* note 12.

[16] *See e.g.* MIAX Options Fee Schedule, Section 1(a)(v), ''MIAX Price Improvement Mechanism (''PRIME'') Fees, which provides that PRIME Customer Agency orders are also free of charge and PRIME Non-Customer Agency orders are assessed a higher fee of $0.30, *see also* Cboe Options Fees Schedule, ''Rate Table—All Products Excluding Underlying Symbol List A (34)(13)'', which also assesses a fee of $0.20 for Non-Customer Agency orders submitted into its AIM and SAM auctions; *and* EDGX Options Fee Schedule, ''Fee Codes and Associated Fees'', which also assesses a fee of $0.20 for Non-Customer Contra orders submitted into its AIM auction, which is substantially similar to the SAM auction.

[17] *See supra* note 12.

that assessing a fee of $0.50 per contract for orders in Penny Pilot Securities and a fee of $1.05 per contract for orders in Non-Penny Pilot Securities is reasonable because this associated revenue will also contribute to the Exchange's maintenance and enhancement of SAM. Similar to that described above, the proposed fees in connection with SAM Response Orders are also reasonable as they are similar to, or within the range of, fees and rebates assessed by other exchanges employing similar fee structures for price improvement mechanisms, and are identical to the fees currently assessed by the Exchange for comparable AIM Response Orders.[18] Other competing exchanges offer different fees and rebates for agency orders, contra-side order, and responders to the auction in a manner similar to the proposal. Further, the proposed fee for such orders is equitable and not unfairly discriminatory because it will apply the same rates to all participants' SAM Response orders and will vary only based on whether the security is a Penny Pilot Security or a Non-Penny Pilot Security.

The Exchange further believes its proposal represents a reasonable and equitable allocation of dues and fees in that the proposal would treat an unrelated order, as well as a SAM Agency Order that executes against such order, differently depending on whether the unrelated order was already resting on the Exchange's order book at the time the SAM Agency Order was received or was received after the SAM Auction had begun. The Exchange believes that this proposal is reasonable, equitable, and not unfairly discriminatory as the Fee Schedule currently provides that unrelated orders and Agency Orders in the AIM Auction (which, as noted, is substantially similar to the SAM Auction) will be treated in the same manner that is being proposed for unrelated and Agency Orders in a SAM Auction. As proposed, an unrelated order would be considered a SAM Responder Order if received after the SAM Auction had commenced. As a result, both the SAM Agency Order executing against such order and such order itself would be assessed fees and provided rebates according to the proposed SAM pricing. The Exchange believes this is a reasonable and equitable allocation of dues and fees, and is not unreasonably discriminatory, because it ensures that market participants are treated similarly with respect to their executions against SAM Agency Orders. To do otherwise, to the extent fees are higher pursuant to SAM pricing than under the Exchange's Standard Fee Rates, would potentially incentivize a market participant that wished to participate in an auction to nonetheless avoid sending orders to the Exchange that are not targeted towards the auction and instead send orders to the Exchange's order book generally, knowing that such orders would still be considered in the auction. In contrast, as proposed, to the extent an unrelated order was already present on the Exchange's order book when a SAM Agency Order is received, such unrelated order, if executed in an Auction, as well as the SAM Agency Order against which it trades would be charged a fee or provided a rebate as if the transaction occurred on the Exchange's order book pursuant to the Exchange's normal order handling methodology and not in SAM. The Exchange similarly believes this is a reasonable and equitable allocation of dues and fees, and is not unreasonably discriminatory, because it will ensure that the participant that had established position on the Exchange's order book first, the unrelated order, is not impacted with respect to applicable fees or rebates despite the later arrival of a SAM Agency Order that commences an Auction.

SAM Agency Orders and Designated Give Up

The Exchange believes that the proposal to add new fee code SC to the lead-in sentence of footnote 5 and to append footnote 5 to fee code SC is a reasonable and equitable allocation of fees and dues and is not unreasonably discriminatory because, as is currently the case pursuant to footnote 5 and Rule 21.12(b)(1), the proposal simply makes clear that a firm acting as a Routing Firm that routes SAM Agency Orders to the Exchange will be provided applicable rebates, including any SAM Break-Up Credits, based on the Routing Firm's decision to route the order to the Exchange.

SAM Agency Orders and Break-Up Credits

With respect to the proposal to adopt SAM-related Break-Up Credits under footnote 6, the Exchange believes this is reasonable because it encourages use of SAM and because Break-Up Credits are currently applied in the same manner to similar AIM Agency Orders. Specifically, the Exchange believes that the proposed Break-Up Credits for SAM Agency Orders would encourage increased Agency Order flow to SAM Auctions, thereby potentially increasing the initiation of and volume executed through SAM Auctions. Additional auction order flow provides market participants with additional trading opportunities at improved prices. The Exchange also believes that the proposed SAM Break-Up Credits of $0.15 for both a Penny Pilot Security and a Non-Penny Pilot Security are reasonable and equitable as this credit is in line with a corresponding break-up fee for a price improvement auction offered by another options exchange.[19] Also, the proposed SAM Break-Up Credits are not unreasonably discriminatory because such credits are equally available to all Members submitting SAM Agency Orders to the Exchange. In addition, the Exchange believes that it is reasonable and equitable to update the language in the Break-Up Credit section of footnote 6, to make clear that a Routing Firm will be provided any applicable SAM or AIM Break-Up Credits.

Marketing Fees and SAM Pricing

The Exchange believes its proposal to expand the exclusions listed in the marketing fees section to also exclude orders subject to SAM Pricing set forth in footnote 6 is reasonable and equitable because the rates for Market Makers for orders subject to SAM Pricing are allocated as an all-inclusive rate (*i.e.*, the same SAM ''Non-Customer'' rate applies to Market Makers as it would a proprietary firm or other liquidity provider) but would increase such rates to a level higher than that paid by other Non-Customer participants if Marketing Fees were also assessed on Market Makers' SAM transactions. The Exchange believes that it is reasonable and equitable to waive the marketing fee as it applies to Market Maker orders subject to SAM pricing, and consequently assess the same fees for Market Maker and all other Non-Customer orders in SAM, because the application of marketing fees to Market Maker orders in SAM may discourage Market Maker participation in the SAM Auction. The Exchange recognizes that Market Makers are the primary liquidity providers in the options markets, and particularly, during auctions. Thus, the Exchange believes Market Makers provide the most accurate prices reflective of the true state of the market and are primarily responsible for encouraging more aggressive quoting and superior price improvement during an auction. By waiving the marketing fees for such orders the Exchange aims to incentivize Market Maker participation in SAM. The Exchange does not believe that this proposal is

[18] *See supra* note 12.

[19] *See supra* note 12, Nasdaq ISE Facilitation and Solicitation Break-Up Rebate.

unfairly discriminatory as the marketing fees currently apply only to Market Makers and the proposed change is uniformly excluding Market Maker orders subject to SAM pricing from the marketing fees, thus, uniformly applying the proposed SAM rates for Non-Customer orders to all Non-Customers. Also, the Exchange notes that Market Maker executions subject to the similar AIM price improvement auction are currently excluded from marketing fees, as are market makers on another options exchange that provides for similar marketing fees and auction pricing.[20]

QCC Initiator/Solicitation Rebate Tiers

The Exchange believes the proposed adoption of a Solicitation Rebate, and modification of the QCC Initiator Rebate, to apply by tiers are reasonable because they provide opportunities for Members to receive higher rebates by providing for incrementally increasing volume-based criteria they can reach for. The Exchange again notes that volume-based incentives and discounts have been widely adopted by other exchanges,[21] and believes that the proposed tiers are reasonable, equitable and non-discriminatory because they are open to all Members on an equal basis.

The Exchange believes the proposed QCC Initiator/Solicitation Rebate tiers are reasonable means to encourage Members to increase their liquidity on the Exchange, particularly in connection with additional QCC and/or Solicitation Agency Order flow to the Exchange in order to benefit from the proposed enhanced rebates. The Exchange believes that the proposed tiers are reasonable in that they provide an ample number of opportunities for a Member to receive an enhanced rebate for qualifying orders. The proposed tiers provide an incremental incentive for Members to strive for the highest tier levels, which provide increasingly higher rebates for incrementally more QCC Initiator/Solicitation volume achieved, which the Exchange believes is a reasonably designed incentive for Members to grow their QCC Initiator and/or Solicitation order flow to receive the enhanced rebates. The Exchange notes that it currently experiences little to no QCC volume on the Exchange, and therefore believes that all Members are similarly situated and incentivized to achieve the proposed tiers upon the implementation of such tiers. The Exchange additionally notes that, if a Member does not reach a tier between Tiers 2 and 6, the Member will still receive no charge on qualifying orders submitted (per Tier 1). The Exchange believes that incentivizing greater QCC Initiator and/or Solicitation order flow would provide more opportunities for participation in QCC trades or in the SAM Auction, thus increasing opportunities for price improvement. The Exchange also notes that any overall increased liquidity that may result from the proposed tier incentives benefits all investors by offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection. The Exchange also believes that proposed enhanced rebates are reasonable based on the difficulty of satisfying each proposed tiers' volume criteria and ensures the proposed rebates and thresholds appropriately reflect the incremental difficulty to achieve each ascending tier. The proposed enhanced rebate and volume amounts are the same on other options exchanges that provide tiered rebates or credits for QCC and/or solicitation orders.[22] The Exchange believes that the proposal represents an equitable allocation of fees and is not unfairly discriminatory because it applies uniformly to all Members that chose to submit QCC Agency Orders or a SAM Agency Orders, and each has a reasonable opportunity to satisfy any of the proposed tiers' criteria, which, as stated, the Exchange believes is reasonably designed to be incrementally more difficult per ascending tier.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, as discussed above, the Exchange believes that the proposed change would encourage the submission of additional order flow to a public exchange, thereby promoting market depth, execution incentives and enhanced execution opportunities, as well as price discovery and transparency for all Members. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.''

The Exchange believes that the proposed rule change does not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed change to adopt SAM pricing would not impose any burden on intramarket competition, but rather, serves to increase intramarket competition by incentivizing members to direct their orders, and, in particular, Customer orders, to the Exchange's SAM Auction, in turn providing for more opportunities to compete at improved prices. The proposed SAM-related fees and Break-Up Credits will apply uniformly to all Members that submit such qualifying orders (*e.g.*, all Members have the opportunity to choose to submit a SAM Response order and all Members' SAM Response orders will be assessed the same fee according to the proposed rates). To the extent that there is a differentiation between proposed fees assessed to Customers as opposed to other market participants, the Exchange believes that this is appropriate because preferential pricing to Customers is a long-standing options industry practice to incentivize increased Customer order flow through a fee and rebate schedule in order to attract professional liquidity providers. Indeed, the proposed fee changes serve to enhance Customer volume on the Exchange because Customer volume continues to attract liquidity, including Market Maker activity, by providing more trading opportunities. As stated, increased Market Maker activity may facilitate tighter spreads potentially triggering an additional corresponding increase in order flow from other market participants and contributing to increased price discovery and overall enhancing quality of the market. The Exchange also notes that the options industry has a long history of providing preferential pricing to Customers orders in order. The Exchange's current Fee Schedule currently provides preferential pricing to Customer orders in many places, particularly in relation to its similar auction, AIM, as do the fees structures in relation to auctions of multiple other exchanges.[23]

Further, the Exchange believes that the proposed fees and rebates generally for participation in the SAM Auction will not impose a burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the

[20] *See* MIAX Options Fee Schedule, Section 1(b), ''Marketing Fees'', which provides that the exchange will not assess a marketing fee to market makers for agency orders, as well as other orders, executed in the exchange's PRIME auction.

[21] *See supra* note 13.

[22] *See supra* note 13, Nasdaq ISE QCC and Solicitation Rebate; and Nasdaq Phlx QCC Rebate Schedule.

[23] *See supra* note 12.

proposed rates are based on the total cost for participants to transact as respondents to the Auction as compared to the cost for participants to engage in non-Auction electronic transactions on the Exchange.

In addition to this, the Exchange notes that the proposed exclusion of marketing fees for orders subject to SAM pricing will not impose a burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the waiver of the marketing fee as it applies to Market Maker orders subject to SAM pricing will ensure that pricing for all Non-Customer SAM orders will be the same for Market Makers and all other Non-Customers, thus, encouraging Market Maker participation in the SAM Auction, an important source of price discovery and price improvement during an auction.

Finally, the Exchange believes that the proposed QCC Initiator/Solicitation Rebate does not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act as it applies uniformly to all market participants that choose to submit qualifying orders. As stated, the tiers represent a reasonable ascension of criteria difficulty and greater rebates, and at the very least, if a Member submits a qualifying order they will still be assessed no charge (per Tier 1).

Next, the Exchange believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues they may participate on and direct their order flow, including 15 other options exchanges. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single options exchange has more than 22% of the market share.[24] Therefore, no exchange possesses significant pricing power in the execution of order flow. Indeed, participants can readily choose to send their orders to other exchanges and off-exchange venues if they deem fee levels at those other venues to be more favorable. As noted above, the Exchange believes that the proposed pricing for the SAM Auction is comparable to that of other exchanges offering similar electronic price improvement mechanisms, and the Exchange believes that, based on general industry practice and experience, the price-improving benefits offered by an auction justify and offset the transaction costs associated with such auction [sic] The Exchange again notes that the proposed pricing and volume ranges are identical to that of other options exchanges for QCC initiator orders and/or solicitation orders.[25] Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' The fact that this market is competitive has also long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''. Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[26] and paragraph (f) of Rule 19b–4[27] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–CboeEDGX–2020–009 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeEDGX–2020–009. 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

[24] *See supra* note 3.

[25] *See supra* note 13.

[26] 15 U.S.C. 78s(b)(3)(A).

[27] 17 CFR 240.19b–4(f).

to make available publicly. All submissions should refer to File Number SR–CboeEDGX–2020–009 and should be submitted on or before March 19, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Jill M. Peterson,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88266; File No. SR–FICC–2020–801]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing of Advance Notice To Amend the Mortgage-Backed Securities Division Stress Testing Methodology

February 24, 2020.

Pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act entitled the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') [1] and Rule 19b–4(n)(1)(i) under the Securities Exchange Act of 1934 (''Act''),[2] notice is hereby given that on January 21, 2020, Fixed Income Clearing Corporation (''FICC'') filed with the Securities and Exchange Commission (''Commission'') the advance notice SR–FICC–2020–801 (''Advance Notice'') as described in Items I, II and III below, which Items have been prepared by the clearing agency. The Commission is publishing this notice to solicit comments on the Advance Notice from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

This Advance Notice consists of modifications to the Mortgage-Backed Securities Division's (''MBSD'') stress testing methodology.[3] FICC is proposing to (1) use vendor-supplied historical risk factor [4] time series data (''Historical Data'') in MBSD's stress testing methodology's historical stress scenario selection (''Scenario Selection'') process, (2) change the look-back period for identifying historical stress scenarios for the Scenario Selection process, (3) use vendor-supplied security-level risk sensitivity data [5] (''Security-Level Data'') and Historical Data in the stress testing methodology's calculation of stress profits and losses (''P&L'') for Clearing Members' portfolios,[6] and (4) use a back-up calculation in the event the vendor fails to provide the Security-Level Data and Historical Data (such failure, a ''Vendor Data Disruption''), as described in greater detail below.[7] The proposed changes would not require modifications to the MBSD Rules.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, the clearing agency included statements concerning the purpose of and basis for the Advance Notice and discussed any comments it received on the Advance Notice. The text of these statements may be examined at the places specified in Item IV below. The clearing agency has prepared summaries, set forth in sections A and B below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement on Comments on the Advance Notice Received From Members, Participants, or Others

FICC has not received or solicited any written comments relating to this proposal. FICC will notify the Commission of any written comments received by FICC.

(B) Advance Notice Filed Pursuant to Section 806(e) of the Clearing Supervision Act

I. Nature of the Proposed Change

A. Background

Stress testing is an essential component of FICC's risk management. FICC uses stress testing to help ensure that it is collecting adequate prefunded financial resources [8] to cover MBSD's potential losses resulting from the default of a Clearing Member and such Clearing Member's affiliated family (that are also Clearing Members) (''Affiliated Family'') under multiple extreme but plausible market stress conditions (sometimes referred to as ''stress scenarios'').[9] As set forth in the Framework, the development of FICC's

[28] 17 CFR 200.30–3(a)(12).

[1] 12 U.S.C. 5465(e)(1).

[2] 17 CFR 240.19b–4(n)(1)(i).

[3] Capitalized terms used herein and not otherwise defined shall have the meaning assigned to such terms in the FICC MBSD Clearing Rules (the ''MBSD Rules''), *available at www.dtcc.com/legal/rules-and-procedures.aspx.*

[4] Generally, the term ''risk factor'' (or ''risk driver'') means an attribute, characteristic, variable or other concrete determinant that influences the risk profile of a system, entity, or financial asset. Risk factors may be causes of risk or merely correlated with risk.

[5] The term ''sensitivity'' means the percentage value change of a security given each risk factor change.

[6] The proposed change to use Security-Level Data would be applicable to MBSD's stress testing methodology for historical and hypothetical scenarios. The proposed change to use Historical Data would be applicable only for historical scenarios. FICC currently receives the Security-Level Data and Historical Data from a vendor. FICC currently utilizes this Security-Level Data and Historical Data in MBSD's value-at-risk (''VaR'') model, which calculates the VaR Charge component in each Clearing Member's margin (referred to in the MBSD Rules as Required Fund Deposit). *See* MBSD Rule 1, Definitions—VaR Charge, *supra* note 3. FICC is proposing to use this same data set in MBSD's Scenario Selection process, and stress P&L calculation of each Clearing Member's portfolio.

[7] FICC would receive the following data from the vendor:

- Interest rate (including 11 tenors) measures the sensitivity of a price change to changes in interest rates;
- convexity measures the degree of curvature in the price/yield relationship of key interest rates (convexity would not be utilized in the scenarios selection process; it would only be utilized in the stress P&L calculation);
- mortgage option adjusted spread is the yield spread that is added to a benchmark yield curve to discount a TBA's cash flows to match its market price, which takes into account a credit premium and the option-like feature of mortgage-backed-securities due to prepayment;
- interest rate volatility reflects the implied volatility observed from the swaption market to estimate fluctuations in interest rates; and
- mortgage basis captures the basis risk between the prevailing mortgage rate and a blended U.S. Treasury rate, which impacts borrowers' refinance incentives and the model prepayment assumptions.

The Historical Data would include (1) interest rate, (2) mortgage option adjusted spread, (3) interest rate volatility, and (4) mortgage basis.

The Security Level Data would include (1) sensitivity to interest rates, (2) convexity, (3) sensitivity to mortgage option adjusted spread, (4) sensitivity to interest rate volatility, and (5) sensitivity to mortgage basis.

FICC does not believe that its current engagement of the vendor would present a conflict of interest because the vendor is not an existing Clearing Member nor are any of the vendor's affiliates existing Clearing Members. To the extent that the vendor or any of its affiliates applies to become a Clearing Member, FICC will negotiate an appropriate information barrier with the applicant in an effort to prevent a conflict of interest from arising. An affiliate of the vendor currently provides an existing service to FICC; however, this arrangement does not present a conflict of interest because the existing agreement between FICC and the vendor, and the existing agreement between FICC and the vendor's affiliate, each contains provisions that limit the sharing of confidential information.

[8] MBSD's prefunded financial resources consist of Required Fund Deposits collected from Clearing Members in the form of cash and/or Eligible Clearing Fund Securities, with any such Eligible Clearing Fund Securities being subject to a haircut. *See* MBSD Rules 1 and 4, *supra* note 3.

[9] Consistent with the Clearing Agency Stress Testing Framework (Market Risk) (''Framework''), FICC aggregates each Clearing Member's stress deficiency within such Clearing Member's applicable Affiliated Family because FICC assumes that all Affiliated Families will simultaneously default, and the gains and losses of different legal entities within an Affiliated Family would not offset each other. The Framework is described in rule filing SR–FICC–2017–009. *See* Securities Exchange Act Release No. 82368 (December 19, 2017), 82 FR 61082 (December 26, 2017) (''Framework Approval Order'').

stress testing methodology is comprised of three key components.[10]

The first component is the risk identification process. FICC identifies the principal credit/market risk drivers that are representative and specific to each Clearing Member's portfolio to determine potential risk exposure. FICC accomplishes this by analyzing the securities in each Clearing Member's portfolio to identify the principal market price risk factor drivers and capture the risk sensitivity of such portfolios under stressed market conditions.

The second component is the scenario development process, which is designed to construct comprehensive and relevant sets of extreme but plausible historical and hypothetical stress scenarios. In order to select historical stress scenarios, MBSD's stress testing model selects dates from the past that represent stressed market conditions based on the largest historical changes of the selected risk factors. In order to select hypothetical stress scenarios, MBSD considers potential future events and their perceived impact to portfolio market risk factors.

The third component is the risk measurement and aggregation process. This process involves calculating risk metrics for each Clearing Member's portfolio. The stress testing methodology calculates stress P&L under each stress scenario and determines the loss amount exceeding a Clearing Member's Required Fund Deposit for each scenario. This calculation is referred to as the ''Clearing Member Level Stress Deficiencies.'' In addition, the stress testing methodology calculates the ratio of an Affiliated Family's deficiency [11] over the total value of the MBSD Clearing Fund excluding the sum value of the applicable Affiliated Family's Required Fund Deposits. This calculation is referred to as the ''Cover 1 Ratio.'' [12]

B. Proposed Change to MBSD's Stress Testing Methodology

As further described below, FICC is proposing to use Security-Level Data and Historical Data in MBSD's stress testing methodology. Specifically, FICC is proposing to (1) use Historical Data in the Scenario Selection process, (2) change the look-back period used for identifying historical stress scenarios for the Scenario Selection process, (3) use Security-Level Data and Historical Data in the methodology's calculation of stress P&L for Clearing Members' portfolios,[13] and (4) use a back-up calculation in the event of a Vendor Data Disruption.

(1) Proposed Change To Use Historical Data in the Scenario Selection Process

FICC uses two risk factors as inputs to the MBSD stress testing model for the historical Scenario Selection process. The risk factors are (1) interest rate and (2) mortgage option adjusted spread. The interest rate risk factor consists of swap rates [14] with tenors [15] of 2 years, 5 years, 10 years, and 30 years. The mortgage option adjusted spread risk factor is constructed as the difference between the agency mortgage-backed TBA securities' current coupon rate and the average swap rate, in each case, for Fannie Mae (''FNMA'') 30-year mortgages and Ginnie Mae (''GNMA'') 30-year mortgages. MBSD's scenario selection algorithm uses a technique referred to as principal component analysis [16] to convert correlated risk factors into uncorrelated risk drivers that account for the joint co-movements [17] of the multiple risk factors during the 10-year look-back period.

FICC is proposing to continue to utilize the interest rate risk factor and the mortgage option adjusted spread risk factor as inputs to MBSD's stress testing model, however, both risk factors would be sourced from a vendor. FICC is also proposing to include two new risk factors in the methodology—interest rate volatility and mortgage basis. The proposed change would result in an expansion of the number of tenors for the existing interest rate risk factor and an expansion of the number of individual factors to the existing mortgage option adjusted spread risk factor. As a result of this change, the proposed interest rate risk factor would include 11 tenors and the proposed mortgage option adjusted spread risk factor would include up to approximately 32 individual factors,[18] which would differentiate between various agency mortgage programs, underlying collateral maturities, and the level of moneyness.[19]

FICC is proposing to use the Historical Data (as described above) because this data is more comprehensive, granular,[20] and transparent. The Historical Data is more comprehensive and granular because (1) it would reflect a total of four risk factors (*i.e.,* interest rate, interest rate volatility, mortgage option adjusted spread and mortgage basis), (2) the proposed interest rate risk factor would include 11 tenors and (3) the proposed mortgage option adjusted spread risk factor would include up to approximately 32 individual factors. As a result of this change, FICC believes that the proposed Historical Data would better explain the market price changes of TBA transactions cleared by MBSD [21] and FICC would be able to identify stress risk exposures under broader and more varied market conditions. The Historical Data would also provide MBSD with an enhanced capability to design more transparent scenarios. Because Clearing Members typically use risk factor analysis for their own risk

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[10] *Id.* at 61083.

[11] An ''Affiliated Family deficiency'' is the aggregate of all Clearing Members' stress deficiencies within the applicable Affiliated Family.

[12] *See* Framework Approval Order, 82 FR at 61083.

[13] In connection with this proposal, FICC is not proposing any changes to the hypothetical Scenario Selection process other than to use the vendor's data. The hypothetical scenarios are currently represented by five interest rate tenors (*i.e.,* 1-year, 2-year, 5-year, 10-year, and 30-year tenors), one mortgage option adjusted spread, and one interest rate volatility point. The hypothetical scenarios are reflected as shocks to the referenced risk factors. This process would not change, however, in order to calculate the stress P&L in the proposed model, FICC would map the referenced risk factors to the set of risk factors in the proposed model.

[14] Generally, the term ''swap rate'' means the fixed interest rate that the receiver demands in exchange for the uncertainty of having to pay the short-term floating rate over time.

[15] Generally, the term ''tenor'' means the amount of time left for the repayment of a loan or until a financial contract expires.

[16] Principal component analysis is a standard statistical technique that is applied to a set of observations of potentially correlated variables. It is used to identify a set of linearly uncorrelated variables, which are referred to as principal components.

[17] Generally, the term ''joint co-movement'' means the movement of two variables at the same time.

[18] As described in the paragraph above, the current stress testing methodology uses four tenors for the interest rate risk factor and two individual factors for the mortgage option adjusted spread risk factor.

[19] The changes of spread are parameterized according to the difference between the underlying weighted average coupon (''WAC'') and the current prevailing mortgage rate. This difference is also referred to as the ''moneyness.'' A TBA security with a WAC that is 10 basis points higher than the prevailing mortgage rate is said to be 10 basis points in the money. Fifteen moneyness points are used to parameterize the FNMA 30-year mortgage.

[20] The term ''granular'' in the risk context means detailed and diversified.

[21] Specified Pool Trades and Stipulated Trades are mapped to the corresponding TBAs. FICC's guarantee of Option Contracts on TBAs is limited to the intrinsic value of the option positions meaning that, when the underlying price of the TBA position is above the call price, the Option Contract is considered in-the-money and FICC's guarantee reflects this portion of the Option Contract's positive value at the time of a Clearing Member's insolvency. The value change of an Option Contract's position is simulated as the change in its intrinsic value. No changes are being proposed to MBSD's treatment of Specified Pool Trades, Stipulated Trades and Option Contracts pursuant to this proposal.

and financial reporting, such Members would have comparable data and analysis to stress test their portfolios. Thus, Clearing Members would be able to simulate their stressed portfolios to a closer degree than under the existing stress testing methodology.

(2) Proposed Change to the Look-Back Period Used for the Identification of Historical Stress Scenarios in the Scenario Selection Process

MBSD's current set of historical stress scenarios is comprised of scenarios that reflect the most severe market price movements which have been observed during past periods of extreme market conditions. To identify specific dates for these market movements, MBSD's stress testing model analyzes the historical risk factor time series data over a 10-year look-back period. Specifically, MBSD's stress testing model currently selects 50 historical scenarios based on actual historical time periods observed over a 10-year look-back period.[22] On a quarterly basis, MBSD eliminates all historical data that fall outside the scope of the 10-year look-back period.

FICC is proposing to change the current 10-year look-back period to a look-back period that starts on a fixed date of May 29, 2002 and continues to expand forward—meaning that no portion of the timeframe within the proposed look-back period would be eliminated from the stress testing model; instead the entire timeframe within the look-back period would continue to expand forward.[23]

FICC selected May 29, 2002 as the fixed starting point based on its assessment of the accuracy and consistency of the Historical Data provided by the vendor. FICC is proposing this change because it believes that the expanded look-back period would better capture the potential market price changes of TBA securities, preserve historical dates that would otherwise be eliminated under the current 10-year look-back period, and provide the stress testing model with a larger set of scenarios for the historical Scenario Selection process.[24]

(3) Proposed Change To Use Security-Level Data and Historical Data in the Stress Testing Model's Stress P&L Calculation

Currently, in order to determine the potential loss to a Clearing Member's portfolio under a given stress scenario, MBSD's stress testing methodology applies a profit-and-loss calculation that multiplies a set of risk factors' stress movements by its corresponding risk sensitivities. Currently this methodology utilizes two interest rate risk factors (*i.e.,* 2-year swap rates and 10-year swap rates) and the FNMA 30-year current coupon mortgage option adjusted spread. The risk sensitivities are estimated using an empirical regression with a two-month look-back period.[25] FICC believes that the current methodology's use of a smaller set of risk factors and the relatively short two-month look-back period is a limitation that contributes to an inability to explain the results of the sensitivities estimation.

FICC is proposing to leverage the Security-Level Data and Historical Data in the methodology's calculation of stress P&L. Specifically, FICC is proposing to replace the current empirical regression-based profit-and-loss calculation with a financial profit-and-loss calculation. The proposed financial profit-and-loss calculation would use the Security-Level Data and Historical Data. The Security-Level Data is generated using the vendor's suite of security valuation models that includes an agency mortgage prepayment model and interest rate term structure model.[26] FICC believes that the vendor's approach generates more stable and robust Security-Level Data and addresses the limitations of the current empirical regression algorithm.[27] Because the proposed change would include Security-Level Data, FICC believes the proposed Security-Level Data would improve the stress testing model's stress P&L calculation, and the calculated results would be closer to actual price changes for TBA securities during larger market moves which are typical of stress testing scenarios.

(4) Proposed Change To Use a Back-Up Calculation in the Event of a Vendor Data Disruption

As described above, FICC would utilize the vendor's data for MBSD's stress testing methodology. Prior to MBSD's use of this data in its VaR model, FICC reviewed a description of the vendor's calculation methodology and the manner in which the market data is used to calibrate the vendor's models. At that time, The Depository Trust & Clearing Corporation's (''DTCC'') Quantitative Risk Management, Vendor Risk Management, and Information Technology teams conducted due diligence of the vendor in order to evaluate its control framework for managing key risks.[28] FICC's due diligence included an assessment of the vendor's technology risk, business continuity, regulatory compliance, and privacy controls. Because of FICC's due diligence and its use of the vendor data in connection with the calculation of MBSD's margin model, FICC understands and remains comfortable with the vendor's controls. In addition, DTCC's Data Integrity department manages the data that FICC receives including, but not limited to, market data and analytical data provided by vendors.[29] As a result, FICC feels comfortable with leveraging the Security-Level Data and Historical Data for purposes of MBSD's stress testing methodology.

In connection with FICC's proposal to use the Security-Level Data and Historical Data in its stress testing methodology for the historical and hypothetical scenarios, FICC is also

[22] In addition to these 50 historical scenarios, FICC supplements the historical scenario set by including additional events that have occurred outside of the 10-year look-back period and have been identified as important periods of historical stress because such events have had a significant impact on the financial market. These dates include May 29, 1994 (when the Federal Reserve significantly raised rates), October 5, 1998 (when the Long-Term Capital Management crisis occurred), and September 11, 2001 (when the terrorist attacks occurred).

[23] FICC would continue to include events that have occurred prior to the proposed fixed date of May 29, 2002. These events include the events referred to in footnote 22 above.

[24] Pursuant to the proposed change, the look-back period would include at least 16 years of historical data.

[25] Empirical regression is a statistical measure that determines the coefficient range used in the stress P&L calculation.

[26] A prepayment model captures cash flow uncertainty as a result of unscheduled payments of principal (prepayments). An interest rate term structure model describes the relationship between interest rates of different maturities.

[27] As described above, these limitations include the limited number of risk factors and the two-month look-back period.

[28] DTCC is FICC's parent company. DTCC operates on a shared services model with respect to FICC. Most corporate functions are established and managed on an enterprise-wide basis pursuant to intercompany agreements under which DTCC generally provides a relevant service to FICC.

[29] DTCC's Data Integrity department oversees data integrity on behalf of DTCC's Counterparty Credit, Market, and Liquidity Risk Management groups as well as Securities Valuation, Model Validation and Control, and Quantitative Risk Management (collectively, Financial Risk Management (''FRM'')), and the Systemic Risk Office. The Data Integrity department's mission is to align with FRM and ensure that the highest data quality is managed for the purpose of lowering risk and improving efficiency within FRM. The Data Integrity department's prime directive consists of the following: (1) Ensuring a data governance framework is established and adhered to within FRM; (2) ensuring sufficient integrity of key data sources through active rules-based data monitoring; (3) ensuring sufficient alerting is in place to inform necessary parties when data anomalies occur; (4) liaising with subject matter experts to resolve data anomalies in an efficient and effective manner; and (5) ensuring that critical FRM data is catalogued and defined in the enterprise data dictionary.

proposing a back-up calculation (as described in the paragraph below) that it would utilize in the event the vendor fails to provide the data. If the vendor fails to provide any data or a significant portion of the data in accordance with the timeframes agreed to by FICC and the vendor, FICC would use the most recently available data on the first day that such disruption occurs. Subject to discussions with the vendor, if a Managing Director, who oversees Market Risk Management, determines that the vendor would resume providing data within five (5) business days, such Managing Director would determine whether the daily stress testing calculation should continue to be calculated by using the most recently available data or whether the back-up calculation (as described below) should be invoked, subject to the approval of DTCC's Group Chief Risk Officer or his/her designee.[30] Subject to discussions with the vendor, if a Managing Director, who oversees Market Risk Management, determines that the data disruption would extend beyond five (5) business days, the back-up calculation would be applied, subsequent to the approval of DTCC's Management Risk Committee, followed by notification to the Board Risk Committee.

The proposed back-up calculation would be as follows: MBSD would (1) calculate each Clearing Member's portfolio net exposures in four securitization programs,[31] (2) calculate the stress return for each securitization program as the three-day price return for each securitization program index for each scenario date, and (3) calculate each Clearing Member's stress P&L as the sum of the products of the net exposure of each securitization program and the stress return value for each securitization program. FICC would use publicly available indices (*e.g.,* the Bloomberg FNMA 30-year index, Bloomberg GNMA 30-year index, Bloomberg FNMA 15-year index and Bloomberg GNMA 15-year index) as the data source for the stress return calculations.[32]

[30] For the avoidance of doubt, after taking into consideration the vendor's condition and, to the extent applicable, market conditions, FICC may treat the interruption as an extended data interruption sooner.

[31] The securitization programs are as follows: (1) FNMA and Freddie Mac (''FHLMC'') conventional 30-year mortgage-backed securities, (2) GNMA 30-year mortgage-backed securities, (3) FNMA and FHLMC conventional 15-year mortgage-backed securities, and (4) GNMA 15-year mortgage-backed securities.

[32] The proposed calculation is similar to MBSD's calculation of the Margin Proxy, which is the back-up calculation that MBSD will use to calculate the VaR Charge in the event of a vendor data disruption. *See* MBSD Rule 1, Definitions—Margin Proxy, *supra* note 3.

C. Delayed Implementation of the Proposal

This proposal would become operative within 45 business days after the date of the Commission's notice of no objection to this advance notice filing. FICC would announce the operative date in an important notice issued to Clearing Members.[33]

II. Anticipated Effect on and Management of Risks

FICC believes that the proposed change to MBSD's stress testing methodology, which consists of proposals to (1) use Historical Data in the Scenario Selection process, (2) change the 10-year look-back period used for the identification of historical stress scenarios in the Scenario Selection process, (3) use Security-Level Data and Historical Data in the stress testing methodology's calculation of stress P&L for Clearing Members' portfolios, and (4) use a back-up calculation in the event of a Vendor Data Disruption, would affect MBSD's management of risk because the changes would help to ensure that MBSD's stress testing methodology more effectively measures whether it is collecting adequate prefunded financial resources to cover its potential losses resulting from the default of a Clearing Member and its Affiliated Family under multiple extreme but plausible market stress conditions.

A. Proposed Change To Use Historical Data in the Scenarios Selection Process

FICC's proposal to utilize Historical Data in MBSD's historical stress scenario selection process would affect FICC's management of risk because the change would incorporate a broader range of risk factors to better understand a Clearing Member's exposure to these risk factors. As described above, the proposed change would enable MBSD to leverage vendor expertise in supplying the risk data attributes that would then be incorporated into MBSD's stress testing model. The data would expand the number of tenors for the existing interest rate risk factor and expand the number of individual factors to the existing mortgage option adjusted spread risk factor. The proposed interest rate risk factor would include 11 tenors and the proposed mortgage option adjusted spread risk factor would include up to approximately 32 individual factors.[34] In addition, FICC would include two new risk factors in the methodology—interest rate volatility and mortgage basis. FICC believes that the proposed change would provide more comprehensive, granular and transparent risk representations that enable sensitivity analysis on key model parameters and assumptions.

[33] MBSD's important notices are *available at http://www.dtcc.com/legal/important-notices?subsidiary=FICC+-+MBS&pgs=1.*

B. Proposed Change to the 10-Year Look-Back Period Used for the Identification of Historical Stress Scenarios in the Scenario Selection Process

FICC's proposal to change the current 10-year look-back period to a look-back period that starts on a fixed date of May 29, 2002 and continues to expand forward would affect FICC's management of risk because the change (which includes at least 16 years of historical data) would give MBSD the ability to assess a broader spectrum of historical stressed market events that would be used in the stress testing methodology to design a comprehensive set of historical stress scenarios.

C. Proposed Change To Use Security-Level Data and Historical Data in the Stress Testing Model's Stress P&L Calculation

FICC's proposal to use Security-Level Data and Historical Data in the stress testing methodology's calculation of stress P&L would affect FICC's management of risk because leveraging the vendor-supplied data would improve the estimation of the stress P&L calculation by giving FICC the ability to attribute the stress loss under a given stress scenario to specific risk factor changes. As described above, FICC would replace the current empirical regression based profit-and-loss calculation with a financial profit-and-loss calculation that uses Security-Level Data and Historical Data, which are not included in the current algorithm.[35] Thus, FICC believes the proposed change would improve the stress testing model's stress P&L calculation because the calculated results would be closer to actual price changes for TBA securities during larger market moves which are typical of stress testing scenarios.

In an effort to assess the impact of the proposed change, FICC compared the results of the current stress testing

[34] The proposed interest rate risk factor would include 11 tenors between 3 months and 30 years, and the proposed mortgage option adjusted spread risk factor would include factors related to relative value, spread between 15-year and 30-year products, and spread between GNMA and FNMA.

[35] As described above, the empirical regression algorithm incorporates fewer risk factors and a shorter look-back period.

methodology with the proposed stress testing methodology for the period of February 1, 2018 through January 1, 2019 with respect to the historical stress scenarios. The average of the maximum daily historical Cover 1 Ratio for this period is 20.3% for the proposed stress testing methodology compared to 19.2% for the current stress testing methodology (meaning that the proposed methodology would be approximately 1.1% higher (on average) than the current methodology).

D. Proposed Change To Use a Back-Up Calculation in the Event of a Vendor Data Disruption

FICC's proposal to use a back-up calculation would affect FICC's management of risk because it would help to ensure that FICC continues to test the adequacy of MBSD's prefunded financial resources in the event of a Vendor Data Disruption. As described above, FICC would manage the risks associated with a potential data disruption by using the most recently available data (before the disruption) on the first day that a data disruption occurs. If the vendor fails to provide any data or a significant portion of the data in accordance with the timeframes agreed to by FICC and the vendor, FICC would use the most recently available data on the first day that such disruption occurs. Subject to discussions with the vendor, if a Managing Director, who oversees Market Risk Management, determines that the vendor would resume providing data within five (5) business days, such Managing Director would determine whether the daily stress testing calculation should continue to be calculated by using the most recently available data or whether the back-up calculation should be invoked, subject to the approval of DTCC's Group Chief Risk Officer or his/her designee. Subject to discussions with the vendor, if a Managing Director, who oversees Market Risk Management, determines that the data disruption would extend beyond five (5) business days, the back-up calculation would be applied, subject to the approval of DTCC's Management Risk Committee, followed by notification to the Board Risk Committee.

III. Consistency With the Clearing Supervision Act and the Covered Clearing Agency Standards

Although the Clearing Supervision Act does not specify a standard of review for an advance notice, its stated purpose is instructive: To mitigate systemic risk in the financial system and promote financial stability by, among other things, promoting uniform risk management standards for systemically important financial market utilities and strengthening the liquidity of systemically important financial market utilities.[36]

Section 805(a)(2) of the Clearing Supervision Act[37] authorizes the Commission to prescribe risk management standards for the payment, clearing and settlement activities of designated clearing entities, like FICC, and financial institutions engaged in designated activities for which the Commission is the supervisory agency or the appropriate financial regulator. Section 805(b) of the Clearing Supervision Act[38] states that the objectives and principles for the risk management standards prescribed under Section 805(a) shall be to, among other things, promote robust risk management, promote safety and soundness, reduce systemic risks, and support the stability of the broader financial system. The Commission has adopted risk management standards under Section 805(a)(2) of the Clearing Supervision Act[39] and Section 17A of the Act[40] (the risk management standards are referred to as the ''Covered Clearing Agency Standards'').[41] The Covered Clearing Agency Standards require registered clearing agencies to establish, implement, maintain, and enforce written policies and procedures that are reasonably designed to be consistent with the minimum requirements for their operations and risk management practices on an ongoing basis.[42]

A. Consistency With Section 805(b) of the Clearing Supervision Act

FICC believes that the proposed changes in this advance notice are consistent with the objectives and principles of the risk management standards as described in Section 805(b) of the Clearing Supervision Act and in the Covered Clearing Agency Standards. As discussed above, FICC is proposing several changes to MBSD's stress testing methodology. FICC believes the proposed changes are consistent with promoting robust risk management because the changes are designed to enhance MBSD's stress testing methodology, which is used to help ensure that MBSD collects adequate prefunded financial resources to cover its potential losses resulting from the default of a Clearing Member and its Affiliated Family under multiple extreme but plausible market stress conditions.

First, FICC is proposing to leverage Historical Data in the Scenario Selection process. FICC believes the proposed change would promote robust risk management because the Historical Data would incorporate a broader range of risk factors that would be used in MBSD's stress testing model to better understand a Clearing Member's exposure to these risk factors.

Second, FICC is proposing to change the 10-year look-back period to a look-back period that starts on a fixed date of May 29, 2002 and continues to expand forward. FICC believes the proposed change would promote robust risk management because the change, which includes at least 16 years of historical data, would capture the potential market price changes of TBA securities over a longer time period, preserve historical dates that would otherwise be eliminated under the current 10-year look-back period and provide the stress testing model with a larger set of scenarios for the historical Scenario Selection process.

Third, FICC is proposing to leverage Security-Level Data and Historical Data in the methodology's calculation of stress P&L. FICC believes the proposed change would promote robust risk management because it would replace the current empirical regression-based profit-and-loss calculation with a financial profit-and-loss calculation that utilizes the Security-Level Data and Historical Data. The change would cause the stress testing model's stress P&L calculation to calculate amounts that are closer to actual price changes for TBA securities during larger market moves in an effort to test the adequacy of MBSD's prefunded resources.

Fourth, FICC is proposing to use a back-up calculation in the event of a Vendor Data Disruption. FICC believes the proposed change would promote robust risk management because the change would help to ensure that FICC has a stress testing methodology in place that allows it to continue to test the adequacy of MBSD's prefunded financial resources in the event of a Vendor Data Disruption.

For these reasons, FICC believes the proposed changes would help to promote MBSD's robust risk management, which, in turn, is consistent with reducing systemic risks and supporting the stability of the broader financial system, consistent with Section 805(b) of the Clearing

[36] *See* 12 U.S.C. 5461(b).
[37] *See* 12 U.S.C. 5464(a)(2).
[38] *See* 12 U.S.C. 5464(b).
[39] *See* 12 U.S.C. 5464(a)(2)
[40] *See* 15 U.S.C. 78q–1.
[41] *See* 17 CFR 240.17Ad–22.
[42] *Id.*

Supervision Act.[43] FICC also believes the changes proposed in this advance notice are consistent with promoting safety and soundness, which, in turn, is consistent with reducing systemic risks and supporting the stability of the broader financial system, consistent with Section 805(b) of the Clearing Supervision Act.[44] As described above, the proposed changes are designed to help ensure that FICC's stress testing methodology measures whether MBSD is collecting adequate prefunded financial resources to cover its potential losses resulting from the default of a Clearing Member and its Affiliated Family under multiple extreme but plausible market stress conditions. Because the proposed changes would better position FICC to limit its exposures to Clearing Members in the event of a Clearing Member's default, FICC believes the proposed changes are consistent with promoting safety and soundness, which, in turn, is consistent with reducing systemic risks and supporting the stability of the broader financial system.

B. Consistency With Rule 17Ad–22(e)(4) Under the Act

This proposal is also designed to be consistent with Rule 17Ad–22(e)(4) under the Act, which requires, in part, that each covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes.[45]

Rule 17Ad–22(e)(4)(i) under the Act requires that a covered clearing agency maintain sufficient financial resources to cover its credit exposure to each participant fully with a high degree of confidence.[46] The proposed changes are consistent with Rule 17Ad–22(e)(4)(i) because they describe how FICC has developed and carries out a credit risk management strategy to maintain sufficient prefunded financial resources to cover fully its credit exposures to each Clearing Member with a high degree of confidence.

FICC believes (1) the proposal to use Historical Data in the historical Scenario Selection process and incorporate a broader range of risk factors that would be used in MBSD's stress testing model would enable FICC to better understand a Clearing Member's exposure to these risk factors, (2) the proposal to change the 10-year look-back period to a look-back period that starts on a fixed date of May 29, 2002 and continues to expand forward would better capture the potential market price changes of TBA securities, preserve historical dates that would otherwise be eliminated under the current 10-year look-back period and provide the stress testing model with a larger set of scenarios for the historical selection process, (3) the proposal to leverage Security-Level Data and Historical Data in the stress testing methodology's calculation of stress P&L for Clearing Members' portfolios would provide for calculated amounts that are closer to actual price changes for TBA securities during larger market moves in an effort to test the adequacy of MBSD's prefunded resources, and (4) the proposal to use a back-up calculation would help to ensure that FICC has a methodology in place that allows it to continue to measure the adequacy of MBSD's prefunded financial resources in the event of a Vendor Data Disruption. FICC believes that the proposed changes would improve MBSD's stress testing methodology, which is used to test the sufficiency of MBSD's prefunded resources daily to support compliance with Rule 17Ad–22(e)(4)(i). As such, FICC believes that, taken together, the proposed changes are designed to be consistent with the requirements of Rule 17Ad–22(e)(4)(i) under the Act.[47]

Rule 17Ad–22(e)(4)(vi)(A) under the Act requires that a covered clearing agency conduct stress testing of its total financial resources once each day using standard predetermined parameters and assumptions.[48] FICC believes the proposal to (1) use Historical Data in the historical Scenario Selection process, (2) change the 10-year look-back period to a look-back period that starts on a fixed date of May 29, 2002 and continues to expand forward, (3) leverage Security-Level Data and Historical Data in the stress testing methodology's calculation of stress P&L for Clearing Members' portfolios, and (4) use a back-up calculation in the event of a Vendor Data Disruption would reflect standard predetermined parameters and assumptions that FICC would use in MBSD's stress testing methodology to conduct daily stress testing.

FICC believes that the proposed changes would reflect its use of standard predetermined parameters and assumptions in FICC's daily stress testing of its financial resources in order to support compliance with Rule 17Ad–22(e)(4)(vi)(A) under the Act.[49] As such, FICC believes that, taken together, the proposed changes are designed to be consistent with the requirements of Rule 17Ad–22(e)(4)(vi)(A) under the Act.[50]

III. Date of Effectiveness of the Advance Notice, and Timing for Commission Action

The proposed change may be implemented if the Commission does not object to the proposed change within 60 days of the later of (i) the date that the proposed change was filed with the Commission or (ii) the date that any additional information requested by the Commission is received. The clearing agency shall not implement the proposed change if the Commission has any objection to the proposed change.

The Commission may extend the period for review by an additional 60 days if the proposed change raises novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension. A proposed change may be implemented in less than 60 days from the date the advance notice is filed, or the date further information requested by the Commission is received, if the Commission notifies the clearing agency in writing that it does not object to the proposed change and authorizes the clearing agency to implement the proposed change on an earlier date, subject to any conditions imposed by the Commission.

The clearing agency shall post notice on its website of proposed changes that are implemented.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the Advance Notice is consistent with the Clearing Supervision 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–FICC–2020–801 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

[43] *See* 12 U.S.C. 5464(b).

[44] *Id.*

[45] 17 CFR 240.17Ad–22(e)(4).

[46] 17 CFR 240.17Ad–22(e)(4)(i).

[47] 17 CFR 240.17Ad–22(e)(4)(i).

[48] 17 CFR 240.17Ad–22(e)(4)(vi)(A). The Framework identifies the sources of MBSD's prefunded resources for purposes of meeting FICC's requirements under Rule 17Ad–22(e)(4)(iii).

[49] *Id.*

[50] 17 CFR 240.17Ad–22(e)(4)(vi)(A).

All submissions should refer to File Number SR–FICC–2020–801. 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 Advance Notice that are filed with the Commission, and all written communications relating to the Advance Notice 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 FICC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). 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–FICC–2020–801 and should be submitted on or before March 13, 2020.

By the Commission.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–03996 Filed 2–26–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88259; File No. SR–CboeBZX–2020–007]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Eliminate the Requirement That the Intraday Indicative Value Be Disseminated as Set Forth Under Rule 14.11(c) for Certain Series of Index Fund Shares and Under Rule 14.11(i) for All Series of Managed Fund Shares

February 21, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 14, 2020, Cboe BZX Exchange, Inc. (the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the 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

Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') is filing with the Securities and Exchange Commission (''Commission'') a proposed rule change to eliminate the requirement that the Intraday Indicative Value be disseminated as set forth under Rule 14.11(c) (''Index Fund Shares'') for certain series of Index Fund Shares and under Rule 14.11(i) (''Managed Fund Shares'') for all series of Managed Fund Shares. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Exchange Rules 14.11(c) and 14.11(i) relate to the listing and trading of Index Fund Shares and Managed Fund Shares on the Exchange. Among a number of other requirements, numerous sub-paragraphs of each of these rules require that an intraday estimate of the value of a share of each series (the ''Intraday Indicative Value'' or ''IIV'') of Index Fund Shares and Managed Fund Shares be disseminated and updated at least every 15 seconds.[3] The Exchange is proposing to eliminate the requirement to disseminate an IIV for all series of Managed Fund Shares [4] listed on the Exchange and for those series of Index Fund Shares that also publish their Portfolio Holdings (as defined below) on a daily basis.

As part of this proposal, the Exchange is also proposing to adopt proposed Rule 14.11(c)(1)(F) to define the term ''Portfolio Holdings'' which would mean the holdings of a particular series of Index Fund Shares that will form the basis for the calculation of its net asset value (''NAV'') at the end of the business day.[5] Existing Exchange Rules require issuers of Managed Fund Shares to provide IIV and daily disclosure of the Disclosed Portfolio.[6] Similarly, existing Exchange Rules require issuers of Index Fund Shares to disseminate an IIV for each fund, but do not universally require daily disclosure of a fund's underlying holdings.[7]

The dissemination of an IIV, together with disclosure of the fund's underlying

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* subparagraphs (c)(3)(C), (c)(6)(A), and (c)(9)(B)(i)(e) of Exchange Rule 14.11. *See also* subparagraphs (i)(3)(C), (i)(3)(D), (i)(4)(B)(i), (i)(4)(B)(iii)(b), and (i)(4)(B)(iv) of Exchange Rule 14.11.

[4] The Exchange notes that Rule 14.11(i)(4)(B)(ii)(a) requires that the Disclosed Portfolio for a series of Managed Fund Shares be disseminated at least once daily and be made available to all market participants at the same time. Further, Rule 14.11(i)(4)(B)(iii)(b) requires that the Exchange consider suspension of trading in and commence delisting proceedings for a series of Managed Fund Shares where the Disclosed Portfolio is not made available to all market participants at the same time. As such, the Exchange is proposing to eliminate the IIV dissemination requirements entirely from Rule 14.11(i).

[5] For purposes of Rule 14.11(c), Portfolio Holdings would include various information, to the extent applicable, as listed in proposed subparagraphs (c)(1)(F)(i) through (c)(1)(F)(xi). The proposed definition of Portfolio Holdings is substantively identical to the definition of ''Disclosed Portfolio'' as set forth in Rule 14.11(i)(3)(B).

[6] *See* subparagraphs (i)(3)(B), (i)(4)(A)(ii), and (i)(4)(B)(ii) of Exchange Rule 14.11. The term ''Disclosed Portfolio'' means the identities and quantities of the securities and other assets held by the Investment Company that will form the basis for the Investment Company's calculation of net asset value at the end of the business day. *See also* Exchange Rule 14.11(i)(3)(B).

[7] The Exchange notes that Rule 14.11(c)(1)(B)(iv) would require the daily disclosure of certain information related to a fund's portfolio holdings where a fund ''seeks to provide investment results that either exceed the performance of a specified . . . index . . . by a specified multiple or that correspond to the inverse (opposite) of the performance of a specified . . . index . . . by a specified multiple,'' however, the Exchange does not currently list any such funds.

holdings, was designed to allow investors to determine the value of the underlying portfolio of such funds on a daily basis and provide a close estimate of that value throughout the trading day. However, as consistently highlighted in the adopting release of Rule 17 CFR 270.6c–11 (''Rule 6c–11'')[8] under the Investment Company Act of 1940[9] (the ''1940 Act''), the Commission has expressed concerns regarding the accuracy of IIV estimates for certain Exchange-Traded Funds (''ETFs'').[10] Specifically, the Commission noted that an IIV may not accurately reflect the value of an ETF that holds securities that trade less frequently as such IIV can be stale or inaccurate.[11] Similarly, the Commission also expressed concerns with the IIV of ETFs with frequently traded component securities because ''in today's fast moving markets, given the dissemination lags, an IIV may not accurately reflect the value of an ETF that holds frequently traded component securities.'' [12] Additionally, the Commission indicated that even in circumstances when an IIV may be reliable, retail investors do not have easy access to free, publicly available IIV information.[13] Further, in instances when IIV may be free and publicly available, it can be delayed by up to 45 minutes.[14]

Aside from the fact that the disseminated IIV may provide investors with stale or misleading data, the Commission also stated that market makers and authorized participants typically calculate their own intraday value of an ETF's portfolio with proprietary algorithms that use an ETF's daily portfolio disclosure and available pricing information.[15] Such information allows those market participants to support the arbitrage mechanism for ETFs. The arbitrage mechanism is designed to help keep the market price of ETF shares at or close to the NAV per share of an ETF, and is important because it helps to ensure ETF investors are treated equitably when buying and selling fund shares.[16] Therefore, as market participants who engage in arbitrage typically calculate their own intraday value of an ETF's portfolio based on the ETF's daily portfolio disclosure and pricing information and use an IIV only as a secondary check to their own calculation,[17] the Commission noted that IIV was not necessary to support the arbitrage mechanism.[18] Given this, combined with shortcomings of the IIV noted above, the Commission concluded that ETFs will not be required to disseminate an IIV under Rule 6c–11.[19] As such, exchange listing rules are the only reason that a series of Managed Fund Shares is required to disseminate an IIV. Similarly, exchange listings rules are the only reason that a series of Index Fund Shares that also publishes its Portfolio Holdings on a daily basis is required to disseminate an IIV.

The Exchange believes that the limitations and shortcomings of IIV as it pertains to ETFs relying on Rule 6c–11 and highlighted in the Adopting Release are equally applicable to all Managed Fund Shares listed on the Exchange and Index Fund Shares for which the Portfolio Holdings are disclosed on a daily basis. The Exchange further agrees with the conclusion of the Adopting Release that the ''IIV is not necessary to support the arbitrage mechanism for ETFs that provide daily portfolio holdings disclosure.'' The transparency that comes from daily portfolio holdings disclosure provides market participants with sufficient information to facilitate the intraday valuation of the shares of an ETF, including Managed Fund Shares and Index Fund Shares for which Portfolio Holdings are disclosed daily, which, ignoring the many criticisms of IIV in the Adopting Order, renders IIV at the very least duplicative and unnecessary.

As such, the Exchange is proposing to eliminate the requirement for the dissemination of the IIV for all series of Managed Fund Shares and for Index Fund Shares for which Portfolio Holdings are disclosed on a daily basis. Additionally, the Exchange is proposing to make conforming numbering changes to Rules 14.11(c) and 14.11(i).

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[20] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[21] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed amendment seeks to eliminate the requirement that Managed Fund Shares and Index Fund Shares for which the Portfolio Holdings are disclosed daily, disseminate an IIV for the same reasons articulated in the Adopting Order for Rule 6c–11, which does not require the dissemination of IIV. The Exchange believes that the proposed amendment will eliminate the dissemination of potentially stale and misleading IIV information to market participants, as was also noted in the Adopting Order. Further, as the proposed rule text would only eliminate the requirement for series of Index Fund Shares[22] and Managed Fund Shares[23] that provide full daily portfolio transparency, such full daily portfolio transparency would provide market participants with a tool to easily calculate the IIV of a series of Managed Fund Shares or Index Fund Shares, which the Exchange believes generally mitigates the need for the dissemination of an IIV for certain series of Index Fund Shares or Managed Fund Shares. Nonetheless, nothing in this proposal limits the ability of such Index Fund Shares or Managed Fund Shares from disseminating the IIV should they choose to do so. Further, the Exchange notes that its rules still include certain circumstances in which an issuer would be required to disseminate an IIV.[24]

As a result of the proposed rule change, the Exchange believes issuers may benefit from cost savings because of the eliminated requirement to disseminate an IIV. The reduced cost

[8] *See* Investment Company Act Release No. 10695 (September 25, 2019), 84 FR 57162 (October 24, 2019) (the ''Adopting Release'').

[9] 15 U.S.C. 80a–1.

[10] An Exchange-Traded Fund means a registered open-end investment company: (i) That issues (and redeems) creation units to (and from) authorized participants in exchange for a basket and a cash balancing amount if any; and (ii) Whose shares are listed on a national securities exchange and traded at market-determined prices. *See Id.*

[11] *See* supra note 8, at 62.

[12] *See id.*

[13] *See Id.,* at 66.

[14] *See Id.*

[15] *See Id.,* at 63.

[16] *See Id.,* at 12.

[17] *See Id.,* at 63.

[18] *See Id.,* at 65.

[19] *See Id.,* at 61.

[20] 15 U.S.C. 78f(b).

[21] 15 U.S.C. 78f(b)(5).

[22] As provided in proposed Rules 14.11(c)(3)(C) and 14.11(c)(6)(A), a series of Index Fund Shares would only be exempt from IIV dissemination requirements where there is daily public website disclosure of Portfolio Holdings.

[23] *See* supra note 4.

[24] For example, a series of Index Fund Shares that does not provide daily portfolio transparency would still be required to disseminate an IIV. Additionally, the requirement of IIV dissemination will continue to be required for certain products that are not subject to the Investment Company Act of 1940.

could also result in lower barriers to entry for new issuers and new series of Managed Fund Shares and Index Fund Shares for which the Portfolio Holdings are disclosed daily, which will result in enhanced competition among products and issuers of such funds, which can lead to lower fees for investors, encourage financial innovation, and increase investor choice in the ETF market.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange believes that issuers may benefit from cost savings and lower barriers to entry because of the eliminated requirement to disseminate an IIV. In turn, the proposed rule change will enable increased product competition among issuers of such funds, which can lead to lower fees for investors, encourage financial innovation, and increase investor choice in the ETF market.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve or disapprove such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CboeBZX–2020–007 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–2020–007. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeBZX–2020–007 and should be submitted on or before March 19, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2020–03920 Filed 2–26–20; 8:45 am]

BILLING CODE 8011–01–P

[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88263; File No. SR–CboeBZX–2020–006]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of a Proposed Rule Change Relating To Providing Members Certain Optional Risk Settings Under Proposed Interpretation and Policy .03 of Rule 11.13

February 21, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 12, 2020, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') is filing with the Securities and Exchange Commission (the ''Commission'') a proposal to provide Members certain optional risk settings under proposed Interpretation and Policy .03 of Rule 11.13.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to provide Members [3] the option to utilize certain risk settings under proposed Interpretation and Policy .03 of Rule 11.13. In order to help Members manage their risk, the Exchange proposes to offer optional risk settings that would authorize the Exchange to take automated action if a designated limit for a Member is breached. Such risk settings would provide Members with enhanced abilities to manage their risk with respect to orders on the Exchange. Paragraph (a) of proposed Interpretation and Policy .03 of Rule 11.13 sets forth the specific risk controls the Exchange proposes to offer. Specifically, the Exchange proposes to offer two credit risk settings as follows:

- The ''Gross Credit Risk Limit'', which refers to a pre-established maximum daily dollar amount for purchases and sales across all symbols, where both purchases and sales are counted as positive values. For purposes of calculating the Gross Credit Risk Limit, only executed orders are included; and
- The ''Net Credit Risk Limit'', which refers to a pre-established maximum daily dollar amount for purchases and sales across all symbols, where purchases are counted as positive values and sales are counted as negative values. For purposes of calculating the Net Credit Risk Limit, only executed orders are included.

The Gross Credit and Net Credit risk settings are similar to credit controls measuring both gross and net exposure provided for in paragraph (h) of Interpretation and Policy .01 of Rule 11.13, but with certain notable differences. Importantly, the proposed risk settings would be applied at a Market Participant Identifier (''MPID'') level, while the controls noted in paragraph (h) of Interpretation and Policy .01 are applied at the logical port level.[4] Therefore, the proposed risk management functionality would allow a Member to manage its risk more comprehensively, instead of relying on the more limited port level functionality offered today. Further, the proposed risk settings would be based on a notional execution value, while the controls noted in paragraph (h) of Interpretation and Policy .03 are applied based on a combination of outstanding orders on the Exchange's book and notional execution value. The Exchange notes that the current gross and net notional controls noted in paragraph (h) of Interpretation and Policy .03 will continue to be available in addition to the proposed risk settings.

Paragraph (c) of proposed Interpretation and Policy .03 of Rule 11.13 provides that a Member that does not self-clear may allocate and revoke [5] the responsibility of establishing and adjusting the risk settings identified in proposed paragraph (a) to a Clearing Member [6] that clears transactions on behalf of the Member, if designated in a manner prescribed by the Exchange.

By way of background, Exchange Rule 11.15(a) requires that all transactions passing through the facilities of the Exchange shall be cleared and settled through a Qualified Clearing Agency using a continuous net settlement system.[7] This requirement may be satisfied by direct participation, use of direct clearing services, or by entry into a corresponding clearing arrangement with another Member that clears through a Qualified Clearing Agency (*i.e.,* a Clearing Member). If a Member clears transactions through another Member that is a Clearing Member, such Clearing Member shall affirm to the Exchange in writing, through letter of authorization, letter of guarantee or other agreement acceptable to the Exchange, its agreement to assume responsibility for clearing and settling any and all trades executed by the Member designating it as its clearing firm.[8] Thus, while not all Members are Clearing Members, all Members are required to either clear their own transactions or to have in place a relationship with a Clearing Member that has agreed to clear transactions on their behalf in order to conduct business on the Exchange. Therefore, the Clearing Member that guarantees the Member's transactions on the Exchange has a financial interest in the risk settings utilized within the System [9] by the Member.

Paragraph (c) is proposed by the Exchange in order to offer Clearing Members an opportunity to manage their risk of clearing on behalf of other Members, if authorized to do so by the Member trading on the Exchange. Specifically, the Exchange believes such functionality would help Clearing Members to better monitor and manage the potential risks that they assume when clearing for Members of the Exchange. A Member may allocate or revoke the responsibility of establishing and adjusting the risk settings identified in proposed paragraph (a) to its Clearing Member via the risk management tool available on the web portal at any time. By allocating such responsibility, a Member would thereby cede all control and ability to establish and adjust such risk settings to its Clearing Member unless and until such responsibility is revoked by the Member, as discussed in further detail below. Because the Member is responsible for its own trading activity, the Exchange will not provide a Clearing Member authorization to establish and adjust risk settings on behalf of a Member without first receiving consent from the Member. The Exchange would consider a Member to have provided such consent if it allocates the responsibility to establish and adjust risk settings to its Clearing Member via the risk management tool available on the web portal. By allocating such responsibilities to its Clearing Member, the Member consents to the Exchange taking action, as set forth in proposed paragraph (d) of Interpretation and Policy .03, with respect to the Member's trading activity. Specifically, if the risk setting(s) established by the Clearing Member are breached, the Member consents that the Exchange will automatically block new orders submitted and cancel open orders [10] until such time that the applicable risk setting is adjusted to a higher limit by the Clearing Member. A Member may

[3] *See* Exchange Rule 1.5(n).

[4] A logical port represents a port established by the Exchange within the Exchange's System for trading and billing purposes. Each logical port established is specific to a Member or non-Member and grants that Member or non-Member the ability to accomplish a specific function, such as order entry, order cancellation, or data receipt.

[5] As discussed below, if a Member revokes the responsibility of establishing and adjusting the risk settings identified in proposed paragraph (a), the settings applied by the Member would be applicable.

[6] The term ''Clearing Member'' refers to a Member that is a member of a Qualified Clearing Agency and clears transactions on behalf of another Member. *See* Exchange Rule 11.15(a).

[7] The term ''Qualified Clearing Agency'' means a clearing agency registered with the Commission pursuant to Section 17A of the Act that is deemed qualified by the Exchange. *See* Exchange Rule 1.5(u). The rules of any such clearing agency shall govern with the respect to the clearance and settlement of any transactions executed by the Member on the Exchange.

[8] A Member can designate one Clearing Member per Market Participant Identifier (''MPID'') associated with the Member.

[9] System is defined as ''the electronic communications and trading facility designated by the Board through which securities orders of Members are consolidated for ranking, execution and, when applicable, routing away.'' *See* Exchange Rule 1.5(aa).

[10] As discussed in further detail below, in the event of a risk setting breach certain orders entered for participation in an auction will not be canceled by the Exchange after the applicable cut-off period.

also revoke responsibility allocated to its Clearing Member pursuant to this paragraph at any time via the risk management tool available on the web portal.

Paragraph (b) of proposed Interpretation and Policy .03 of Rule 11.13 provides that either a Member or its Clearing Member, if allocated such responsibility pursuant to paragraph (c) of the proposed Interpretation and Policy, may establish and adjust limits for the risk settings provided in proposed paragraph (a) of Interpretation and Policy .03. A Member or Clearing Member may establish and adjust limits for the risk settings through the Exchange's risk management tool available on the web portal. The risk management web portal page will also provide a view of all applicable limits for each Member, which will be made available to the Member and its Clearing Member, as discussed in further detail below.

Proposed paragraph (d) of Interpretation and Policy .03 of Rule 11.13 would provide optional alerts to signal when a Member is approaching its designated limit. If enabled, the alerts would generate when the Member breaches certain percentage thresholds of its designated risk limit, as determined by the Exchange. Based on current industry standards, the Exchange anticipates initially setting these thresholds at fifty, seventy, or ninety percent of the designated risk limit. Both the Member and Clearing Member [11] would have the option to enable the alerts via the risk management tool on the web portal and designate email recipients of the notification.[12] The proposed alert system is meant to warn a Member and Clearing Member of the Member's trading activity, and will have no impact on the Member's order and trade activity if a warning percentage is breached. Proposed paragraph (e) of Interpretation and Policy .03 of Rule 11.13 would authorize the Exchange to automatically block new orders submitted and cancel all open orders in the event that a risk setting is breached.[13] The Exchange will continue to block new orders submitted until the Member or Clearing Member, if allocated such responsibility pursuant to paragraph (c) of proposed Interpretation and Policy .03, adjusts the risk settings to a higher threshold. The proposed functionality is designed to assist Members and Clearing Members in the management of, and risk control over, their credit risk. Further, the proposed functionality would allow the Member to seamlessly avoid unintended executions that exceed their stated risk tolerance.

The Exchange does not guarantee that the proposed risk settings described in proposed Interpretation and Policy .03, are sufficiently comprehensive to meet all of a Member's risk management needs. Pursuant to Rule 15c3–5 under the Act,[14] a broker-dealer with market access must perform appropriate due diligence to assure that controls are reasonably designed to be effective, and otherwise consistent with the rule.[15] Use of the Exchange's risk settings included in proposed Interpretation and Policy .03 will not automatically constitute compliance with Exchange or federal rules and responsibility for compliance with all Exchange and SEC rules remains with the Member.

Additionally, as the Exchange currently has the authority to share any of a Member's risk settings specified in Interpretation and Policy .01 of Rule 11.13 under Exchange Rule 11.15(f) with the Clearing Member that clears transactions on behalf of the Member, the Exchange also seeks such authority as it pertains to risk settings specified in proposed Interpretation and Policy .03. Existing Rule 11.15(f) provides the Exchange with authority to directly provide Clearing Members, that clear transactions on behalf of a Member, to share any of the Member's risk settings set forth under Interpretation and Policy .01 to Rule 11.13.[16] The purpose of such a provision under Rule 11.15(f) was implemented in order to reduce the administrative burden on participants on the Exchange, including both Clearing Members and Members, and to ensure that Clearing Members receive information that is up to date and conforms to the settings active in the System. Further, the provision was implemented because the Exchange believed such functionality would help Clearing Members to better monitor and manage the potential risks that they assume when clearing for Members of the Exchange. Now, the Exchange also proposes to amend paragraph (f) of Exchange Rule 11.15 to authorize the Exchange to share any of a Member's risk settings specified in proposed Interpretation and Policy .03 to Rule 11.13 with the Clearing Member that clears transactions on behalf of the Member. The Exchange notes that the use by a Member of the risk settings offered by the Exchange is optional. By using these proposed optional risk settings, a Member therefore also opts-in to the Exchange sharing its designated risk settings with its Clearing Member. The Exchange believes that its proposal to offer additional risk settings will allow Members to better manage their credit risk. Further, by allowing Members to allocate the responsibility for establishing and adjusting such risk settings to its Clearing Member, the Exchange believes Clearing Members may reduce potential risks that they assume when clearing for Members of the Exchange. The Exchange also believes that its proposal to share a Member's risk settings set forth under proposed Interpretation and Policy .03 to Rule 11.13 directly with Clearing Members reduces the administrative burden on participants on the Exchange, including both Clearing Members and Members, and ensures that Clearing Members are receiving information that is up to date and conforms to the settings active in the System.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[17] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [18] requirements that the rules of an exchange be designed to prevent

[11] A Clearing Member would have the ability to enable alerts regardless of whether it was allocated responsibilities pursuant to proposed paragraph (c).

[12] The Member and Clearing Member may input any email address for which an alert will be sent via the risk management tool on the web portal.

[13] Orders entered for participation in the Opening or Closing Auction cannot be canceled or modified after the applicable ''cut-off'' time, but will be marked for cancellation. *See* Exchange Rules 11.23(b)(1)(B) and 11.23(c)(1)(B). Therefore, if a risk setting breach occurs after the applicable cut-off time for an Opening or Closing Auction, the auction orders will not be canceled by the Exchange. Similarly, orders entered for participation in the Cboe Market Close (''CMC'') will be matched for execution at the applicable cut-off time, and cannot be canceled or modified after the cut-off time. *See* Exchange Rule 11.28(a) and (b). Therefore, if a risk setting breach occurs after the CMC cut-off time, the CMC auction orders will not be canceled by the Exchange.

[14] 17 CFR 240.15c3–5.

[15] *See* Division of Trading and Markets, Responses to Frequently Asked Questions Concerning Risk Management Controls for Brokers or Dealers with Market Access, *available at https://www.sec.gov/divisions/marketreg/faq-15c-5-risk-management-controls-bd.htm.*

[16] By using the optional risk settings provided in Interpretation and Policy .01, a Member opts-in to the Exchange sharing its risk settings with its Clearing Member. Any Member that does not wish to share such risk settings with its Clearing Member can avoid sharing such settings by becoming a Clearing Member. *See* Securities Exchange Act Release No. 80611 (May 5, 2017) 82 FR 22045 (May 11, 2017) (SR–BatsBZX–2017–24).

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(5).

fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Specifically, the Exchange believes the proposed amendment will remove impediments to and perfect the mechanism of a free and open market and a national market system because it provides additional functionality for a Member to manage its credit risk. In addition, the proposed risk settings could provide Clearing Members, who have assumed certain risks of Members, greater control over risk tolerance and exposure on behalf of their correspondent Members, if allocated responsibility pursuant to proposed paragraph (c), while also providing an alert system that would help to ensure that both Members and its Clearing Member are aware of developing issues. As such, the Exchange believes that the proposed risk settings would provide a means to address potentially market-impacting events, helping to ensure the proper functioning of the market.

In addition, the Exchange believes that the proposed rule change is designed to protect investors and the public interest because the proposed functionality is a form of risk mitigation that will aid Members and Clearing Members in minimizing their financial exposure and reduce the potential for disruptive, market-wide events. In turn, the introduction of such risk management functionality could enhance the integrity of trading on the securities markets and help to assure the stability of the financial system.

Further, the Exchange believes that the proposed rule will foster cooperation and coordination with persons facilitating transactions in securities because the Exchange will provide alerts when a Member's trading activity reaches certain thresholds, which will be available to both the Member and Clearing Member. As such, the Exchange may help Clearing Members monitor the risk levels of correspondent Members and provide tools for Clearing Members, if allocated such responsibility, to take action.

The proposal will permit Clearing Members who have a financial interest in the risk settings of Members to better monitor and manage the potential risks assumed by Clearing Members, thereby providing Clearing Members with greater control and flexibility over setting their own risk tolerance and exposure. To the extent a Clearing Member might reasonably require a Member to provide access to its risk settings as a prerequisite to continuing to clear trades on the Member's behalf, the Exchange's proposal to share those risk settings directly reduces the administrative burden on participants on the Exchange, including both Clearing Members and Members. Moreover, providing Clearing Members with the ability to see the risk settings established for Members for which they clear will foster efficiencies in the market and remove impediments to and perfect the mechanism of a free and open market and a national market system. The proposal also ensures that Clearing Members are receiving information that is up to date and conforms to the settings active in the System. The Exchange believes that the proposal is consistent with the Act, particularly Section 6(b)(5),[19] because it will foster cooperation and coordination with persons engaged in facilitating transactions in securities and more generally, will protect investors and the public interest, by allowing Clearing Members to better monitor their risk exposure and by fostering efficiencies in the market and removing impediments to and perfect the mechanism of a free and open market and a national market system.

Finally, the Exchange believes that the proposed rule change does not unfairly discriminate among the Exchange's Members because use of the risk settings are optional and are not a prerequisite for participation on the Exchange. The proposed risk settings are completely voluntary and, as they relate solely to optional risk management functionality, no Member is required or under any regulatory obligation to utilize them.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. In fact, the Exchange believes that the proposal may have a positive effect on competition because it would allow the Exchange to offer risk management functionality that is comparable to functionality proposed to be offered by other national securities exchanges.[20] Further, by providing Members and their Clearing Members additional means to monitor and control risk, the proposed rule may increase confidence in the proper functioning of the markets and contribute to additional competition among trading venues and broker-dealers. Rather than impede competition, the proposal is designed to facilitate more robust risk management by Members and Clearing Members, which, in turn, could enhance the integrity of trading on the securities markets and help to assure the stability of the financial system.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

II. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve or disapprove such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–CboeBZX–2020–006 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–2020–006. 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

[19] 15 U.S.C. 78f(b)(5).

[20] *See* Securities Exchange Act Release No. 87715 (December 11, 2019) 84 FR 68995 (December 17, 2019) (SR–NYSE–2019–68).

only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeBZX–2020–006 and should be submitted on or before March 19, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2020–03921 Filed 2–26–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88260; File No. SR–NSCC–2020–004]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Establish Implementation Date of National Securities Clearing Corporation's Enhancements to the Haircut-Based Volatility Charge Applicable to Municipal Bonds

February 21, 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 20, 2020, National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the clearing agency. NSCC filed the proposed rule change pursuant to Section 19(b)(3)(A)[3] of the Act and subparagraph (f)(4)[4] of Rule 19b–4 thereunder. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change consists of amendments to the NSCC Rules & Procedures (the ''Rules'')[5] in order to establish February 28, 2020 as the implementation date of rule changes submitted pursuant to rule filing SR–NSCC–2019–004 (''Rule Filing'')[6] and advance notice SR–NSCC–2019–801 (''Advance Notice'').[7]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency 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 clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On February 13, 2020, the Commission issued an order approving the Rule Filing,[8] which was filed by NSCC pursuant to Section 19(b)(2) of the Act.[9] The Commission also issued a notice of no objection to the Advance Notice,[10] which was filed with the Commission pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act entitled the Payment, Clearing, and Settlement Supervision Act of 2010[11] and Rule 19b–4(n)(1)(i) of the Act.[12]

The purpose of the Rule Filing and the Advance Notice is to amend the Rules to enhance the methodology NSCC uses for calculating the haircut-based margin charge applicable to municipal bonds.

NSCC is filing this proposed rule change to establish February 28, 2020 as the implementation date of the rule changes submitted pursuant to the Rule Filing and the Advance Notice. Specifically, NSCC would add a legend to Procedure XV (Clearing Fund Formula and Other Matters) of the Rules (''Procedure XV'')[13] to state that the rule changes submitted pursuant to the Rule Filing and the Advance Notice have been approved and not objected to, respectively, but are not yet implemented. The legend would provide February 28, 2020 as the date on which these rule changes would be implemented and include the file numbers of the Rule Filing and the Advance Notice. The legend would also state that when the rule changes are implemented the legend would automatically be removed from Procedure XV.

2. Statutory Basis

Section 17A(b)(3)(F) of the Act requires, in part, that the Rules be designed to (i) promote the prompt and accurate clearance and settlement of securities transactions and (ii) remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions, and, in general, to protect investors and the public interest.[14] The proposed rule change would establish the implementation date of rule changes described above and provide Members with an understanding of when these rule changes will begin to affect them. Knowing when the rule changes will begin to affect Members would enable them to timely fulfill their obligations to NSCC, which would in turn ensure NSCC's processes work as intended. Therefore, NSCC believes that the proposed rule change would promote

[21] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(4).

[5] Capitalized terms not defined herein are defined in the Rules, available at *http://dtcc.com/~/media/Files/Downloads/legal/rules/nscc_rules.pdf.*

[6] *See* Securities Exchange Act Release No. 87858 (December 26, 2019), 85 FR 149 (January 2, 2020) (SR–NSCC–2019–004).

[7] *See* Securities Exchange Act Release No. 87911 (January 8, 2020), 85 FR 2197 (January 14, 2020) (File No. SR–NSCC–2019–801).

[8] *See* Securities Exchange Act Release No. 88191 (February 13, 2020) (SR–NSCC–2019–004).]

[9] 15 U.S.C. 78s(b)(2).

[10] *See* Securities Exchange Act Release No. 88162 (February 11, 2020) (SR–NSCC–2019–801).

[11] 12 U.S.C. 5465(e)(1).

[12] 17 CFR 240.19b–4(n)(1)(i).

[13] Procedure XV, *supra* note 5.

[14] 15 U.S.C. 78q–1(b)(3)(F).

the prompt and accurate clearance and settlement of securities transactions as well as remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions, consistent with Section 17A(b)(3)(F) of the Act cited above.

(B) Clearing Agency's Statement on Burden on Competition

NSCC does not believe that the proposed rule change to establish an implementation date for the rule changes described above would have any impact, or impose any burden, on competition because the proposed rule change is intended to provide additional clarity in the Rules with respect to when these rule changes would be implemented. As such, the proposed rule change would not affect the rights or obligations of the Members or NSCC other than establishing when the rule changes described above would begin to impact the Members.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

NSCC has not received or solicited any written comments relating to this proposal. NSCC will notify the Commission of any written comments received by NSCC.

III. Date of Effectiveness of the Proposed Rule Change, and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) [15] of the Act and paragraph (f) [16] of Rule 19b–4 thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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–NSCC–2020–004 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–NSCC–2020–004. 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 NSCC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*).

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NSCC–2020–004 and should be submitted on or before March 19, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2020–03918 Filed 2–26–20; 8:45 am]

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[15] 15 U.S.C 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88261; File No. SR-CboeEDGA–2019–012]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Order Disapproving Proposed Rule Change To Introduce a Liquidity Provider Protection Delay Mechanism on EDGA

February 21, 2020.

I. Introduction

On June 7, 2019, Cboe EDGA Exchange, Inc. (''EDGA'' or ''Exchange'') 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 introduce a delay mechanism on EDGA. The proposed rule change was published for comment in the **Federal Register** on June 26, 2019.[3] On August 5, 2019, pursuant to Section 19(b)(2) of the Exchange Act,[4] 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 the proposed rule change should be disapproved.[5]

On September 24, 2019, the Commission instituted proceedings to determine whether to approve or disapprove the proposed rule changes.[6] On December 16, the Commission designated a longer period for Commission action on the proposed rule change.[7] This order disapproves the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to adopt the Liquidity Provider Protection (''LP2'') delay mechanism in order ''to protect liquidity providers and thereby enable those liquidity providers to make better markets in equity securities traded on the Exchange.'' [8] As described in detail

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 86168 (June 20, 2019), 84 FR 30282 (''Notice'').

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 86567 (Aug. 5, 2019), 84 FR 39385 (Aug. 9, 2019). The Commission designated September 24, 2019, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

[6] *See* Securities Exchange Act Release No. 87096, 84 FR 51657 (September 30, 2019) (''Order Instituting Proceedings'' or ''OIP'').

[7] *See* Securities Exchange Act Release No. 87757, 84 FR 70231 (December 20, 2019).

[8] *See* Notice, 84 FR at 30282.

in the Notice,[9] the LP2 delay mechanism would delay all incoming executable orders that would remove liquidity from the EDGA Book, but not incoming or outgoing market data, for up to four milliseconds. Under the proposal, if book conditions changed such that an incoming order was no longer executable against orders resting on the EDGA Book (*e.g.,* resting orders on the book are cancelled or modified such that they are no longer marketable against the delayed incoming order), the incoming order would be released from the queue prior to the completion of the 4 millisecond delay.[10] The LP2 delay mechanism would also apply to the cancel, cancel/replace, or modification messages that are associated with liquidity taking orders.[11] The Exchange would apply such messages after the liquidity taking order is released from the delay mechanism.[12] At the end of the delay period, incoming orders, cancel, cancel/replace, and modification messages subjected to the delay mechanism would be processed after the System[13] has processed, if applicable, all messages in the security received by the Exchange during such delay period.[14]

Certain order types, or orders with instructions, that are not eligible for execution upon entry would become subject to the LP2 delay mechanism when a potential execution is triggered by a subsequent incoming order. For example, orders entered with either a Stop Price or Stop Limit Price instruction would not be executed until elected, and would only be subject to the delay mechanism after the order is converted to either a Market Order or Limit Order. Similarly, orders entered with a time-in-force instruction of Regular Hours Only would be subjected to the delay mechanism when entered into the EDGA Book after an opening or re-opening process.[15]

An incoming order that is not executable upon entry would not be subject to the delay mechanism. For example, orders with instructions that are not executable when entered due to its order instructions (*e.g.,* Minimum Quantity and Post Only) would not be subject to the LP2 Delay Mechanism. In addition, incoming routable orders that bypass the EDGA book would not be subject to the LP2 delay mechanism, but any returning, executable remainder of such a routed order would be subject to the delay mechanism. The sole exception to a non-executable incoming order being subject to the delay would be incoming orders with the EdgeRisk Self Trade Protection (''ERSTP'') modifier. ERSTP modifiers are an optional risk protection that prevents the execution of orders originating from the same market participant identifier, Exchange Member identifier or ERSTP Group identifier.[16] The ERSTP modifier would be applied to the order after it is delayed.

Market Data

The Exchange proposes that the LP2 delay mechanism would not apply to inbound or outbound market data. Current, un-delayed data, would be used for all purposes including regulatory compliance and the pricing of pegged orders and the quotation and trade data would continue to be disseminated, without delay, to the applicable securities information processor (''SIP'') and direct market data feeds.[17]

Regulation NMS

In conjunction with the proposed LP2 delay mechanism, the Exchange proposes to disseminate a manual, unprotected quotation to the SIP.[18] In addition, because certain Regulation NMS rules related to locked and crossed markets would apply differently to EDGA's manual, unprotected quotation, compared to its current automated, protected quotation, the Exchange proposed to make the two rule changes described below.

First, the Exchange proposes to add new EDGA Rule 11.10(a)(6) to provide that a bid (offer) on the EDGA Book is eligible to remain posted to the EDGA Book for one second after such bid (offer) is crossed by a Protected Offer (Protected Bid). The bid (offer) on the EDGA Book will be cancelled if it continues to be higher (lower) than a Protected Offer (Protected Bid) after this one second period. Because the delayed cancellation behavior set forth by proposed EDGA Rule 11.10(a)(6) would allow bids and offers on EDGA to remain posted and executable for up to one second if crossed by a Protected Bid or Protected Offer of another market, the Exchange also proposes to amend EDGA Rule 11.10(a)(2) to provide that the Exchange will not execute any portion of a bid or offer at a price that is more than the greater of five cents or 0.5 percent through the lowest Protected Offer or highest Protected Bid, as applicable.

Second, the Exchange proposes to amend EDGA Rule 11.10(f) related to the dissemination and display of Locking Quotations or Crossing Quotations.[19] Because the Exchanges' quotations would be marked manual, Rule 610(d)(1)(ii) of Regulation NMS requires that the Exchange avoid locking or crossing any quotation in an NMS stock disseminated pursuant to an effective national market system plan. The Exchange proposes to amend EDGA Rule 11.10(f)(3) to provide that an EDGA quotation would not be considered a Locking or Crossing Quotation if the quotation being locked or crossed is a manual quotation that is allowed to be locked or crossed pursuant to an exemption request submitted by the Exchange.[20]

Eliminate or Modify Certain Order Types and Instructions

The Exchange proposes to eliminate or modify certain order types and instructions to reduce System complexity in light of the operation of the proposed LP2 delay mechanism. Specifically, the Exchange proposes to eliminate the:

[9] *See id.* at 30283–89.

[10] *See id.* at 30284.

[11] *See id.*

[12] *See id.*

[13] The term ''System'' refers to the electronic communications and trading facility designated by the Board through which securities orders of Users are consolidated for ranking, execution and, when applicable, routing away. *See* EDGA Rule 1.5(cc).

[14] *See* Notice, 84 FR at 30284, n. 11. According to the Exchange, an incoming message may be delayed for longer than four milliseconds depending on the volume of messages being processed by the Exchange. *Id.*

[15] *See* EDGA Rule 11.7 relating to the opening and re-opening process.

[16] *See* Notice, 84 FR at 30283–84.

[17] *See id.*

[18] Rule 600(a)(37) defines a ''manual quotation'' as any quotation other than an automated quotation.

[19] A ''Locking Quotation'' is the display of a bid for an NMS stock at a price that equals the price of an offer for such NMS stock previously disseminated pursuant to an effective national market system plan, or the display of an offer for an NMS stock at a price that equals the price of a bid for such NMS stock previously disseminated pursuant to an effective national market system plan in violation of Rule 610(d) of Regulation NMS. *See* EDGA Rule 11.6(g). A ''Crossing Quotation'' is the display of a bid (offer) for an NMS stock at a price that is higher (lower) than the price of an offer (bid) for such NMS stock previously disseminated pursuant to an effective national market system plan in violation of Rule 610(d) of Regulation NMS. *See* EDGA Rule 11.6(c).

[20] *See* Notice, 84 FR at 30285. In the Notice, the Exchange notes that it submitted an exemption request to the Commission pursuant to Rule 610(e) of Regulation NMS that, if granted by the Commission, would permit the Exchange to lock or cross manual quotations disseminated by the New York Stock Exchange LLC (''NYSE''). *Id.; see also* Letter from Adrian Griffiths, Assistant General Counsel, Cboe, to Vanessa Countryman, Acting Secretary, dated June 7, 2019 (requesting exemptive relief from certain requirements related to locked and crossed markets pursuant to Rule 610(e) of Regulation NMS).

• Discretionary Range instruction [21] and the MidPoint Discretionary Order (''MDO''); [22]

• Pegged instruction,[23] including the Market Peg [24] and Primary Peg [25] instruction;

• Supplemental Peg Orders; [26] and

• Non-Displayed Swap and Super Aggressive instructions.[27]

In addition, the Exchange proposes to modify the:

• MidPoint Peg Order (''MPO'') [28] by eliminating the optional functionality that allows a User to: (1) Peg the order to the less aggressive midpoint or one minimum price variation inside the same side of the NBBO, and (2) opt for executions during a locked market;

• Price Adjust [29] and Display-Price Sliding [30] instructions to eliminate the functionality to allow orders with these instructions to adjust multiple times to a more aggressive price in response to changes to the prevailing NBBO; [31]

• Post Only [32] instruction to (1) limit the use of the instruction to displayed orders and MPOs and (2) eliminate the ability of such orders to execute on an incoming basis; and

• Market Maker Peg Orders to require the use of a Post Only instruction with such orders.[33]

Finally, the Exchange proposes conforming changes to rules referencing the current Post Only functionality that would permit an incoming order to be executed.[34]

III. Discussion

A. The Applicable Standard for Review

Under Section 19(b)(2)(C) of the Exchange Act,[35] the Commission shall approve a proposed rule change of a self-regulatory organization (''SRO'') if it finds that such proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that are applicable to such organization.[36] The Commission shall disapprove a proposed rule change if it does not make such a finding.[37] Rule 700(b)(3) of the Commission's Rules of Practice states that the ''burden to demonstrate that a proposed rule change is consistent with the [Exchange Act] and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change'' and that a ''mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient.''[38] Rule 700(b)(3) also states that ''the description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding.'' [39] Any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations.[40] Moreover, ''unquestioning reliance'' on an SRO's representations in a proposed rule change is not sufficient to justify Commission approval of a proposed rule change.[41]

The Commission concludes that the Exchange has not met its burden to show that approval of the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.[42] In particular, as discussed below, the Exchange has not met its burden with respect to Section 6(b)(5) of the Exchange Act, which requires, among other things, that the rules of a national securities exchange be designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest

[21] Discretionary Range is an optional instruction that a User may attach to an order to buy (sell) a stated amount of a security at a specified, displayed or non-displayed ranked price with discretion to execute up (down) to another specified, non-displayed price. *See* EDGA Rule 11.6(d).

[22] A Midpoint Discretionary Order is a limit order to buy that is pegged to the NBB, with discretion to execute at prices up to and including the midpoint of the NBBO, or a limit order to sell that is pegged to the NBO, with discretion to execute at prices down to and including the midpoint of the NBBO. *See* EDGA Rule 11.8(e).

[23] Pegged is an instruction to automatically re-price an order in response to changes in the NBBO, and can be entered as either a Market Peg or Primary Peg. *See* EDGA Rule 11.6(j).

[24] Market Peg is an order instruction to peg an order to the NBB, for a sell order, or the NBO, for a buy order. *See* EDGA Rule 11.6(j)(1).

[25] Primary Peg is an order instruction to peg an order to the NBB, for a buy order, or the NBO, for a sell order. *See* EDGA Rule 11.6(j)(2).

[26] Supplemental Peg Orders are non-displayed Limit Orders that are eligible for execution at the NBB for a buy order and NBO for a sell order against an order that is in the process of being routed to an away Trading Center if such order that is in the process of being routed away is equal to or less than the aggregate size of the Supplemental Peg Order interest available at that price. *See* EDGA Rule 11.8(g).

[27] Currently, when an order entered with an NDS or Super Aggressive instruction is locked by an incoming order with a Post Only instruction that would not remove liquidity based on the economic impact of removing liquidity on entry compared to resting on the order book and subsequently providing liquidity, the order with the NDS or Super Aggressive instruction is converted to an executable order and will remove liquidity against such incoming order. If an order that does not contain a Super Aggressive instruction maintains higher priority than one or more Super Aggressive eligible orders, the Super Aggressive eligible order(s) with lower priority will not be converted and the incoming order with a Post Only instruction will be posted or cancelled in accordance with Rule 11.6(n)(4). This does not apply to orders entered with an NDS instruction. *See* EDGA Rule 11.6(n)(2), (n)(7).

[28] MPOs are non-displayed, market or limit orders with an instruction to execute at the midpoint of the NBBO, or, alternatively, pegged to the less aggressive of the midpoint of the NBBO or one minimum price variation inside the same side of the NBBO as the order. *See* EDGA Rule 11.9(c)(9).

[29] Price Adjust is an order instruction requiring that where an order would be a locking quotation or crossing quotation of an external market if displayed by the System on the EDGA Book at the time of entry, the order will be displayed and ranked at a price that is one minimum price variation lower (higher) than the locking price for orders to buy (sell). *See* EDGA Rule 11.6(l)(1)(A).

[30] Display-Price Sliding is an order instruction requiring that where an order would be a locking quotation or crossing quotation of an external market if displayed by the System on the EDGA Book at the time of entry, will be ranked at the locking price in the EDGA Book and displayed by the System at one minimum price variation lower (higher) than the locking price for orders to buy (sell). *See* EDGA Rule 11.6(l)(1)(B).

[31] *See* EDGA Rule 11.6(l)(1)(A)(i),(B)(iii).

[32] Post Only is an order instruction that would allow an otherwise marketable incoming order to (1) cancel or (2) post to the System in a manner that complies with Regulation NMS and forego an execution with a resting order on the EDGA book unless the execution would be economically beneficial when considered in tandem with the applicable Exchange fee or rebate for taking liquidity. *See* EDGA Rules 11.6(n)(4), 11.9, and 11.10(a)(4).

[33] A Market Maker Peg Order is designed to assist market makers maintain compliance with their continuous quoting obligations. Specifically, it is a limit order that is automatically priced by the System at the Designated Percentage away from the then current NBB (in the case of an order to buy) or NBO (in the case of an order to sell), or if there is no NBB or NBO at such time, at the Designated Percentage away from the last reported sale from the responsible single plan processor.

[34] *See e.g.,* EDGA Rule 11.6(l)(A)(4),(B)(4) and EDGA Rule 11.8(c)(5).

[35] 15 U.S.C. 78s(b)(2)(C).

[36] 15 U.S.C. 78s(b)(2)(C)(i).

[37] 15 U.S.C. 78s(b)(2)(C)(ii); *see also* 17 CFR 201.700(b)(3).

[38] 17 CFR 201.700(b)(3).

[39] *Id.*

[40] *See id.*

[41] Susquehanna Int'l Group, LLP v. Securities and Exchange Commission, 866 F.3d 442, 447 (DC Cir. 2017).

[42] In disapproving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f). The Commission recognizes that some commenters stated that the proposal would help foster competition. *See, e.g.,* Letter from Steve Crutchfield, Head of Market Structure, CTC Trading Group, LLC, dated October 28, 2019 (''CTC Letter II'') at 1–2. But, for the reasons discussed throughout, the Commission is disapproving the proposed rule change because the Exchange has not met its burden to demonstrate that the proposed rule change is consistent with the Exchange Act.

and not to permit unfair discrimination between customers, issuers, brokers, or dealers.[43]

B. Whether EDGA Has Met Its Burden To Demonstrate That the Proposal Is Designed Not To Permit Unfair Discrimination

The proposed rule change is discriminatory in that the Exchange would delay incoming executable orders by 4 milliseconds, which would allow market participants with orders on the EDGA book that are not subject to the delay up to 4 milliseconds to cancel or modify their orders. A discriminatory proposal, however, is not inconsistent with the Exchange Act if the discrimination permitted is not unfair. The Commission has previously stated that ''a proposed access delay that is only imposed on certain market participants or certain types of orders would be scrutinized to determine whether or not the discriminatory application of that delay is unfair.'' [44] In analyzing whether the Exchange has met its burden to demonstrate that its proposal is consistent with Section 6(b)(5) of the Exchange Act,[45] the Commission examines below whether the record supports the Exchange's assertions that the LP2 delay mechanism is designed to not permit unfair discrimination.

1. The Exchange's Basis for a Four Millisecond Delay

The Exchange stated that the proposal is designed to protect liquidity providers by reducing the effectiveness of certain harmful latency arbitrage strategies employed by a small number of liquidity takers and thereby promote improvements to market quality.[46] Specifically, the Exchange asserted that the reduced risk of adverse selection for market makers would result in increased displayed liquidity with tighter spreads and greater size on the Exchange.[47] According to the Exchange, the potential for trading at stale prices increases risk for firms that wish to provide liquidity to the market, and harms market quality by causing liquidity providers to enter quotes with either a wider spread or a smaller size than they may otherwise display.[48] The Exchange believes that a ''meaningful portion'' of any savings earned by liquidity providers would be passed on to investors in the form of better market quality and benefit the majority of investors.[49]

A commenter supporting the proposal asserted that the term latency arbitrage ''generally means using dedicated microwave towers to transmit order information from one location to another to trade the same or correlated financial instrument based on information that is a few milliseconds away from becoming available to all market participants.'' [50] This commenter stated that the 4 millisecond delay ''would neutralize the difference between commodity fiber connections and microwave networks.'' [51] In contrast, several commenters opposing the proposal asserted that the proposed rule change did not identify the problem (*i.e.,* cross-asset latency arbitrage) with sufficient specificity or detail to establish the scope of the problem to be addressed or the magnitude of the problem on the Exchange.[52] Five commenters indicated that the data provided by EDGA was inadequate to establish the extent of the negative impact of cross-asset latency arbitrage on the EDGA market.[53] Two commenters indicated that the term ''latency arbitrage'' was too broad and not clearly defined, and expressed concern that beneficial hedging activity for Exchange Traded Funds (''ETFs'') or by options liquidity providers in the underlying markets could be caught in the definition of latency arbitrage.[54] Two commenters did not believe that EDGA offered credible evidence to establish how the proposal would reduce cross-market latency arbitrage.[55]

In order to (1) establish the extent of the latency arbitrage issue on EDGA, (2) explain how the LP2 delay mechanism would resolve the latency arbitrage issue without permitting unfair discrimination, and (3) demonstrate that 4 milliseconds was an appropriate duration for the LP2 delay mechanism, the Exchange provided a markout analysis (*i.e.,* an analysis of execution costs) for EDGA liquidity providers in SPY during July 2019.[56] The Exchange stated that the charts demonstrated whether a liquidity provider attempted and failed to cancel or replace their quotation within 4 milliseconds after an execution and the price differential between the execution price and the midpoint price at the time of the trade and the milliseconds following an execution.[57] The Exchange also asserted that the charts showed that ''the midpoint price move[d] dramatically in the milliseconds immediately following transactions in this category, and often involved a handful of faster firms that are routinely able to predict and profit from prices that are about to change.'' [58] According to the Exchange, the markout analysis represented ''the majority of trading activity conducted on the Exchange, [and] showed relatively stable prices following an execution.'' [59] The Exchange also included a similar markout analysis for other securities during July 2019.[60] The Exchange concluded, based on the markout analysis, that investors that are not actively engaging in latency arbitrage would not be harmed by the LP2 delay mechanism and would continue to be able to access liquidity at similar prices

[43] 15 U.S.C. 78f(b)(5).

[44] *See* Securities Exchange Act Release No. 78102; 81 FR 40785, 40792 n.75 (June 23, 2016) (Commission Interpretation Regarding Automated Quotations Under Regulation NMS). *See also* Securities Exchange Act Release No. 77406, 81 FR 15765 (Mar 24, 2016) (File No. 10–222) (Order Instituting Proceedings on IEX's Form 1 with discussion related to the potentially unfair discriminatory application of an access delay to advantage an affiliated outbound routing broker).

[45] 15 U.S.C. 78f(b)(5).

[46] *See* Letters from Adrian Griffiths, Assistant General Counsel, Cboe Global Markets, dated August 22, 2019 (''Exchange Response Letter I'') at 1, and dated December 20, 2019 (''Exchange Response Letter II'') at 4.

[47] *See* Exchange Response Letter I at 1.

[48] *See* Notice at 30289. The Exchange also stated ''that the LP2 delay mechanism would promote liquidity provision without unfairly discriminating against specific segments of the market'' and that it is appropriate to provide protection for orders that provide liquidity because these orders provide an important service to the market and face asymmetric risks due to the fact that the market may move while they are posted to the order book. *See id.* at 30290.

[49] *See* Exchange Response Letter II at 5.

[50] *See* Letter from Eric Swanson, CEO, XTX Markets LLC (Americas), dated July 16, 2019 (''XTX Letter I'') at 2.

[51] *See* XTX Letter I at 5.

[52] *See* Letters from: Stephen John Berger, Managing Director, Global Head of Government and Regulatory Policy, Citadel Securities, dated July 16, 2019 (''Citadel Letter I'') at 6–7; Joanna Mallers, Secretary, FIA Principal Traders Group, dated July 16, 2019 (''FIA Letter I'') at 2; ''); Joanna Mallers, Secretary, FIA Principal Traders Group, dated October 21, 2019 (''FIA Letter II'') at 1–2; Tyler Gellasch, Executive Director, Healthy Markets, dated July 16, 2019 (''Healthy Markets Letter I'') at 6; Tyler Gellasch, Executive Director, Healthy Markets Association, dated Oct. 21, 2019 (''Healthy Markets Letter II'') at 2; R.T. Leuchtkafer, dated October 21, 2019 (''Leuchtkafer Letter IV'') at 1, 3; Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, dated July 18, 2019 (''SIFMA Letter'') at 2.

[53] *See* Citadel Letter I at 6–7; FIA Letter I at 2; FIA Letter II at 1–2; Healthy Markets Letter I at 6; Healthy Markets Letter II at 2; Leuchtkafer Letter IV at 1, 3; SIFMA Letter at 2.

[54] *See* Citadel Letter II at 3 n.5; FIA Letter II at 1–2.

[55] *See* Healthy Markets Letter II at 2; Letter from R.T. Leuchtkafer, dated February 7, 2020 (''Leuchtkafer Letter V'') at 2. One of these commenters also believed that EDGA did not establish the taxonomy of cross-market latency arbitrage that the proposal would seek to address, or to what extent market participants would use the ''time advantage'' contemplated by the proposal. Healthy Markets Letter II at 2.

[56] *See* Exchange Response Letter I at 3.

[57] *See id.* at 3–4.

[58] *See id.* at 3.

[59] *See id.* at 4.

[60] *See id.* at Appendix.

after the 4 millisecond delay because ''published quotations are relatively stable immediately following an execution.'' [61] The Exchange also concluded that concerns related to ''the possibility that a published quotation may not be accessible because a liquidity provider cancels its orders before an investor can access the published bid or offer'', were unwarranted because the data showed that prices are ''relatively stable for most investors'' after an execution, and the liquidity would likely be available notwithstanding the introduction of the delay.[62] The Exchange stated that ''the [p]roposal is likely to make it less profitable to engage in latency arbitrage while not materially affecting the ability of ordinary investors to access liquidity on EDGA.'' [63]

In response to the Exchange's markout analysis, one commenter supporting the proposal stated that the Exchange's markout analysis could be used to measure the reduction in adverse selection on executed transactions.[64] In contrast, two commenters opposing the proposal did not believe that the Exchange's markout analysis established the latency arbitrage problem on the Exchange or that the proposal would necessarily provide an effective counter measure.[65] One commenter suggested that the Exchange's markout analysis did not necessarily show stale quotes being picked off by latency arbitrageurs out of Chicago, but rather may demonstrate that either (1) the SPY signal for the cancellation of orders is coming from somewhere geographically closer than Chicago, or (2) that EDGA market makers could be utilizing connections that are faster than fiber.[66] This commenter believed that the Exchange's markout analysis could be evidence that the proposal may provide EDGA market makers with an ''investor-funded subsidy'' of $900 a day or more in SPY.[67] This commenter also suggested that the data likely shows the effect of investor equities market sweeps as opposed to latency arbitrage activity based on the futures markets in Chicago.[68] Another commenter believed that the markout data did not provide evidence of stale prices, but rather showed that liquidity providers try, but fail, to cancel their quotes before receiving an execution more often when the price is moving compared to when the price is stable.[69] This commenter believed that the execution prices for failed cancellations ''very likely matched the executed prices on other exchanges as investors executed orders against existing market-maker quotes and other resting orders.'' [70] This commenter also believed the data was consistent with the ''standard'' broker-dealer practice of sweeping the top-of-book across all exchanges on behalf of both institutional and retail investors seeking to fill orders that are equal to, or larger than, the size at the NBB or NBO.[71]

In response, the Exchange disagreed with the comment related to its markout analysis that reducing adverse selection risk for liquidity providers would effectively serve as a ''subsidy'' for liquidity providers.[72] The Exchange stated that ''only a very small minority of market participants are capable of targeting millisecond or microsecond level price changes, and the benefits the [p]roposal would offer in terms of reduced adverse selection risk for liquidity providers would come primarily from the reduced ability of those firms to continue engaging in potentially harmful latency arbitrage strategies.'' [73] The Exchange also stated that liquidity providers would not benefit at the expense of investors, but rather that investors could ''more accurately'' be considered the ultimate beneficiaries of the proposal.[74] The Exchange also stated that while certain commenters were dubious as to whether the benefits received by a liquidity provider under the proposal would be passed on to investors, such factual questions could only be answered ''with finality'' by implementing the proposed delay mechanism and attempting to improve the market.[75]

Certain commenters cited to studies suggesting that the TSX Alpha speedbump (*i.e.,* an intentional, asymmetric delay for otherwise marketable orders in a market with a taker/maker or inverted fee structure) increased transaction costs and decreased market quality in the Canadian equities markets.[76] In response, the Exchange stated that these commenters failed to mention the results of a subsequent study by Canadian regulators that found that the TSX Alpha speedbump ''did not adversely affect the quality of Canadian equity markets'' or the results of an analysis that found ''no evidence'' of market quality being negatively impacted.[77] While the Exchange acknowledged the material differences between the instant proposal and the randomized 1–3 millisecond, asymmetric, intentional delay implemented on TSX Alpha as well as significant differences between the U.S. and Canadian equities markets,[78] it also stated that to the extent that the analysis by the Canadian regulators is instructive it demonstrates the value of market innovation similar to the instant proposal.[79]

Four commenters opposing the proposal did not believe that the analyses conducted by Canadian regulators, and referenced by the Exchange, necessarily supported the Exchange's assertions.[80] One commenter stated that the empirical data obtained from the asymmetric delay introduced by TSX Alpha in the Canadian equity markets is not sufficient or conclusive as to whether an asymmetric delay should be introduced in U.S. equity markets.[81] This commenter emphasized that the IIROC and Bank of Canada study found ''no evidence'' that the TSX Alpha speedbump impacted certain market-

[61] *See id.* at 5.

[62] *See id.*

[63] *See* Exchange Response Letter I at 5–6.

[64] *See* Letter from Eric Swanson, CEO, XTX Markets LLC (Americas), dated October 18, 2019 (''XTX Letter III'') at 2.

[65] *See* FIA Letter II at 2; Letter from R.T. Leuchtkafer, dated September 9, 2019 (''Leuchtkafer Letter III'') at 2–3; Leuchtkafer Letter IV at 4–5; Leuchtkafer Letter V at 2.

[66] *See* Leuchtkafer Letter III at 2–3; Leuchtkafer Letter IV at 4–5.

[67] *See* Leuchtkafer Letter III at 5; Leuchtkafer Letter IV at 9.

[68] *See* Leuchtkafer Letter III at 6.

[69] *See* FIA Letter II at 2.

[70] *See id.* at 2.

[71] *See id.*

[72] *See* Exchange Response Letter II at 5.

[73] *See id.* at 5.

[74] *See id.* at 5.

[75] *See id.* at 5–6.

[76] *See e.g.,* Chen, Haoming et al., *The value of a Millisecond: Harnessing Information in Fast, Fragmented Markets,* SSRN (Nov. 18, 2017), *available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2860359* (''Australian Study''); *see also* OIP *supra* note 6, notes 139–146 and accompanying text, for a summary of the comments referenced by the Exchange.

[77] *See* Exchange Response Letter I at 10. The Exchange referenced a joint study on the impact of the TSX Alpha redesign, which included the implementation of a randomized 1–3 millisecond speedbump, conducted by the Investment Industry Regulatory Organization of Canada (''IIROC'') and the Bank of Canada, as well as a review of the market quality impact of the TSX Alpha speedbump conducted by the Ontario Securities Commission (''Canadian Studies''). *See id.* at 10–11; *see also* Exchange Response Letter II at 10.

[78] *See* Exchange Response Letter I at 11.

[79] *See id.*

[80] *See* Letter from Stephen John Berger, Managing Director, Global Head of Government and Regulatory Policy, Citadel Securities, dated October 21, 2019 (''Citadel Letter II'') at 4; Leuchtkafer Letter IV at 7; Letter from Rick A. Fleming, Investor Advocate, Office of the Investor Advocate at the U.S. Securities and Exchange Commission, dated December 13, 2019 (''Investor Advocate Letter'') at 8; Letter from Doug Clark, Chairman, and James Toes, President & CEO, Security Traders Association, dated October 21, 2019 (''STA Letter'') at 2.

[81] *See* STA Letter at 2.

wide measures.[82] One commenter noted that while the IIROC and Bank of Canada study did not find that the TSX Alpha speedbump impacted market-wide liquidity, it did find that certain market participants, such as buy-side investors, were negatively impacted by higher price impacts and effective spreads.[83] Another commenter stated that the IIROC and Bank of Canada study ''fails to provide evidence that the proposed speedbump will actually benefit investors.'' [84] Another commenter stated that the evidence from the ''reasonably comparable'' asymmetric delay implemented on the TSX Alpha exchange in the Canadian equity market showed that institutional and retail investor concerns related to an increase in quote fading and a decline in fill rates were legitimate.[85] This commenter stated that neither of the Canadian Studies disputed the conclusion of the Australian study [86] that the implementation of the asymmetric speedbump enabled fast liquidity providers to ''fade'' away from liquidity taking orders across multiple venues and quote fading increased by 46% on average.[87] This commenter did a separate analysis of quote fading on TSX Alpha using Canadian exchange data and reached conclusions that it believed were consistent with the Australian study.[88] Two commenters pointed out that, as per an Ontario Securities Commission review, market participants reported a decrease in fill rates on TSX Alpha, particularly for orders that were expected to sweep through multiple price levels or be routed to multiple marketplaces simultaneously (*e.g.,* institutional orders).[89]

The Exchange responded that the analysis of the Canadian market conducted by one commenter [90] was ''unhelpful'' and had ''fundamental flaws''.[91] The Exchange stated that evidence from the Canadian markets suggests that investors using a combination of strategies designed to take advantage of the TSX Alpha speedbump ''may benefit from improved market quality without sacrificing order interaction.'' [92] The Exchange stated that evidence from Canadian market studies had shown an increase in trade size on TSX Alpha following the introduction of its speedbump, and suggested that market participants may be able to get their orders filled on a single venue such as EDGA due to the expected increase in liquidity.[93] The Exchange indicated that although a chart published by TSX Alpha in December 2019 shows that proprietary and high speed participants may experience lower order interaction rates, as intended, order interaction rates remain high for retail and institutional orders routed by broker-dealers ''that have taken appropriate steps'' to account for the TSX Alpha speedbump.[94] The Exchange believed that, while broker-dealers may need to change their routing methodologies, a delay mechanism similar to that on TSX Alpha could benefit U.S. equities investors ''without harming their ability to access needed liquidity.'' [95]

One commenter stated that while the EDGA proposal is designed to reduce the overall execution risk for a certain class of liquidity providers (*i.e.,* market makers), with the ''hope'' that these market makers voluntarily respond by taking on the additional risk of quoting tighter spreads for longer durations and with greater size, there is no requirement for them to do so, and furthermore the likelihood that these market makers will use the speedbump to avoid the execution risk presented by the orders of ordinary investors should be considered.[96] This commenter also stated that although the proposal describes potential benefits for retail and institutional investors in the market, there is no guarantee that such improvements would occur.[97] One commenter opposing the proposal believed that overall market quality would not improve because EDGA liquidity providers would tend to join existing quotes in order to maximize their ability to observe away executions.[98] Two commenters believed the proposal was unlikely to incentivize EDGA liquidity providers to set new price levels that would establish the NBBO, and would instead more often result in EDGA liquidity providers posting prices equal to or inferior to the NBBO set by liquidity providers on other exchanges.[99] One commenter stated that EDGA did not analyze its key assertion that the application of the LP2 delay mechanism would improve market quality in the light of the Exchange's inverted (*i.e.,* taker/maker) fee structure,[100] and one commenter stated that inverted markets set new prices only ''a very small amount of the time'' because typically liquidity providers that are improving price on an inverted venue do not also pay to post, because to do so is to pay twice.[101] The latter commenter expected that to the extent EDGA remains an inverted venue and the proposal does not contemplate a change in fee type, EDGA would rarely set new prices.[102] One commenter believed EDGA did not provide ''any data or analysis regarding how many members could be expected to increase quoting as a result'' of the proposal,[103] while another commenter indicated that EDGA did not provide ''any estimate of what its market makers will return to investors via tighter spreads and larger quotes.'' [104] This commenter also noted that the proposal would not require market makers to improve their quotes, and suggested that more stringent quoting obligations could be added to EDGA's rulebook.[105] Another commenter indicated the proposal could potentially lead to decreased fill rates, misleading market-wide statistics, and altered execution prices.[106] Two commenters expressed concern about the proposal's potential impact on transaction costs,[107] and one of these commenters referenced a study on the impact of the intentional, randomized, asymmetric delay implemented on TSX Alpha which purportedly concluded that there was a negative impact on

[82] *See id.* at 4.

[83] *See* Leuchtkafer Letter IV at 7.

[84] Investor Advocate Letter at 8.

[85] *See* Citadel Letter II at 4.

[86] *See* note 77 *supra.*

[87] *See* Citadel Letter II at 4.

[88] *See id.* The commenter found the following for price-level depleting trade clusters based on their analysis: (1) Quote fading on TSX Alpha ''immediately and significantly'' increased following the implementation of the asymmetric speedbump in September 2015; (2) these elevated quote fading rates persisted, as data over the last 12 months showed that approximately 70–80% of the quoted volume on TSX Alpha is being cancelled without executing; and (3) this contrasts with quote fading rates of approximately 30% on other inverted venues and approximately 20% on maker-taker venues. *See id.* at 4–5.

[89] *See* Citadel Letter II at 4; Leuchtkafer Letter IV at 7.

[90] *See* Citadel Letter II at 4.

[91] Exchange Response Letter II at 11.

[92] *See id.* at 11.

[93] *See id.*

[94] *See id.* at 12.

[95] *See id.*

[96] Investor Advocate Letter at 4–5.

[97] *See id.*

[98] *See* Letter from Mark D. Epley, Executive Vice President & Managing Director, General Counsel, and Jennifer W. Han, Associate General Counsel, Managed Funds Association, dated October 22, 2019 (''MFA Letter II'') at 3.

[99] *See* Citadel Letter II at 8; FIA Letter II at 2. One commenter explained that because EDGA is an inverted venue, matching the NBBO may also result in being routed to first in light of the rebate provided to the liquidity taker. *See* Citadel Letter II at 8

[100] *See* Citadel Letter I at 10.

[101] *See* STA Letter at 5.

[102] *See id.*

[103] *See* Healthy Markets Letter I at 7.

[104] *See* Leuchtkafer Letter V at 1.

[105] *See id.* at 1–2.

[106] *See* Healthy Markets Letter II at 8.

[107] *See* Letter from Tim Lang, Chief Executive Officer, ACS Execution Services, dated Oct. 21, 2019 (''ACS Letter'') at 2; MFA Letter II at 2.

liquidity in the Canadian equities market and increased, market-wide costs for liquidity takers.[108] In response to concerns about whether there would be market quality improvements, the Exchange suggested that reducing the cost of adverse selection for liquidity providers would allow them to improve their quotations and increase available liquidity throughout the trading day.[109]

The Commission concludes that the Exchange has not met its burden to demonstrate that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,[110] and the applicable rules and regulations thereunder. In particular, the Commission does not believe that the Exchange has supported its assertions and demonstrated that the LP2 delay mechanism is appropriately tailored to address latency arbitrage and not permit unfair discrimination. Commenters raised questions as to whether the proposed LP2 delay mechanism is appropriately tailored to its stated purpose, which is to reduce the risk of adverse selection to market makers, improve displayed liquidity on the Exchange, and thereby potentially enable market makers to offer tighter quotes and greater size. The Exchange has not demonstrated why, in light of these questions, the proposal is consistent with the Act. For example, the Exchange points to the differentials between the geographical latencies for microwave and fiber optic connections currently experienced between the Chicago Mercantile Exchange (''CME'') data center in Aurora, IL and the Exchange's primary data center in Secaucus, NJ with the apparent assumption, unsupported by analysis or evidence, that opportunistic trading firms use the latest microwave connections and EDGA liquidity providers use traditional fiber connections. The Exchange, however, fails to demonstrate why it is appropriate to apply the 4 millisecond delay to incoming executable orders that would remove liquidity from the EDGA Book for *all* equities securities traded on the Exchange instead of limiting the application of the delay to incoming, executable orders for those securities that have a futures counterpart, or other relationship to trading on the CME, and generate opportunities for latency arbitrage from that venue. In addition, the Exchange has not demonstrated the extent to which latency arbitrage is a problem on its market or how the proposal is tailored to the problem by, for instance, providing an estimate of the percentage of trading activity on the Exchange (for example, orders, trades, share volume, or dollar volume) affected by signals from the futures markets.

The limited empirical information provided by the Exchange does not adequately demonstrate either the extent of the problem of latency arbitrage that the Exchange seeks to address or that the proposal would be sufficiently tailored to address the identified problem. As noted above, the Exchange provided markout data to (1) establish the extent of the latency arbitrage issue on EDGA, (2) explain how the LP2 delay mechanism would resolve the latency arbitrage issue without permitting unfair discrimination, and (3) demonstrate that 4 milliseconds was an appropriate duration for the LP2 delay mechanism. The charts provided by the Exchange showed trading activity for three ETFs that are often traded in relation to an actively traded futures contract (SPY, TLT, and GLD) and three common stocks included in the S&P 500 index (CCI, MSFT, and UTX). The Exchange concluded that trades were likely executed at a stale price where prices immediately moved against the resting order in the milliseconds following the trade on EDGA (*i.e.,* the Exchange contends that the missed cancel analysis illustrates the impact of trades where the liquidity provider understands that it is quoting a stale price but is unable to revise its published bid or offer before its quotation is accessed by a faster market participant). However, because the Exchange did not (1) explain why it chose these six symbols, (2) explain why these symbols are representative of equities securities that are traded on the Exchange for which the LP2 delay mechanism would apply, or (3) provide data on the relative sizes of the two groups of orders in its analysis, it is not possible to fully analyze the charts or to independently verify the Exchange's conclusions. Accordingly, the EDGA markout analysis does not provide a sufficient basis to support an affirmative finding that the proposed rule change is consistent with the Act.[111]

The Exchange stated that the results of the Canadian studies related to the TSX Alpha speedbump could be instructive with regard to demonstrating the value of introducing innovative market structure solutions similar to the instant proposal to the U.S. equities markets. However, the Commission believes that because the delay on TSX Alpha is a shorter, randomized delay of 1–3 milliseconds, and there are material differences between the Canadian and U.S. equities markets, the effects of the intentional delay on TSX Alpha in the Canadian equities market are not wholly relevant to assess the potential impact of this proposed rule change on the U.S. equities markets, in general, and market quality (*e.g.,* width, displayed size, and effective spreads during different periods of market volatility) in particular. Accordingly, given the failure of the Exchange to demonstrate why the differences between the fixed LP2 delay mechanism and the randomized TSX Alpha delay mechanism are immaterial, the Commission does not believe that the findings and conclusions of the various TSX Alpha studies provide a sufficient basis to support an affirmative finding that this proposed rule change is consistent with the Act.[112]

The Exchange and supporting commenters assert that the proposal will bolster EDGA market quality and reduce the existing problem of latency arbitrage and argue that therefore the proposal would not permit unfair discrimination. However, such assertions do not demonstrate that the proposal would not permit unfair discrimination. Specifically, as noted above, the Commission does not believe that the EDGA markout analysis or the TSX Alpha studies can be relied upon to determine that the proposed rule change is consistent with the Act.[113]

2. Discrimination Between Liquidity Takers and Liquidity Providers

Commenters supporting the proposal believed that the intentional 4 millisecond delay was a ''reasonable'' [114] or ''appropriate'' [115] length because the time correlates to the transmission of data between data centers located in the New York-New Jersey metro area and those located in the Chicago area.[116] One of these commenters indicated that latencies related to matching engines occur naturally during the course of normal operation for ''many . . . exchanges'', and these natural latencies could exceed the duration of the LP2 delay mechanism by several orders of magnitude.[117] A commenter opposing the proposal indicated that the proposed 4 millisecond delay did not appear to

[108] *See* ACS Letter at 2.

[109] *See* Exchange Response Letter II at 4; *see also* Section III.B.1.a *supra* for further discussion of market quality improvements that the Exchange anticipates would result from the proposed LP2 delay mechanism.

[110] 15 U.S.C. 78f(b)(5).

[111] *See* 17 CFR 201.700(b)(3).

[112] *See id.*

[113] *See id.*

[114] *See* CTC Letter II at 4.

[115] *See* XTX Letter III at 5.

[116] *See* CTC Letter I at 3; XTX Letter I at 5.

[117] *See* CTC Letter II at 5.

exceed the stated transmission time from Illinois to New Jersey, and on that basis questioned how the proposal could achieve its stated objective.[118] This commenter did not believe that the proposed rule change should be tied to the use and operation of current technology and questioned whether the length of the delay would need to be modified as technology and the time required to transmit data evolves.[119]

The Exchange restated its belief that an intentional delay of four milliseconds is an appropriate duration in order to negate the advantages that opportunistic trading firms using the latest microwave connections have over liquidity providers using traditional fiber connections.[120] In response to whether the proposal would successfully protect liquidity providing orders on the EDGA book given that the length of the delay is shorter than the transmission time from Illinois to New Jersey, the Exchange stated that a four millisecond delay is appropriate because the respective transmission times over fiber and high speed microwave connections is approximately 7.75 milliseconds and 4.005 milliseconds, and opportunistic trading firms with microwave connections use the resulting 3.745 millisecond ''advantage'' to ''race to the equities market and trade at potentially stale prices'' before EDGA liquidity providers can update their quotations.[121]

The Exchange also stated that its own analysis suggested that a four millisecond delay would not be material for investors with long term investment horizons because these investors would not be sensitive to millisecond level price changes.[122] The Exchange stated that such investors should have the ability to make tradeoffs in the public markets similar to those that are available in OTC markets, where a number of broker-dealers offer conditional orders that are only executable after a firm-up period that can range between 500 milliseconds and two seconds depending on the firm.[123] The Exchange stated that market participants that choose to use this functionality in OTC markets have decided that the value of the execution provided by such orders outweighs the time it may take to receive that execution (*i.e.,* they value the quality of the execution over its immediacy).[124] The Exchange also stated that broker-dealers often make tradeoffs between the speed of an execution and other factors, such as price improvement and liquidity, and noted that NASDAQ introduced a midpoint extended life order that contains a built-in speedbump of 500 milliseconds.[125]

Commenters supporting the proposal asserted that the proposed rule change is not unfairly discriminatory toward any particular type of market participant.[126] Specifically, one of these commenters stated that the LP2 delay mechanism is a targeted response to a known problem (*i.e.,* latency arbitrage) and that the mechanism would reduce costs for most market participants, enhance market quality in the form of better displayed prices and larger size, and lower the barrier to entry for new market making firms.[127] This commenter also stated that the proposed delay mechanism: (1) Targets the particular trading activity of latency arbitrage as opposed to a type of market participant, and (2) protects all liquidity adding orders as opposed to orders from a subset of market participants.[128] In addition, the commenter stated that market participants that engage in latency arbitrage may not be readily defined or grouped by one aspect of their overall trading activity, and will typically adapt their businesses and activities to accommodate the specific market structure of each product and market.[129] The other commenter argued that the proposal was not unfairly discriminatory because all market participants who send limit orders would be treated ''equally and therefore fairly,'' since all limit orders from all of these market participants would be eligible for protection by the LP2 delay mechanism.[130] This commenter also stated that the proposal was not unfairly discriminatory because liquidity providers may be picked off by participants with speed advantages related to exchange connectivity or market data processing and therefore incur greater risks than liquidity takers.[131] The commenter stated that reducing the degree of an existing disparity (*i.e.,* reducing the magnitude of the risk being assumed by liquidity providers) could not constitute unfair discrimination.[132] This commenter further stated that as long as the orders of liquidity takers are not correlated with microsecond-level price dislocations, they should expect to receive the same fill rate under the proposal as they receive today.[133] The commenter stated that the likelihood of a market maker backing away during the delay would be small because the ''natural liquidity demands'' of investors and end users are uncorrelated with microsecond or millisecond level price dislocations.[134]

In contrast, other commenters raised concerns that the proposed rule change would permit unfair discrimination against liquidity takers because EDGA liquidity providers could use the 4 millisecond delay to observe executions on other venues, and then cancel their displayed quotes in anticipation of a similar order being routed to EDGA.[135] Several of these commenters expressed concern that EDGA liquidity providers would be able to modify or cancel their displayed quotes while an executable, incoming order was being subjected to the LP2 delay mechanism, indicating that this capability would allow liquidity providers to back away from their quotes while creating uncertainty for liquidity takers, including many retail and institutional investors, in terms of their ability to access publicly displayed orders, which could serve to degrade quote quality on EDGA.[136] Another commenter asserted that the proposed LP2 delay mechanism ''essentially provides all market participants with resting orders a free option to modify or cancel their orders before execution,'' and thus ''[s]ometimes a liquidity taking order would receive an execution, and other times it would not.'' [137] Several commenters believed that such quote fading could lead to poor execution outcomes for institutional investors,

[118] *See* Healthy Markets Letter II at 3 n.6. In the Notice, the Exchange stated that the proposed delay would negate the advantages that ''opportunistic trading firms that use the latest microwave connections have over liquidity providers using traditional fiber connections.'' Notice at 30284. The Exchange stated that Quincy Data advertised a latency of 4.005 milliseconds for its high speed microwave connection, or about half the 7.75 milliseconds of latency experienced over a fiber connection provided by ICE Global Network. *See* Notice, 84 FR at 30284 n.10.

[119] *See* Healthy Markets Letter II at 4.

[120] *See* Exchange Response Letter II at 8.

[121] *See id.* at 9.

[122] *See id.*

[123] *See id.* at 10.

[124] *See* Exchange Response Letter II at 10.

[125] *See id.* at 9.

[126] *See* CTC Letter II at 3; XTX Letter III at 3.

[127] *See* XTX Letter III at 3.

[128] *See id.*

[129] *See* XTX Letter III at 3.

[130] *See* CTC Letter II at 3.

[131] *See id.*

[132] *See id.*

[133] *See id.* at 4.

[134] *See id.* at 2.

[135] *See* ACS Letter at 2; Citadel Letter II at 6, 10; Letter from Ray Ross, Chief Technology Officer, Clearpool, dated Oct. 21, 2019 (''Clearpool Letter II'') at 3; FIA Letter II at 2; Healthy Markets Letter II at 3; ICI Letter at 1; Leuchtkafer Letter IV at 1–2; MFA Letter II at 1–2.

[136] *See* ACS Letter at 2; Citadel Letter II at 2; ICI Letter at 2; MFA Letter II at 3; STA Letter at 3.

[137] *See* Healthy Markets Letter III at 8.

such as a decline in fill rates,[138] and two commenters indicated that this would negatively impact firms that send orders simultaneously to more than one execution venue in order to obtain the desired size through mechanisms such as intermarket sweep orders.[139] A commenter characterized the 4 millisecond window afforded by the delay as the ''economic equivalent of a 'last look' '' since a liquidity provider could use market data to anticipate the timing of incoming orders delayed by the speedbump.[140] A commenter suggested that the differential in the execution prices related to quote fading by liquidity providers would be akin to a fee that is imposed on institutional investors.[141] A commenter stated that EDGA did not provide data to evaluate the proposal's impact on different types of market participants, for example, the Exchange did not evaluate the frequency with which liquidity providers would reprice or cancel orders as a result of the LP2 delay mechanism, the impact on retail and institutional orders, and the impact on ETF market makers.[142]

In response to comments that the proposal would permit unfair discrimination, the Exchange acknowledged that the instant proposal is different than the Commission-approved delays on IEX and American and stated that the differences associated with the LP2 delay mechanism would serve to ''enhance displayed liquidity and benefit investors.'' [143] The Exchange also stated that the commenters ''miss[ed] the point'' because a ''truly symmetric delay would do nothing to protect investors' orders.'' [144] The Exchange noted that the LP2 delay mechanism, like the delays on IEX and American, would protect resting orders, but unlike the IEX and American delays, this proposal would not rely on exchange driven algorithms and would enable liquidity providers to ''improve displayed prices.'' [145] The Exchange also asserted that the proposal is not unfairly discriminatory because the LP2 delay mechanism would apply to a subset of orders on EDGA (*i.e.,* liquidity taking orders) but not others (*i.e.,* liquidity adding orders), because the relevant differences between such orders, and in particular the ''free option'' provided by price-setting quotations, justifies protecting orders that provide liquidity to investors (*i.e.,* liquidity adding orders).[146] The Exchange stated that (1) ''all market models necessarily involve treating certain orders differently from others in some manner based on one or more identifiable characteristics,'' (2) market operators must make certain determinations about what sort of market model would promote the maintenance of fair, orderly, and efficient markets, and (3) competitive forces, measured by order flow and market share, would ultimately dictate the efficacy of the market model.[147] The Exchange also stated that while liquidity providers are most directly impacted by latency arbitrage, ''market participants that access . . . liquidity on national securities exchanges'' are also affected because the ''ability for investors to trade with a published quotation and obtain a quality execution depends on the ability for liquidity providers to offer their best prices and sizes to the market.'' [148] The Exchange stated it was important to protect liquidity providers ''given the service that they provide to the market, and the asymmetric risks'' they assume.[149] The Exchange stated that the LP2 delay mechanism should largely eliminate adverse selection risks for liquidity providers, who otherwise must price such risks into their posted quotations—and the benefits of this reduced risk would accrue to investors as well as liquidity providers, since liquidity providers would be competing to offer the best quoted prices on the EDGA book.[150] The Exchange stated that reducing the cost of adverse selection for liquidity providers would allow them to improve their quotations and increase available liquidity throughout the trading day.[151]

The Exchange also stated that the crux of the disagreement about whether the proposal was unfairly discriminatory was substantively related to ''who would benefit'' and ''whether the Exchange would ultimately be successful in its goal of improving market quality for investors.'' [152] The Exchange asserted that the proposal is ''plainly not unfairly discriminatory'' because it ''would offer strong incentives for liquidity providers to improve quote quality, and hence execution quality for investors, and would do so by offering an innovative solution to investors on a purely voluntary basis.'' [153] The Exchange stated that all market participants that are not engaged in the latency arbitrage strategies could benefit from the proposal, ''either th[r]ough submitting liquidity providing orders that benefit directly from the LP2 delay mechanism, or through submitting liquidity removing orders that may benefit from improved market quality.'' [154] The Exchange also referenced a prior comment letter to convey that although high-frequency liquidity providers may be the immediate beneficiaries of the asymmetric speedbump, benefits are likely to be passed on to investors as well.[155] The Exchange also stated that the proposal is distinguishable from ''last look'' functionality on the foreign exchange markets because EDGA liquidity providers would not have the opportunity to avoid executions with an incoming marketable order after it has been presented for execution.[156] Rather, the Exchange stated that liquidity providers would continue to set quoted prices based on available market information, and the liquidity taking order would only become known when the order is presented for execution after exiting the delay mechanism.[157]

As expressed by certain concerned commenters, unfair discrimination against liquidity takers could result because EDGA liquidity providers could use the 4 millisecond delay to observe executions on other venues and then cancel or modify their displayed quotes in anticipation of a similar order being routed to EDGA.[158] The Exchange has identified that it could be problematic for a market participant to observe an execution on one exchange and use such market information in conjunction with its speed advantage to effect an execution against a soon to be stale quotation on another exchange (*i.e.,* latency arbitrage). However, the Exchange has not demonstrated why a 4 millisecond delay, that is designed to mimic the differentials in the

[138] *See* Citadel Letter II at 2; Clearpool Letter II at 3; MFA Letter II at 1–2.

[139] *See* Citadel Letter II at 10; MFA Letter II at 1–2.

[140] *See* Citadel Letter II at 6.

[141] *See* MFA Letter II at 2.

[142] *See* Citadel Letter I at 7.

[143] *See* Exchange Response Letter I at 6.

[144] *See id.*

[145] *See* Exchange Response Letter I at 7.

[146] *See* Exchange Response Letter II at 2–3.

[147] Exchange Response Letter II at 3.

[148] *See* Exchange Response Letter I at 7.

[149] *See id.*

[150] *See* Exchange Response Letter II at 5.

[151] *See id.* at 4.

[152] *See* Exchange Response Letter II, *supra* note 9, at 3; *see also* Section III.B.1.d *supra* for further discussion of the impact of the proposal on market quality.

[153] Exchange Response Letter I at 9.

[154] Exchange Response Letter II at 2.

[155] *See* Exchange Response Letter II at 4 (referencing the letter from Joshua Mollner, Assistant Professor, Kellogg School of Management, Northwestern University, and Markus Baldauf, Assistant Professor, Sauder School of Business, University of British Columbia, dated September 12, 2019 (''Mollner & Baldauf Letter'').

[156] *See* Exchange Response Letter I at 15.

[157] *See id.* at 15–16.

[158] *See* ACS Letter at 2; Citadel Letter II at 6, 10; FIA Letter II at 2; Healthy Markets Letter II at 3; ICI Letter at 1; Leuchtkafer Letter IV at 1–2; MFA Letter II at 1–2.

geographic latency between data centers located in northern New Jersey and Illinois, is also appropriate to protect against latency arbitrage when the relevant data centers are both located in northern New Jersey and the geographic latency differential would presumably be less than 4 milliseconds.

The Exchange [159] and supporting commenters [160] reason that the LP2 delay mechanism applies equally to all market participants submitting incoming executable orders and therefore the proposal would not permit unfair discrimination. However, the Exchange has not provided specific analysis or demonstrated that the proposed rule change would not permit unfair discrimination against liquidity taking orders that are not related to latency arbitrage as they would be treated in the same manner as orders engaged in latency arbitrage that the Exchange seeks to target in its effort to protect EDGA liquidity providers.[161]

The Exchange and supporting commenters also suggest that the proposal would not permit unfair discrimination because liquidity providers provide a valuable service to the market and assume disproportionate risks compared to liquidity takers. While the Commission agrees that liquidity providers add value to the markets and assume certain financial risks in providing liquidity, the Commission, for the reasons described above, concludes that the Exchange has not provided sufficiently detailed and specific analysis that demonstrates that the LP2 delay mechanism's benefits to liquidity providers makes the discriminatory impact on liquidity takers not unfair.[162] The Exchange also has not explained why providing a benefit without a corresponding obligation (*e.g.,* quoting or enhanced quoting obligations) to liquidity providers is consistent with the Act when the proposed rule permits discrimination against liquidity takers.

Lastly, the Exchange and supporting commenters state that the proposal would not permit unfair discrimination because liquidity takers would be able to adapt to better use the LP2 delay mechanism. However, a market participant's ability to adapt its business model or alter its trading strategies in response to this proposed rule does not, by itself, demonstrate that the proposal would not permit unfair discrimination, and the Exchange has not provided adequate analysis to support its assertion.[163]

3. Discrimination Between Slow and Fast Liquidity Providers

Supporting commenters did not believe that the proposal would increase the risk of adverse selection for market participants unable to update their quotes within the four millisecond delay period.[164] One of these commenters characterized the concern that the proposal favored sophisticated traders and would result in the orders of institutional investors being left to absorb the negative impact of latency arbitrage strategies as ''meritless.'' [165]

In contrast, several commenters opposing the proposal expressed concern that slower liquidity providers on EDGA could be unfairly discriminated against due to continued exposure to adverse selection risk as a result of the delay.[166] Specifically, any investor with a limit order at the EDGA BBO who does not have the ability to cancel or modify such order within 4 milliseconds would be at risk of receiving an adverse execution because of opportunistic traders.[167] A commenter believed that in order to take advantage of the proposal, liquidity providers would likely need high-speed data feeds from EDGA and the CME, high-speed networks between Chicago and New Jersey, and co-located servers in EDGA's data center, among other items.[168] This commenter indicated that because retail market participants cannot compete on millisecond timeframes, and ''only a very small minority of market participants are certain to directly benefit'' from the proposal, the proposal is unfairly discriminatory.[169] A commenter stated that ''the facially neutral proposal appears tailored to have a disparate impact on various EDGA liquidity providers'' although the proposal ties its benefit to a specific market behavior (*i.e.,* the ability to react to price movements within 4 milliseconds), rather than limiting the benefit to specified market participants, such as registered market makers.[170] This commenter believed that the proposal intentionally discriminates in favor of liquidity providers that can modify their quotes within 4 milliseconds of a price change, and that the resting orders of all other classes of investors would be left exposed to the ''alleged predatory arbitrage behavior.'' [171]

In response to commenter concerns that certain liquidity providers would be unable to react to cross-market signals and modify or cancel a quote during the four millisecond delay, the Exchange stated that liquidity providers could submit midpoint peg orders that would automatically reprice during the four millisecond delay and indicated that ''a very significant amount of institutional order flow is managed through broker-dealer algorithms that could respond to market information in less than this timeframe.'' [172] Two commenters supporting the proposal stated that agency brokers could utilize commercially available passive algorithms that could process market signals to reprice or cancel orders within the four millisecond delay period in order to benefit investors.[173] A commenter stated that various service providers, broker-dealers, and even exchanges (*i.e.,* IEX) could provide such an algorithm to effect cancels in the case of various adverse market signals, including price moves in correlated instruments or ''crumbling quotes.'' [174] This commenter also stated that under the proposal a broader group (*i.e.,* everyone able to cancel or modify an order within the 4 millisecond during the LP2 delay), beyond just the fastest firms, would be able to benefit.[175] A commenter also stated that while institutional investors that send an order to sweep the top of book liquidity across multiple exchanges could see a decline in fill rates, these market participants could adapt their routing strategies to attain higher fill rates.[176]

[159] *See* Notice, 84 FR at 30290–1.

[160] *See* note 123, *supra.*

[161] *See* 17 CFR 201.700(b)(3).

[162] *See id.*

[163] *See* 17 CFR 201.700(b)(3).

[164] *See* CTC Letter II at 4; XTX Letter III at 4.

[165] *See* XTX Letter III at 4.

[166] *See* ACS Letter at 2; Citadel Letter II at 6–7; Healthy Markets Letter II at 4; ICI Letter at 1–2; Investor Advocate Letter at 4–5; Leuchtkafer Letter IV at 3; MFA Letter II at 2.

[167] *See* ICI Letter at 2; Investor Advocate Letter at 4.

[168] *See* Leuchtkafer Letter IV at 2–3.

[169] *See* Leuchtkafer Letter V at 1. This commenter also distinguished the instant proposal from a recent IEX proposal to add a discretionary limit order type designed to protect liquidity providers from potential adverse selection by latency arbitrage trading strategies, noting that the IEX proposal would be ''available to everyone'' as opposed to a smaller group of market participants. *See id.* at 3.

[170] Investor Advocate Letter at 4–5.

[171] *See id.* at 4.

[172] *See* Exchange Response Letter I at 10.

[173] *See* CTC Letter II at 4; XTX Letter III at 4.

[174] *See* CTC Letter II at 4.

[175] *See id.*

[176] *See* Letter from Eric Swanson, CEO, XTX Markets LLC (Americas), dated July 31, 2019 (''XTX Letter II'') at 3–4; XTX Letter III at 3. Specifically, this commenter suggested that (1) orders could be ''staged'' into the marketplace to account for the LP2 delay (*e.g.,* route order to EDGA first, wait out the duration of the LP2 delay mechanism, and then route additional orders to other exchanges), or (2) in the absence of staging the sweep, institutional investors could seek to access EDGA liquidity when EDGA could fulfill the size of what previously would have been a market sweep order. *See* XTX Letter II at 3–4.

The Exchange also stated that, just as in other instances where market participants have adapted in response to a market structure initiative, broker-dealers may need to modify their order handling procedures to make the ''best use'' of the LP2 delay mechanism by, for instance, accounting for the 4 millisecond delay when routing orders to multiple exchanges the way many broker-dealers currently monitor latency on a real-time basis using heat maps or other strategies to improve order routing outcomes and obtain best execution for clients.[177]

A commenter opposing the proposal contended that, notwithstanding unsupported claims to the contrary (by the Exchange and supporters of the proposal), ''substantially all commercially available algorithms are unable to process and respond to cross-asset and cross-market signals within 4 milliseconds the way [supporters of the proposal can],'' which would result in retail and institutional investors being disadvantaged.[178] Another opposing commenter disagreed with a prior commenter that suggested institutional investors modify their routing strategies to mitigate the potential impact of quote fading.[179] This commenter stated that this suggestion asks institutional investors ''to assume the risk that the market will move against them while holding back on sending orders to all exchanges other than EDGA'' and suggested the proposed workaround would be ineffective, especially if other exchanges were to introduce similar asymmetric speedbumps.[180]

The Commission concludes that the proposal is discriminatory and the Exchange has not demonstrated that the proposal would not be unfair. The Exchange has not demonstrated that the proposal is sufficiently tailored to its stated purpose, which is to improve displayed liquidity on the Exchange by reducing the risk of adverse selection to liquidity providers, thereby potentially enabling liquidity providers to offer tighter quotes and greater size. For instance, as discussed above, the Exchange has not provided support for a fundamental premise of this proposed rule change—that liquidity takers use the latest microwave connections and EDGA liquidity providers use traditional fiber connections, and liquidity takers are able to use the resulting speed differential to effect latency arbitrage on the Exchange. The Exchange does not differentiate between latency arbitrage and other trading activity such as hedging activity by ETFs or options liquidity providers. Further, the Exchange does not provide specific analysis as to why it is appropriate to apply the 4 millisecond delay to all incoming executable orders that would remove liquidity from the EDGA Book from all market participants as opposed to tailoring a response to target the trading of a relatively small number of market participants who engage in latency arbitrage. In addition, the Exchange has not demonstrated why a 4 millisecond delay is sufficient time to effectively protect a wide range of market participants from the latency arbitrage issue identified by the Exchange as the basis for the proposed rule change.[181]

Finally, certain commenters expressed concern that if certain liquidity providers were unable to cancel or modify their quotes during the 4 millisecond delay but other liquidity providers were able to do so, the slower liquidity providers would continue to face the risk of adverse selection after the implementation of the LP2 delay mechanism. In other words, the proposal could unfairly discriminate against slower liquidity providers because they would be exposed to bear the full brunt of the latency arbitrage problems on the Exchange. While the Exchange, and commenters supporting of the proposal, stated that existing, commercially available algorithms could level the playing field against sophisticated (*i.e.,* fast) liquidity providers, other commenters question the viability of these algorithms. Notably, the Exchange provided no evidence to support its assertion relating to the viability of commercially available algorithms such as, for instance, availability, cost, performance or actual use of these algorithms.[182]

C. Other Comments

Other issues have been raised by commenters, including the potential impact of the proposal on competition [183] and broker-dealer obligations related to best execution,[184] whether EDGA's manual, unprotected quotes should be included in the SIP,[185] and whether certain aspects of the proposal would increase the complexity of the national market system.[186] Ultimately, however, additional discussion on these topics is unnecessary, as they do not bear on the basis for the Commission's decision to disapprove the proposal. On the record before us, for the independently sufficient reasons discussed in more detail above, we have concluded that the Exchange has not met its burden to show that approval of the proposed rule change is appropriate. Accordingly, it is not necessary for us to consider either the relevance of such other concerns to our statutory review of this proposed rule change or the merits of the concerns themselves.

IV. Conclusion

For the reasons set forth above, the Commission does not find, pursuant to Section 19(b)(2) of the Exchange Act, that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with Sections 6(b)(5) of the Act.[187]

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[188] that the proposed rule change (SR–CboeEDGA–2019–012) be, and hereby is, disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[189]

Jill M. Peterson,

Assistant Secretary.

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[177] *See* Exchange Response Letter II at 11.

[178] *See* Citadel Letter II at 7.

[179] *See* MFA Letter II at 2.

[180] *See id.*

[181] *See* 17 CFR 201.700(b)(3).

[182] *See id.*

[183] *See* ACS Letter at 2; Citadel Letter II at 6, 8–10; CTC Letter II at 1–2, 6–7; Exchange Response Letter I at 8–9; ICI Letter at 2; STA Letter at 2, 4; XTX Letter III at 8.

[184] *See* ACS Letter at 2; Citadel Letter II at 2–3; CTC Letter II at 6; Citadel Letter II at 5, 11; Healthy Markets Letter II at 7; ICI Letter at 1; Leuchtkafer Letter IV *at 11;* STA Letter *supra* note 8; XTX Letter III at 7.

[185] *See* ACS Letter at 2; Citadel Letter II at 11; Clearpool Letter II at 1–2; CTC Letter II at 5; Healthy Markets Letter II at 6; Leuchtkafer Letter IV at 9–11; Leuchtkafer Letter V at 2–3; STA Letter at 3; XTX Letter III at 6.

[186] *See* Clearpool Letter II at 3; Letter from Tom Quaadman, Executive Vice President, Center for Capital Markets Competitiveness, U.S. Chamber of Commerce (dated October 18, 2019) (''CMC Letter); ICI Letter at 1, 3; Investor Advocate Letter at 6.

[187] 15 U.S.C. 78f(b)(5).

[188] 15 U.S.C. 78s(b)(2).

[189] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88267; File No. SR–NSCC–2020–801]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing of Advance Notice To Enhance the Calculation of the Family-Issued Securities Charge

February 24, 2020.

Pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act entitled the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') [1] and Rule 19b–4(n)(1)(i) under the Securities Exchange Act of 1934 (''Act''),[2] notice is hereby given that on January 28, 2020, National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission'') the advance notice SR–NSCC–2020–801 (''Advance Notice'') as described in Items I, II and III below, which Items have been prepared by the clearing agency.[3] The Commission is publishing this notice to solicit comments on the Advance Notice from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

This Advance Notice consists of modifications to NSCC's Rules and Procedures (''Rules'') [4] in connection with a proposal to enhance the calculation of NSCC's existing charge applied to long positions in Family-Issued Securities [5] (''FIS Charge'') by using the same haircut percentages for all Members and no longer using Members' ratings on the Credit Risk Rating Matrix (''CRRM'') [6] in calculating this charge, as described below.

[1] 12 U.S.C. 5465(e)(1).

[2] 17 CFR 240.19b–4(n)(1)(i).

[3] On January 28, 2020, NSCC filed this Advance Notice as a proposed rule change (SR–NSCC–2020–002) with the Commission pursuant to Section 19(b)(1) of the Act, 15 U.S.C. 78s(b)(1), and Rule 19b–4 thereunder, 17 CFR 240.19b–4. A copy of the proposed rule change is *available at http://www.dtcc.com/legal/sec-rule-filings.aspx.*

[4] Terms not defined herein are defined in the Rules, *available at www.dtcc.com/~/media/Files/Downloads/legal/rules/nscc_rules.pdf.*

[5] A Family-Issued Security is defined in Rule 1 (Definitions and Descriptions) of the Rules as ''a security that was issued by a Member or an affiliate of that Member.'' *Supra* note 4.

[6] *See* Rule 1 and Section 4 of Rule 2B of the Rules, *supra* note 4. *See also* Securities Exchange Act Release Nos. 80734 (May 19, 2017), 82 FR 24177 (May 25, 2017) (SR–DTC–2017–002, SR–FICC–2017–006, SR–NSCC–2017–002); and 80731 (May 19, 2017), 82 FR 24174 (May 25, 2017) (SR–DTC–2017–801, SR–FICC–2017–804, SR–NSCC–2017–801).

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, the clearing agency included statements concerning the purpose of and basis for the Advance Notice and discussed any comments it received on the Advance Notice. The text of these statements may be examined at the places specified in Item IV below. The clearing agency has prepared summaries, set forth in sections A and B below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement on Comments on the Advance Notice Received From Members, Participants, or Others

NSCC has not received or solicited any written comments relating to this proposal. NSCC will notify the Commission of any written comments received by NSCC.

(B) Advance Notice Filed Pursuant to Section 806(e) of the Clearing Supervision Act

Description of Proposed Changes

NSCC is proposing to modify the Rules to enhance the calculation of the FIS Charge by using the same haircut percentages for all Members and no longer using Members' ratings on the CRRM in calculating this charge. By using the same haircut percentages to calculate the FIS Charge for all Members, NSCC believes this proposed enhancement would better mitigate the specific wrong-way risk posed by long positions in Family-Issued Securities that the charge was designed to address, as described below.

Background

As a central counterparty, NSCC occupies an important role in the securities settlement system by interposing itself between counterparties to financial transactions, thereby reducing the risk faced by participants and contributing to global financial stability. The effectiveness of a central counterparty's risk controls and the adequacy of its financial resources are critical to achieving these risk-reducing goals. As part of its market risk management strategy, NSCC manages its credit exposure to Members by determining the appropriate Required Fund Deposits to the Clearing Fund and monitoring its sufficiency, as provided for in the Rules.[7] The Required Fund Deposit serves as each Member's margin.

The objective of a Member's Required Fund Deposit is to mitigate potential losses to NSCC associated with liquidating a Member's portfolio in the event NSCC ceases to act for that Member (hereinafter referred to as a ''default'').[8] The aggregate of all Members' Required Fund Deposits constitutes the Clearing Fund of NSCC.[9] NSCC may access its Clearing Fund should a defaulting Member's own Required Fund Deposit be insufficient to satisfy losses to NSCC caused by the liquidation of that Member's portfolio.[10]

Pursuant to the Rules, each Member's Required Fund Deposit amount consists of a number of applicable components, each of which is calculated to address specific risks faced by NSCC, as identified within Procedure XV of the Rules.[11] NSCC regularly assesses the market, liquidity and other risks that its margining methodologies are designed to mitigate to evaluate whether margin levels are commensurate with the particular risk attributes of each relevant product, portfolio, and market.

Among the various risks that NSCC considers when evaluating the effectiveness of its margining methodology are its counterparty risks, including wrong-way risk. In particular, NSCC seeks to identify and mitigate its exposures to specific wrong-way risk, which is defined as the risk that an exposure to a counterparty is highly likely to increase when the creditworthiness of that counterparty deteriorates.[12] NSCC has identified exposure to specific wrong-way risk when it acts as central counterparty to a Member with long positions in Family-Issued Securities. In the event a Member with long positions in Family-Issued Securities defaults, NSCC would close out those positions following a likely drop in the creditworthiness of the issuer, possibly resulting in a loss to NSCC.

In order to address this exposure to specific wrong-way risk, NSCC

[7] *See* Rule 4 (Clearing Fund) and Procedure XV (Clearing Fund Formula and Other Matters) of the Rules, *supra* note 4.

[8] The Rules identify when NSCC may cease to act for a Member and the types of actions NSCC may take. For example, NSCC may suspend a firm's membership with NSCC or prohibit or limit a Member's access to NSCC's services in the event that Member defaults on a financial or other obligation to NSCC. *See* Rule 46 (Restrictions on Access to Services) of the Rules, *supra* note 4.

[9] *See* Rule 4 (Clearing Fund) of the Rules, *supra* note 4.

[10] *Id.*

[11] *Supra* note 4.

[12] *See* Principles for financial market infrastructures, issued by the Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions, pg. 47 n.65 (April 2012), *available at http://www.bis.org/publ/cpss101a.pdf.*

implemented the FIS Charge in 2015.[13] The FIS Charge is applied to a Member's long positions in Family-Issued Securities, which are the positions NSCC would need to sell into the market following a Member default.[14]

When the FIS Charge was initially implemented, it was only applied to Members that were placed on the Watch List based on the CRRM rating.[15] As part of its ongoing monitoring of its membership, NSCC utilizes the internal CRRM to evaluate its credit risk exposures to its Members based on a scale from strongest to weakest.[16] Members that fall within the higher risk rating categories are considered on NSCC's Watch List and may be subject to enhanced surveillance or additional margin charges, as permitted under the Rules.[17] Therefore, the FIS Charge was applied only to Members on the Watch List based on the reasoning that these Members present a heightened credit risk to NSCC or have demonstrated higher risk related to their ability to meet settlement. However, in the Initial FIS Filing, NSCC proposed to further evaluate its exposure to wrong-way risk presented by positions in Family-Issued Securities by reviewing the impact of expanding the application of the FIS Charge to positions in Family-Issued Securities of all Members.[18]

Following that evaluation, NSCC implemented the current methodology for calculating the FIS Charge, which expanded the application of the charge to all Members, but continues to take into account Members' ratings on the CRRM in calculating the applicable charge.[19] Therefore, under the current methodology, in calculating its Members' Required Fund Deposits, NSCC first excludes long positions in Family-Issued Securities of Members from the applicable volatility charge, and instead charges an amount calculated by multiplying the absolute value of the long Net Unsettled Positions (as such term is defined in Procedure XV of the Rules) in that Member's Family-Issued Securities by a percentage that is no less than 40 percent.[20] The percentage that is used in calculating the FIS Charge depends on a Member's rating on the CRRM. Under Procedure XV of the Rules, long Net Unsettled Positions in (1) fixed income securities that are Family-Issued Securities are charged a haircut rate of no less than 80 percent for Members that are rated 6 or 7 on the CRRM, and no less than 40 percent for Members that are rated 1 through 5 on the CRRM; and (2) equity securities that are Family-Issued Securities are charged a haircut rate of 100 percent for Members that are rated 6 or 7 on the CRRM, and no less than 50 percent for Members that are rated 1 through 5 on the CRRM.[21] The haircut rates used in the FIS Charge as applied to positions in fixed income securities were calibrated based on historical corporate issue recovery rate data and address the risk that the Family-Issued Securities of a Member would be devalued in the event of that Member's default.

Proposed Change

NSCC is now proposing to enhance the methodology for calculating the FIS Charge by using the higher applicable percentage for all Members, and no longer using a Member's CRRM rating in the calculation.

Since implementation of the current calculation, NSCC has continued to monitor its exposure to specific wrong-way risk and determined that the risk characteristics to be considered when margining Family-Issued Securities extend beyond Members' creditworthiness as measured through the CRRM. More specifically, NSCC believes it may be exposed to specific wrong-way risk despite a Members' rating on the CRRM, and NSCC can better mitigate its exposure to this risk by calculating the FIS Charge without considering Members' CRRM ratings. While the current methodology appropriately assumes that Members with a higher rating on the CRRM present a heightened credit risk to NSCC or have demonstrated higher risk related to their ability to meet settlement, NSCC believes this approach does not take into account the risk that a firm may default due to unanticipated causes (referred to as a ''jump-to-default'' scenario) not captured by the CRRM rating. The CRRM rating necessarily relies on historical data as a predictor of future risks. Jump-to-default scenarios are triggered by unanticipated causes that could not be predicted based on historical trends or data, for example fraud or other bad acts by management. The proposed change is designed to improve NSCC's ability to cover the specific wrong-way risk posed by long positions in Family-Issued Securities by applying the higher applicable percentage in calculating the FIS Charge for all Members.

In order to implement this proposal, NSCC would amend Sections I.(A)(1)(a)(iv) and I.(A)(2)(a)(iv) of Procedure XV of the Rules, which describe the methodology for calculating the FIS Charge, and provide that (1) fixed income securities that are Family-Issued Securities shall be charged a haircut rate of no less than 80 percent; and (2) equity securities that are Family-Issued Securities shall be charged a haircut rate of 100 percent.

Anticipated Effect on and Management of Risk

NSCC believes that the proposed change to enhance the calculation of the FIS Charge would improve the risk-based methodology NSCC employs to measure market price risk and would better limit NSCC's credit exposures to Members. Specifically, the proposed change would use the higher applicable haircut percentage in calculating the FIS Charge for all Members. These haircut percentages as applied to positions in fixed income securities were calibrated to address the risk that the Family-Issued Securities of a Member would be devalued in the event of that Member's default. Therefore, the proposed FIS Charge would better address NSCC's exposures to specific wrong-way risk with respect to all Members' positions in Family-Issued Securities, particularly in jump-to-default scenarios. By mitigating specific wrong-way risk for NSCC, the proposed change would also mitigate risk for Members, because lowering the risk profile for NSCC would in turn lower the risk exposure that Members may have with respect to NSCC in its role as a central counterparty. Further, the proposal is designed to meet NSCC's risk management goals and its regulatory obligations, as described below.

Consistency With the Clearing Supervision Act

Although the Clearing Supervision Act does not specify a standard of review for an advance notice, its stated purpose is instructive: To mitigate systemic risk in the financial system and promote financial stability by, among other things, promoting uniform risk management standards for

[13] *See* Securities Exchange Act Release No. 76077 (October 5, 2015), 80 FR 61256 (October 9, 2015) (SR–NSCC–2015–003) (''Initial FIS Filing'').

[14] Short positions in Family-Issued Securities are not subject to the FIS Charge and are subject to the applicable volatility charge, as provided for under the Rules. *See* Sections I.(A)(1)(a)(iv) and I.(A)(2)(a)(iv) of Procedure XV (Clearing Fund Formula and Other Matters) of the Rules, *supra* note 4.

[15] *See supra* note 13.

[16] *See supra* note 6.

[17] *Id.*

[18] *Supra* note 13, at 61257.

[19] *See* Securities Exchange Act Release Nos. 81550 (September 7, 2017), 82 FR 43061 (September 13, 2017) (SR–NSCC–2017–010); and 81545 (September 7, 2017), 82 FR 43054 (September 13, 2017) (SR–NSCC–2017–804).

[20] *See* Sections I.(A)(1)(a)(iv) and I.(A)(2)(a)(iv) of Procedure XV (Clearing Fund Formula and Other Matters) of the Rules, *supra* note 4.

[21] *Id.*

systemically important financial market utilities and strengthening the liquidity of systemically important financial market utilities.[22]

NSCC believes that the proposal is consistent with the Clearing Supervision Act, specifically with the risk management objectives and principles of Section 805(b), and with certain of the risk management standards adopted by the Commission pursuant to Section 805(a)(2), for the reasons described below.[23]

Consistency With Section 805(b) of the Clearing Supervision Act

NSCC believes the proposal is consistent with Section 805(b) of the Clearing Supervision Act because it would enhance the margin methodology applied to long positions in Family-Issued Securities by using the higher applicable percentage for all Members, rather than considering Members' CRRM ratings in the calculation. The proposal would improve NSCC's ability to mitigate specific wrong-way risk exposures in a jump-to-default scenario and, in this way, would assist NSCC in collecting margin that more accurately reflects NSCC's exposure to a Member that clears Family-Issued Securities. The proposal would also assist NSCC in its continuous efforts to improve the reliability and effectiveness of its risk-based margining methodology by taking into account specific wrong-way risk. As such, the proposal would help NSCC, as a central counterparty, promote robust risk management, and thus promote the prompt and accurate clearance and settlement of securities transactions, as well as, in general, protect investors and the public interest.

In its critical role as a central counterparty, NSCC interposes itself between counterparties to financial transactions, thereby reducing the risk faced by its Members and contributing to global financial stability. NSCC's liquidity risk management plays an integral part in NSCC's ability to perform its role as a central counterparty. Therefore, improving the reliability and effectiveness of its risk-based margining methodology would be expected to also reduce systemic risk in the financial system and would promote financial stability by having a positive impact on the safety and soundness of the clearing system.

As a result, NSCC believes the proposal would be consistent with the objectives and principles of Section 805(b) of the Clearing Supervision Act, which specify the promotion of robust risk management, promotion of safety and soundness, reduction of systemic risks and support of the stability of the broader financial system.[24]

Consistency With Section 805(a)(2) of the Clearing Supervision Act

Section 805(a)(2) of the Clearing Supervision Act authorizes the Commission to prescribe risk management standards for the payment, clearing and settlement activities of designated clearing entities, like NSCC, and financial institutions engaged in designated activities for which the Commission is the supervisory agency or the appropriate financial regulator.[25] The Commission has accordingly adopted risk management standards under Section 805(a)(2) of the Clearing Supervision Act and Section 17A of the Act (''Covered Clearing Agency Standards'').[26]

The Covered Clearing Agency Standards require covered clearing agencies to establish, implement, maintain, and enforce written policies and procedures that are reasonably designed to meet certain minimum requirements for their operations and risk management practices on an ongoing basis.[27] NSCC believes that the proposed change is consistent with the Covered Clearing Agency Standards, in particular Rules 17Ad–22(e)(4)(i),[28] and (e)(6)(i) and (v),[29] each promulgated under the Act, for the reasons described below.

Rule 17Ad–22(e)(4)(i) under the Act requires that each covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes, including by maintaining sufficient financial resources to cover its credit exposure to each participant fully with a high degree of confidence.[30] The specific wrong-way risk presented by Family-Issued Securities is the risk that, in the event a Member with unsettled long positions in Family-Issued Securities defaults, NSCC would close out those positions following a likely drop in the credit-worthiness of the issuer, possibly resulting in a loss to NSCC. The haircut rates used in calculating the FIS Charge as applied to positions in fixed income securities were calibrated based on historical corporate issue recovery rate data, and, therefore, address the risk that the Family-Issued Securities of a Member would be devalued in the event of that Member's default. The proposal to apply the higher haircuts to all Members would assist NSCC in addressing specific wrong-way risk exposures in a jump-to-default scenario. By addressing this additional risk exposure, NSCC believes the proposal would allow it to calculate the FIS Charge in a way that more accurately reflects the risk characteristics of Family-Issued Securities. The proposal would, therefore, permit NSCC to more accurately identify, measure, monitor and manage its credit exposures to Members with long positions in Family-Issued Securities, and would assist NSCC in collecting and maintaining financial resources that reflect its credit exposures to those Members. Therefore, NSCC believes the proposed change is consistent with Rule 17Ad–22(e)(4)(i).[31]

Rule 17Ad–22(e)(6)(i) under the Act requires that each covered clearing agency that provides central counterparty services establish, implement, maintain and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, at a minimum, considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market.[32] Rule 17Ad–22(e)(6)(v) under the Act requires that each covered clearing agency that provides central counterparty services establish, implement, maintain and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, at a minimum, uses an appropriate method for measuring credit exposure that accounts for relevant product risk factors and portfolio effects across products.[33]

As stated above, long positions in Family-Issued Securities present NSCC with exposure to specific wrong-way risk that, in the event a Member with these positions defaults, NSCC would close out those positions following a likely drop in the credit-worthiness of the issuer, possibly resulting in a loss to NSCC. The haircut rates used in the current methodology would continue to be used in the proposed methodology

[22] 12 U.S.C. 5461(b).

[23] 12 U.S.C. 5464(a)(2) and (b).

[24] 12 U.S.C. 5464(b).

[25] 12 U.S.C. 5464(a)(2).

[26] 17 CFR 240.17Ad–22(e).

[27] *Id.*

[28] 17 CFR 240.17Ad–22(e)(4)(i).

[29] 17 CFR 240.17Ad–22(e)(6)(i) and (v).

[30] 17 CFR 240.17Ad–22(e)(4)(i).

[31] *Id.*

[32] 17 CFR 240.17Ad–22(e)(6)(i).

[33] 17 CFR 240.17Ad–22(e)(6)(v).

and as applied to positions in fixed income securities were calibrated based on historical corporate issue recovery rate data and address the risk that the Family-Issued Securities of a Member would be devalued in the event of that Member's default. Therefore, the calculation of the charge would continue to reflect the risk characteristics of Family-Issued Securities. As described above, the proposed change to apply the higher haircut rates to all Members would improve NSCC's ability to mitigate its exposure to specific wrong-way risk in a jump-to-default scenario. In this way, the proposal would assist NSCC in maintaining a risk-based margin system that considers, and produces margin levels commensurate with, the risks and particular attributes of long positions in Family-Issued Securities. Additionally, NSCC believes the proposed enhancement to the methodology for calculating the FIS Charge is an appropriate method for measuring its credit exposures to its Members, because the FIS Charge would continue to account for the risk factors presented by these securities, *i.e.* the risk that these securities would be devalued in the event of a Member default. Therefore, NSCC believes the proposed change is consistent with Rule 17Ad–22(e)(6)(i) and (v).[34]

III. Date of Effectiveness of the Advance Notice, and Timing for Commission Action

The proposed change may be implemented if the Commission does not object to the proposed change within 60 days of the later of (i) the date that the proposed change was filed with the Commission or (ii) the date that any additional information requested by the Commission is received. The clearing agency shall not implement the proposed change if the Commission has any objection to the proposed change.

The Commission may extend the period for review by an additional 60 days if the proposed change raises novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension. A proposed change may be implemented in less than 60 days from the date the advance notice is filed, or the date further information requested by the Commission is received, if the Commission notifies the clearing agency in writing that it does not object to the proposed change and authorizes the clearing agency to implement the proposed change on an earlier date, subject to any conditions imposed by the Commission.

The clearing agency shall post notice on its website of proposed changes that are implemented.

The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the Advance Notice is consistent with the Clearing Supervision 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–NSCC–2020–801 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–NSCC–2020–801. 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 Advance Notice that are filed with the Commission, and all written communications relating to the Advance Notice 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 NSCC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). 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–NSCC–2020–801 and should be submitted on or before March 13, 2020.

By the Commission.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–03997 Filed 2–26–20; 8:45 am]

BILLING CODE 8011–01–P

[34] 17 CFR 240.17Ad–22(e)(6)(i) and (v).

SURFACE TRANSPORTATION BOARD

30-Day Notice of Intent To Seek Extension of Approval: Arbitration "Opt-In" Notices

ACTION: Notice and request for comments.

AGENCY: Surface Transportation Board.

SUMMARY: As required by the Paperwork Reduction Act of 1995 (PRA), the Surface Transportation Board (STB or Board) gives notice of its intent to seek approval from the Office of Management and Budget (OMB) for an extension of the collection of arbitration ''opt-in'' notices, described below. The Board previously published a notice about this collection in the **Federal Register** on December 12, 2019. That notice allowed for a 60-day public review and comment period. No comments were received.

DATES: Comments on this information collection should be submitted by March 30, 2020.

ADDRESSES: Written comments should be identified as ''Paperwork Reduction Act Comments, Surface Transportation Board: Arbitration 'Opt-in' Notices.'' These comments should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Michael J. McManus, Surface Transportation Board Desk Officer: by email at *oira_submission@omb.eop.gov;* by fax at (202) 395–1743; or by mail to Room 10235, 725 17th Street NW, Washington, DC 20503. Please also direct comments to Chris Oehrle, PRA Officer, Surface Transportation Board, 395 E Street SW, Washington, DC 20423–0001, or to *PRA@stb.gov.* For further information regarding this collection, contact Michael Higgins, Deputy Director, Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0284 or at *michael.higgins@stb.gov.*

SUPPLEMENTARY INFORMATION: Comments are requested concerning: (1) The accuracy of the Board's burden estimates; (2) ways to enhance the quality, utility, and clarity of the information collected; (3) ways to

minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate; and (4) whether the collection of information is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility. Submitted comments will be summarized and included in the Board's request for OMB approval.

Description of Collection

Title: Arbitration ''Opt-in'' Notices.

OMB Control Number: 2140–0020.

Form Number: None.

Type of Review: Extension without change.

Respondents: All regulated rail carriers.

Number of Respondents: 2.

Estimated Time per Response: 0.5 hours.

Frequency: Annually.

Total Burden Hours (annually including all respondents): 1.0 hours.

Total ''Non-hour Burden'' Cost: None identified. Filings are submitted electronically to the Board.

Needs and Uses: Under the Interstate Commerce Act, as amended by the ICC Termination Act of 1995, the Board is responsible for the economic regulation of common carrier rail transportation. Under 49 CFR 1108.3, rail carriers subject to the Board's jurisdiction may agree to participate in the Board's arbitration program by filing a notice with the Board to ''opt in.'' Once a rail carrier is participating in the Board's arbitration program, it may discontinue its participation only by filing with the Board a notice to ''opt out,'' which would become effective 90 days after its filing.

Under the PRA, a federal agency that conducts or sponsors a collection of information must display a currently valid OMB control number. A collection of information, which is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c), includes agency requirements that persons submit reports, keep records, or provide information to the agency, third parties, or the public. Section 3507(b) of the PRA requires, concurrent with an agency's submitting a collection to OMB for approval, a 30-day notice and comment period through publication in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information.

Dated: February 24, 2020.

Kenyatta Clay,

Clearance Clerk.

[FR Doc. 2020–03989 Filed 2–26–20; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

30-Day Notice of Intent To Seek Extension of Approval: Information Collection—Rail Depreciation Studies

AGENCY: Surface Transportation Board.

ACTION: Notice and request for comments.

SUMMARY: As required by the Paperwork Reduction Act of 1995 (PRA), the Surface Transportation Board (STB or Board) gives notice of its intent to seek approval from the Office of Management and Budget (OMB) for an extension of the collection of Rail Depreciation Studies, described below. The Board previously published a notice about this collection in the **Federal Register** on December 12, 2019 (84 FR 67,990). That notice allowed for a 60-day public review and comment period. No comments were received.

DATES: Comments on this information collection should be submitted by March 30, 2020.

ADDRESSES: Written comments should be identified as ''Paperwork Reduction Act Comments, Surface Transportation Board: Rail Depreciation Studies.'' These comments should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Michael J. McManus, Surface Transportation Board Desk Officer: By email at *oira_submission@omb.eop.gov;* by fax at (202) 395–1743; or by mail to Room 10235, 725 17th Street NW, Washington, DC 20503. Please also direct comments to Chris Oehrle, PRA Officer, Surface Transportation Board, 395 E Street SW, Washington, DC 20423–0001, or to *PRA@stb.gov.* For further information regarding this collection, contact Pedro Ramirez at (202) 245–0333 or *pedro.ramirez@stb.gov.* Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: Comments are requested concerning: (1) The accuracy of the Board's burden estimates; (2) ways to enhance the quality, utility, and clarity of the information collected; (3) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate; and (4) whether the collection of information is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility. Submitted comments will be summarized and included in the Board's request for OMB approval.

Description of Collection

Title: Rail Depreciation Studies.

OMB Control Number: 2140–0028.

Form Number: None.

Type of Review: Extension without change.

Respondents: Class I railroads.

Number of Respondents: 7.

Estimated Time per Response: Approximately 250 hours per study (estimating that studies will require between 125 hours and 375 hours depending on the extent to which the carriers assist outside consultants perform the study).

Frequency of Response: Bi-annual. (Under 49 CFR part 1201, section 4–1 to 4–4, the Board requires all Class I (large) carriers to submit depreciation studies no less than every three years for equipment property and every six years for road property. That means that for any given six-year period, the Class I railroads must submit no less than three depreciation reports, or the equivalent of 0.5 depreciation reports per year.)

Total Annual Hour Burden: 875 hours (250 hours × 0.5 studies/year × 7 Class I railroads).

Total Annual ''Non-Hour Burden'' Cost: Approximately $175,000 per year. Board staff estimates that each study will cost between $20,000 and $80,000, which equals a cost of approximately $10,000–$40,000 per year. Using an average cost ($25,000 per year × 7 Class I railroads), the non-hour burden cost is estimated to be approximately $175,000 per year.

Needs and Uses: Under 49 CFR part 1201, section 4–1 to 4–4, the Board is required to identify those classes of property for which rail carriers may include depreciation charges under operating expenses, and the Board must also prescribe a rate of depreciation that may be charged to those classes of property. Under 49 U.S.C. 11145, Class I rail carriers are required to submit depreciation studies to the Board. Information in these studies is not available from any other source. The Board uses the information in these studies to prescribe depreciation rates. These depreciation rate prescriptions state the period for which the depreciation rates therein are applicable. Class I railroads apply the prescribed depreciation rates to their investment base to determine a monthly

and annual depreciation expense. This expense is included in the railroads' operating expenses, which are reported in their R–1 reports (OMB Control Number 2140–0009). Operating expenses are used to develop operating costs for application in various proceedings before the Board, such as in rate reasonableness cases and in the determination of railroad ''revenue adequacy.''

Under the PRA, a federal agency that conducts or sponsors a collection of information must display a currently valid OMB control number. A collection of information, which is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c), includes agency requirements that persons submit reports, keep records, or provide information to the agency, third parties, or the public. Section 3507(b) of the PRA requires, concurrent with an agency's submitting a collection to OMB for approval, a 30-day notice and comment period through publication in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information.

Information from certain schedules contained in these reports is available at the Board's website at *www.stb.gov* by navigating to ''Reports & Data'' and clicking on ''Economic Data.'' Information in these reports is not available from any other source.

Dated: February 24, 2020.

Kenyatta Clay,

Clearance Clerk.

[FR Doc. 2020–03992 Filed 2–26–20; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

30-Day Notice of Intent To Seek Extension of Approval: Information Collection Activities—Recordations (Rail and Water Carrier Liens), Water Carrier Tariffs, and Agricultural Contract Summaries

AGENCY: Surface Transportation Board.

ACTION: Notice and request for comments.

SUMMARY: As required by the Paperwork Reduction Act of 1995 (PRA), the Surface Transportation Board (STB or Board) gives notice of its intent to seek approval from the Office of Management and Budget (OMB) for an extension of the collections required by statute for rail or water carrier equipment liens (recordations), water carrier tariffs, and rail agricultural contract summaries, described below. The Board previously published a notice about these collections in the **Federal Register** on December 12, 2019 (84 FR 67,991). That notice allowed for a 60-day public review and comment period. No comments were received.

DATES: Comments on these information collections should be submitted by March 30, 2020.

ADDRESSES: Written comments should be identified as ''Paperwork Reduction Act Comments, Surface Transportation Board: Recordations (Rail and Water Carrier Liens), Water Carrier Tariffs, and Agricultural Contract Summaries.'' These comments should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Michael J. McManus, Surface Transportation Board Desk Officer: by email at *oira_submission@omb.eop.gov;* by fax at (202) 395–1743; or by mail to Room 10235, 725 17th Street NW, Washington, DC 20503. Please also direct comments to Chris Oehrle, PRA Officer, Surface Transportation Board, 395 E Street SW, Washington, DC 20423–0001, or to *PRA@stb.gov.* For further information regarding this collection, contact Michael Higgins, Deputy Director, Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0284 or at *michael.higgins@stb.gov.*

SUPPLEMENTARY INFORMATION: Comments are requested concerning: (1) The accuracy of the Board's burden estimates; (2) ways to enhance the quality, utility, and clarity of the information collected; (3) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate; and (4) whether the collection of information is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility. Submitted comments will be summarized and included in the Board's request for OMB approval.

Description of Collections

Collection Number 1

Title: Agricultural Contract Summaries.

OMB Control Number: 2140–0024.

Form Number: None.

Type of Review: Extension without change.

Number of Respondents: Approximately 10 (seven Class I [large] railroads and a limited number of other railroads).

Frequency: On occasion. (Over the last three years, respondents have filed an average of 150 agricultural contract summaries per year. The same number of filings is expected during each of the next three years.)

Estimated Time per Response: Approximately 0.25 hours.

Total Burden Hours (annually including all respondents): 37.5 hours (150 submissions × 0.25 hours estimated per submission).

Total Annual ''Non-hour Burden'' Cost (such as start-up and mailing costs): There are no non-hourly burden costs for this collection.

Needs and Uses: Under 49 U.S.C. 10709(d), railroads are required to file a summary of the nonconfidential terms of any contract for the transportation of agricultural products.

Collection Number 2

Title: Recordations (Rail and Water Carrier Liens).

OMB Control Number: 2140–0025.

Form Number: None.

Type of Review: Extension without change.

Respondents: Parties holding liens on rail equipment or water carrier vessels, and carriers filing proof that a lien has been removed.

Number of Respondents: Approximately 50 respondents.

Frequency: On occasion. (Over the last three years, respondents have filed an average of 1,750 responses per year. The same number of filings is expected during each of the next three years.)

Estimated Time per Response: Approximately 0.25 hours.

Total Burden Hours (annually including all respondents): 437.5 hours (1,750 submissions × 0.25 hours estimated per response)

Total ''Non-hour Burden'' Cost (such as start-up and mailing costs): There are no non-hourly burden costs for this collection. The collection may be filed electronically.

Needs and Uses: Under 49 U.S.C. 11301 and 49 CFR part 1177, liens on rail equipment or water carrier vessels must be filed with the STB in order to perfect a security interest in the equipment. Subsequent amendments, assignments of rights, or release of obligations under such instruments must also be filed with the agency. This information is maintained by the Board for public inspection. Recordation at the STB obviates the need for recording the liens in individual States.

Collection Number 3

Title: Water Carrier Tariffs.

OMB Control Number: 2140–0026.

Form Number: None.

Type of Review: Extension without change.

Respondents: Water carriers that provide freight transportation in noncontiguous domestic trade.

Number of Respondents: Approximately 20.

Frequency: Annual certification.

Total Burden Hours (annually including all respondents): 80 hours (20 annual filings × 4 hours estimated time per certification).

Total ''Non-Hour Burden'' Cost (such as start-up costs and mailing costs): There are no non-hourly burden costs for this collection. The annual certifications will be submitted electronically.

Needs and Uses: Under 49 U.S.C. 13702(b) and 49 CFR part 1312, in lieu of individual tariffs, water carriers that provide freight transportation in noncontiguous domestic trade (*i.e.,* shipments moving to or from Alaska, Hawaii, or the U.S. territories or possessions (Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and the Northern Mariana Islands) to or from the mainland U.S.) may file an annual certification with the Board that includes the internet address of a website containing a list of current and historical tariffs (including prices and fees that the water carrier charges to the shipping public).

Under the PRA, a federal agency that conducts or sponsors a collection of information must display a currently valid OMB control number. A collection of information, which is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c), includes agency requirements that persons submit reports, keep records, or provide information to the agency, third parties, or the public. Section 3507(b) of the PRA requires, concurrent with an agency's submitting a collection to OMB for approval, a 30-day notice and comment period through publication in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information.

Dated: February 24, 2020.

Kenyatta Clay,

Clearance Clerk.

[FR Doc. 2020–03991 Filed 2–26–20; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

30-Day Notice of Intent To Seek Extension of Approval: System Diagram Maps

AGENCY: Surface Transportation Board.

ACTION: Notice and request for comments.

SUMMARY: As required by the Paperwork Reduction Act of 1995 (PRA), the Surface Transportation Board (STB or Board) gives notice of its intent to seek approval from the Office of Management and Budget (OMB) for an extension of the collection of system diagram maps, described below. The Board previously published a notice about this collection in the **Federal Register** on December 12, 2019 (84 FR 67,989). That notice allowed for a 60-day public review and comment period. No comments were received.

DATES: Comments on this information collection should be submitted by March 30, 2020.

ADDRESSES: Written comments should be identified as ''Paperwork Reduction Act Comments, Surface Transportation Board: System Diagram Maps.'' These comments should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Michael J. McManus, Surface Transportation Board Desk Officer: By email at *oira_submission@omb.eop.gov;* by fax at (202) 395–1743; or by mail to Room 10235, 725 17th Street NW, Washington, DC 20503. Please also direct comments to Chris Oehrle, PRA Officer, Surface Transportation Board, 395 E Street SW, Washington, DC 20423–0001, or to *PRA@stb.gov.* For further information regarding this collection, contact Pedro Ramirez at (202) 245–0333 or *pedro.ramirez@stb.gov.* Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: Comments are requested concerning: (1) The accuracy of the Board's burden estimates; (2) ways to enhance the quality, utility, and clarity of the information collected; (3) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate; and (4) whether the collection of information is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility. Submitted comments will be summarized and included in the Board's request for OMB approval.

Description of Collection

Title: System Diagram Maps (or, in the case of Class III carriers, the alternative narrative description of rail system).

OMB Control Number: 2140–0003.

Form Number: None.

Type of Review: Extension without change.

Respondents: Common carrier freight railroads that are either new or reporting changes in the status of one or more of their rail lines.

Number of Respondents: 1.

Estimated Time per Response: 5 hours.

Frequency of Response: On occasion.

Total Annual Burden Hours: 5 hours.

Total ''Non-hour Burden'' Cost: No ''non-hour cost'' burdens associated with this collection have been identified. The information is submitted electronically.

Needs and Uses: Under 49 U.S.C. 10903(c)(2) and 49 CFR 1152.10–1152.13, railroads subject to the Board's jurisdiction must keep current system diagram maps on file, or alternatively, in the case of a Class III carrier (a carrier with annual operating revenues of $39,194,876 or less in 2018 dollars), to submit the same information in narrative form. The information sought in this collection identifies all lines in a particular railroad's system, categorized to indicate the likelihood that service on a particular line will be abandoned and/or whether service on a line is currently provided under the ''financial assistance'' provisions of 49 U.S.C. 10904. Carriers are obligated to amend these maps as the need to change the category of any particular line arises.

Under the PRA, a federal agency that conducts or sponsors a collection of information must display a currently valid OMB control number. A collection of information, which is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c), includes agency requirements that persons submit reports, keep records, or provide information to the agency, third parties, or the public. Section 3507(b) of the PRA requires, concurrent with an agency's submitting a collection to OMB for approval, a 30-day notice and comment period through publication in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information.

Dated: February 24, 2020.

Kenyatta Clay,

Clearance Clerk.

[FR Doc. 2020–03990 Filed 2–26–20; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Office of Commercial Space Transportation: Notice of Availability and Request for Comment on the Draft Environmental Assessment for SpaceX Falcon Launches at Kennedy Space Center and Cape Canaveral Air Force Station

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of availability and request for comment.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended (NEPA), Council on Environmental Quality NEPA implementing regulations, and FAA Order 1050.1F, *Environmental Impacts: Policies and Procedures,* the FAA is announcing the availability of and requesting comment on the Draft Environmental Assessment for SpaceX Falcon Launches at Kennedy Space Center and Cape Canaveral Air Force Station (Draft EA).

DATES: Comments must be received on or before March 20, 2020.

ADDRESSES: Comments should be mailed to Mr. Daniel Czelusniak, Environmental Protection Specialist, Federal Aviation Administration, 800 Independence Avenue SW, Suite 325, Washington, DC 20591. Comments may also be submitted by email to *FAAFalconProgramEA@icf.com.*

FOR FURTHER INFORMATION CONTACT: Mr. Daniel Czelusniak, Environmental Protection Specialist, Federal Aviation Administration, 800 Independence Avenue SW, Suite 325, Washington, DC 20591; phone (202) 267–5924; email *Daniel.Czelusniak@faa.gov.*

SUPPLEMENTARY INFORMATION: SpaceX is applying to the FAA for launch licenses to launch the Falcon 9 and Falcon Heavy from Kennedy Space Center's (KSC) Launch Complex 39A (LC–39A) and Cape Canaveral Air Force Station's (CCAFS) Launch Complex 40 (LC–40). SpaceX is also applying to the FAA for reentry licenses for Dragon reentry operations. The FAA's proposal to issue licenses to SpaceX is considered a major federal action subject to environmental review under NEPA. Due to SpaceX's ability to launch more frequently at KSC and CCAFS, SpaceX's launch manifest includes more annual Falcon launches and Dragon reentries than were considered in previous NEPA analyses. Also, SpaceX is proposing to add a new Falcon 9 southern launch trajectory from Florida for payloads requiring polar orbits. SpaceX is also proposing to construct a mobile service tower (MST) at LC–39A to support commercial launches and the U.S. Air Force's National Security Space Launch program. NASA is responsible for approving the construction of the MST at LC–39A. The FAA has no federal action related to the construction of the MST.

Alternatives under consideration include the Proposed Action and the No Action Alternative. Under the No Action Alternative, the FAA would not modify existing SpaceX licenses or issue new licenses to SpaceX for Falcon launches or Dragon reentry operations at KSC and CCAFS. SpaceX would continue Falcon 9 and Falcon Heavy launch operations at KSC and CCAFS, as well as Dragon reentry operations, as analyzed in previous NEPA and environmental reviews and in accordance with existing FAA licenses until the licenses expire.

The Draft EA evaluates the potential environmental impacts from the Proposed Action and No Action Alternative on air quality; biological resources; climate; coastal resources; Department of Transportation Act Section 4(f); farmlands; hazardous materials, solid waste, and pollution prevention; historical, architectural, archeological, and cultural resources; land use; natural resources and energy supply; noise and noise-compatible land use; socioeconomics, environmental justice, and children's environmental health and safety risks; visual effects (including light emissions); and water resources.

The FAA has posted the Draft EA on the FAA Office of Commercial Space Transportation website: *https://www.faa.gov/space/environmental/nepa_docs/.*

The FAA encourages all interested parties to provide comments concerning the scope and content of the Draft EA. Before including your address, phone number, email address, or other personal identifying information in your comment, be advised that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask the FAA in your comment to withhold from public review your personal identifying information, the FAA cannot guarantee that we will be able to do so.

Issued in Washington, DC on: February 21, 2020.

Daniel Murray,

Manager, Space Transportation Development Division.

[FR Doc. 2020–04039 Filed 2–26–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2020–09]

Petition for Exemption; Summary of Petition Received; The Boeing Company

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Federal Aviation Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before March 18, 2020.

ADDRESSES: Send comments identified by docket number FAA–2020–0066 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket

Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mark Forseth, AIR–673, Federal Aviation Administration, 2200 South 216th Street, Des Moines, WA 98198, phone and fax 206–231–3179, email *mark.forseth@faa.gov.*

This notice is published pursuant to 14 CFR 11.85.

Issued in Des Moines, Washington, on February 19, 2020.

Paul R. Siegmund,

Acting Manager, Transport Standards Branch.

Petition for Exemption

Docket No.: FAA–2020–0066.

Petitioner: The Boeing Company.

Section(s) of 14 CFR Affected: § 25.863(a), (b)(1), and (b)(3).

Description of Relief Sought: Boeing seeks relief to allow drainage provisions on the plug portion of the engine exhaust assembly (the ''long'' exhaust configuration) on a limited number of Boeing Model 737–600, –700, –700C, –800, –900, and –900ER (collectively known as 737NG) airplanes, line numbers 1 thru 3761; as well as allow operators to install the long exhaust configuration with drainage provisions on these airplanes for line numbers greater than line number 3761.

[FR Doc. 2020–04037 Filed 2–26–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2020–0016]

Petition for Waiver of Compliance

Under part 211 of title 49 Code of Federal Regulations (CFR), this provides the public notice that on January 7, 2020, the Northeast Illinois Railroad Corporation (Metra) and the Northern Indiana Commuter Transportation District (NICTD) petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal Railroad safety regulations contained at 49 CFR 238.309(b)(3). FRA assigned the petition Docket Number FRA–2020–0016.

Metra and NICTD seek relief from the requirement to clean, repair, and test every 1,840 days (5 years) for their ''KB–HL1'' air brake system to study the feasibility of clean, repair, and test intervals extended beyond 5 years. Specifically, this petition serves as an update to a previously approved FRA waiver contained at Docket Number FRA–2006–24562, now expired, which allowed a 5-year (1,840 days) clean, repair, and test interval, instead of the previous 2-year requirement. Due to the increased size of the fleets and the continued high level of reliability, performance, and safety of the KB–HL–1 air brake system, petitioners request to restart the relief as an age exploration waiver, to allow intervals beyond 5 years.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Ave. SE, W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Website: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE, W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Ave. SE, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by April 13, 2020 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable.

Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy.* See also *https://www.regulations.gov/privacyNotice* for the privacy notice of *regulations.gov.*

Issued in Washington, DC.

John Karl Alexy,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2020–03984 Filed 2–26–20; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Notice Rescinding Two Notices of Intent To Prepare Environmental Impact Statements

AGENCY: Federal Railroad Administration (FRA), U.S. Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: FRA is issuing this notice to advise the public that FRA is rescinding the Notice of Intent (NOI) for each Environmental Impact Statement (EIS): the Dallas to Fort Worth Core Express Passenger Service between Dallas and Fort Worth, Texas and the New Orleans Rail Gateway in Jefferson and Orleans Parishes, Louisiana.

FOR FURTHER INFORMATION CONTACT: Michael Johnsen, Supervisory Environmental Protection Specialist, at the Federal Railroad Administration, 1200 New Jersey Avenue SE, Washington, DC 20590; telephone (202) 493–0845 or email *Michael.Johnsen@dot.gov.*

SUPPLEMENTARY INFORMATION:

FRA is rescinding the NOIs for two EISs due to project scope changes proposed by the State sponsor. First, FRA is rescinding the NOI for the EIS evaluating the Dallas to Fort Worth Core Express Passenger Service between Dallas and Fort Worth. FRA issued the NOI on September 5, 2014.

Second, FRA is rescinding the NOI for the EIS evaluating the proposed New Orleans Rail Gateway Program. FRA issued the NOI on January 13, 2012.

FRA is recinding these NOIs following coordination with the State sponsors.

Issued in Washington, DC.

Paul Nissenbaum,

Associate Administrator, Office of Railroad Policy and Development.

[FR Doc. 2020–03956 Filed 2–26–20; 8:45 a.m.]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2019–0099; Notice 1]

Toyota Motor North America, Inc., Receipt of Petition for Decision of Inconsequential Noncompliance

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

ACTION: Receipt of petition.

SUMMARY: Toyota Motor North America, Inc., (Toyota) has determined that certain model year (MY) 2019–2020 Toyota Tundra motor vehicles do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 110, *Tire Selection and Rims and Motor Home/Recreation Vehicle Trailer Load Carrying Capacity Information for Motor Vehicles with a GVWR of 4,536 Kilograms (10,000 Pounds) or Less.* Toyota filed a noncompliance report dated September 18, 2019. Toyota subsequently petitioned NHTSA on October 7, 2019, and later amended its petition on January 3, 2020, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This document announces receipt of Toyota's petition.

DATES: Send comments on or before March 30, 2020.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited in the title of this notice and may be submitted by any of the following methods:

- *Mail:* Send comments by mail addressed 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.
- *Hand Delivery:* Deliver comments by hand 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. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal Holidays.
- *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Follow the online instructions for submitting comments.
- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

When the petition is granted or denied, notice of the decision will also be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the dockets. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000 (65 FR 19477–78).

SUPPLEMENTARY INFORMATION:

I. *Overview:* Toyota has determined that certain MY 2019–2020 Toyota Tundra motor vehicles do not fully comply with paragraph S4.3(d) of FMVSS No. 110, *Tire Selection and Rims and Motor Home/Recreation Vehicle Trailer Load Carrying Capacity Information for Motor Vehicles with a GVWR of 4,536 Kilograms (10,000 Pounds) or Less* (49 CFR 571.110). Toyota filed a noncompliance report dated September 18, 2019, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports.* Toyota subsequently petitioned NHTSA on October 7, 2019, and later amended on January 3, 2020, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance.*

This notice of receipt of Toyota's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any Agency decision or other exercise of judgment concerning the merits of the petition.

II. *Vehicles Involved:* Approximately 1,667 MY 2019–2020 Toyota Tundra motor vehicles, manufactured between March 28, 2019, and August 19, 2019, are potentially involved.

III. *Noncompliance:* Toyota explains that the noncompliance is that the subject vehicles have tire information labels that contain spare tire size information that does not match the installed spare tire size.

IV. *Rule Requirements:* Paragraph S4.3(d) of FMVSS No. 110 includes the requirements relevant to this petition. Each vehicle, except for a trailer or incomplete vehicle, shall show the information specified in paragraph S4.3(d) Tire size designation, indicated by the headings ''size'' or ''original tire size'' or ''original size,'' and ''spare tire'' or ''spare,'' for the tires installed at the time of the first purchase for purposes other than resale. For full-size spare tires, the statement ''see above'' may, at the manufacturer's option replace the tire size designation. If no spare tire is provided, the word ''none'' must replace the tire size designation.

V. *Summary of Toyota's Petition:* The following views and arguments presented in this section, V. Summary of Toyota's Petition, are the views and arguments provided by Toyota. They have not been evaluated by the Agency and do not reflect the views of the Agency.

Toyota described the subject noncompliance and stated its belief that the noncompliance is inconsequential as it relates to motor vehicle safety. Toyota believes that the noncompliance is inconsequential to motor vehicle safety for the following reasons:

1. There is no issue with the spare tire installed on the vehicle; it is a tire/wheel combination that is designed for this vehicle and meets all other applicable FMVSS. In addition, the cold tire inflation pressure specified on the placard is correct and is the recommended pressure for both spare tire sizes.

a. The spare tire installed on the vehicle (P255/70R18) meets all applicable FMVSS. It is the appropriate temporary spare tire that was designed for the vehicle and meets the vehicle loading requirements. Only the spare tire size information indicated on the placard is incorrect and reflects the size of the spare that was used on the Tundra prior to a production change. All the other information on the placard is accurate, including the cold tire inflation pressure.

b. In addition, if the vehicle owner wanted to check the size of the spare tire that is installed on the vehicle, the information is in the owner's manual and is also molded into the spare tire sidewall.

c. Given the intent of FMVSS No. 110, S4.3(d), Toyota believes that, because the spare tire installed on the vehicle is the appropriate tire for the vehicle performance and loading requirements, there is no risk to motor vehicle safety.

2. There is also no issue if the installed spare tire is replaced with one of the sizes indicated on the incorrect placard. This would also be a tire/wheel combination that is designed for this vehicle and would meet all other applicable FMVSS because the replacement spare tire would be the same size as the spare tire originally equipped on the Tundra prior to the production change and would be the same size as the four main tires on the subject vehicles.

a. The spare tire size indicated on the incorrect placard was also designed for the subject vehicles and meets all applicable FMVSS. This spare tire wheel combination (P275/65R18) is the same size as the four main tires installed on the subject vehicles. It was used as a spare tire on the prior model year Tundra and on the 2019MY Tundra prior to the adoption of the current spare tire size (P255/70R18).

b. In addition, the recommended spare tire inflation pressure and wheel size (R18) are the same for the subject vehicles as the prior model year Tundra.

c. Because both spare tire sizes are appropriate for the vehicle loading specifications, were designed for the subject vehicles, meet all applicable FMVSS, and the wheel size and recommended tire pressure are the same, Toyota believes there is no risk to occupant safety should a P275/65R18 tire be used in place of the one equipped on the vehicle.

3. Toyota is unaware of any owner complaints, field reports, or allegations of hazardous circumstances concerning the incorrect spare tire placard in the subject vehicles. Toyota has searched its records for reports or other information concerning the tire placard and spare tire in the subject vehicles. No owner complaints, field reports, or allegations of hazardous circumstances concerning the placard or tire were found.

4. NHTSA has previously granted at least five similar petitions for inconsequential noncompliance for inaccurate tire placards. A brief summary of each petition is provided below:

a. *Daimler Chrysler Corporation, 73 FR 11462 (March 3, 2008)* Dodge Dakota pickup trucks had the spare tire size indicated on the placard that did not match the size of the spare tire installed on the vehicle.

b. *Mercedes-Benz USA, LLC (MBUSA) 78 FR 43967 (July 22, 2013)* Vehicle placard on the affected vehicles incorrectly identified the tire size designation of the spare tire in the vehicle.

c. *Volkswagen Group of America, Inc., 81 FR 88728 (December 8, 2016)* Subject vehicles had a tire placard label that was misprinted with an incorrect tire size as compared to the tires the vehicle was equipped with.

d. *Mercedes-Benz USA, LLC, 82 FR 5640 (January 18, 2017)* The tire information placard affixed to the vehicles' B-pillar incorrectly identified the spare tire size.

e. *General Motors, LLC, 84 FR 25117 (May 30, 2019)* Subject vehicles were equipped tire placards that stated the spare tire size is ''None'' when in fact it should have been ''T125/70R17'' and omitted the cold tire pressure for the spare tire when it should have read ''420 kPa, 60 psi''.

Toyota concludes that the subject noncompliance is inconsequential as it relates to motor vehicle safety and that its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, any decision on this petition only applies to the subject vehicles that Toyota no longer controlled at the time it determined that the noncompliance existed. However, any decision on this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after Toyota notified them that the subject noncompliance existed.

Authority: (49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8).

Otto G. Matheke III,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2020–03961 Filed 2–26–20; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2018–0105; Notice 1]

BMW of North America, LLC, Receipt of Petition for Decision of Inconsequential Noncompliance

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

ACTION: Receipt of petition.

SUMMARY: BMW of North America, LLC (BMW), a subsidiary of BMW AG, has determined that certain model year (MY) 2019 BMW F750 GS and F850 GS motorcycles do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 205, *Glazing Materials.* BMW filed a noncompliance report dated October 19, 2018. BMW subsequently petitioned NHTSA on October 29, 2018, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety.

DATES: The closing date for comments on the petition is March 30, 2020.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket number and notice number cited in the title of this notice and may be submitted by any of the following methods:

- *Mail:* Send comments by mail addressed 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.
- *Hand Delivery:* Deliver comments by hand 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. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal Holidays.

• *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Follow the online instructions for submitting comments.

• Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

When the petition is granted or denied, notice of the decision will also be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the dockets. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000 (65 FR 19477–78).

SUPPLEMENTARY INFORMATION:

I. *Overview:* BMW has determined that certain MY 2019 BMW F750 GS and F850 GS motorcycles do not fully comply with paragraph S6.3 of FMVSS No. 205, *Glazing Materials* (49 CFR 571.205). BMW filed a noncompliance report dated October 19, 2018, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports.* BMW subsequently petitioned NHTSA on October 29, 2018, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance.*

This notice of receipt of BMW's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercises of judgment concerning the merits of the petition.

II. *Vehicles Involved:* Approximately 604 MY 2019 BMW F750 GS and F850 GS motorcycles, manufactured between June 21, 2018, and September 19, 2018, are potentially involved.

III. *Noncompliance:* BMW explains that the noncompliance is that the subject motorcycles are equipped with windscreens that do not comply with paragraph S6.3 of FMVSS No. 205. Specifically, the subject windscreens were marked with the AS4 marking instead of the AS6 marking.

IV. *Rule Requirements:* Paragraph S6.3 of FMVSS No. 205 includes the requirements relevant to this petition. A manufacturer or distributor who cuts a section of glazing material to which this standard applies, for use in a motor vehicle or camper, must mark that material in accordance with section 7 of ANSI/SAE Z26.1–1996 and certify that its product complies with this standard in accordance with 49 U.S.C. 30115.

AS4 certified windscreens are rigid plastic and only for use on certain locations, not including motorcycle windscreens and they are not subject to a flexibility test, whereas AS6 marked windscreens are subject to this test. AS6 certified windscreens are flexible plastic and, unlike AS4 certified windscreens, can be used as a motorcycle windscreen. Additionally, AS6 certified windscreens are not required to be subject to an impact test or an abrasion test, whereas, AS4 certified windscreens are.

V. *Summary of BMW's Petition:* BMW described the subject noncompliance and stated its belief that the noncompliance is inconsequential as it relates to motor vehicle safety.

In support of its petition, BMW submitted the following reasoning:

1. FMVSS No. 205 Section 2 (Purpose) states, ''The purpose of this standard is to reduce injuries resulting from impact to glazing surfaces, to ensure a necessary degree of transparency in motor vehicle windows for driver visibility, and to minimize the possibility of occupants being thrown through the vehicle windows in collisions.''

2. Potentially affected vehicles conform to all of the FMVSS No. 205 performance requirements. Therefore, they satisfy the stated purpose of FMVSS No. 205 regarding (a) injury reduction, and (b) rider visibility.

3. Potentially affected vehicles conform to all the FMVSS No. 205 performance requirements. Therefore, there are no safety performance implications associated with this potential noncompliance.

4. BMW has not received any contacts from vehicle owners regarding this issue. Therefore, BMW is unaware of any vehicle owners that have encountered this issue.

5. BMW is unaware of any accidents or injuries that may have occurred as a result of this issue.

6. NHTSA has previously granted petitions for inconsequential noncompliance regarding FMVSS No. 205 involving marking of window glazing. BMW believes that its petition is similar to other manufacturers' petitions in which NHTSA has granted approval. Examples of similar petitions, in which NHTSA has granted approval, include the following:

• Ford Motor Company, 80 FR 11259 (March 2, 2015).

• Ford Motor Company, 78 FR 32531 (May 30, 2013).

• Ford Motor Company, 64 FR 70115 (December 15, 1999).

• General Motors, LLC, 79 FR 23402 (September 25, 2015).

• General Motors, LLC, 70 FR 49973 (August 25, 2005).

• Toyota Motor North America Inc., 68 FR 10307 (March 4, 2003).

• Fuji Heavy Industries USA, Inc., 78 FR 59088 (September 25, 2013).

• Mitsubishi Motors North America, Inc., 80 FR 72482 (August 22, 2015).

• Pilkington North America, Inc., 78 FR 22942 (April 17, 2003).

• Supreme Corporation, 81 FR 72850 (October 21, 2016).

• Custom Glass Solutions Upper Sandusky Corp., 80 FR 3737 (January 23, 2015).

7. Vehicle production has been corrected to conform to FMVSS No. 205 S6.

8. BMW also provided a copy of the FMVSS No. 205 Certification Report from AIB-Vincotte International N.V.

BMW's complete petition and all supporting documents are available by logging onto the Federal Docket Management System (FDMS) website at: *https://www.regulations.gov* and following the online search instructions to locate the docket number listed in the title of this notice.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to

exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, any decision on this petition only applies to the subject vehicles that BMW no longer controlled at the time it determined that the noncompliance existed. However, any decision on this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after BMW notified them that the subject noncompliance existed.

(Authority: 49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8)

Otto G. Matheke III,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2020–03959 Filed 2–26–20; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2019–0122]

Notice of Request for Comments: Drug-Impaired Driving Criminal Justice Evaluation Tool

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

ACTION: Request for comment.

SUMMARY: The National Highway Traffic Safety Administration (NHTSA) is engaged in numerous activities to reduce drug-impaired driving, including conducting research and developing tools, resources, and promising practices to assist States and local communities. To aid in evaluating efforts to address drug-impaired driving, NHTSA has developed the Drug-Impaired Driving Criminal Justice Evaluation Tool. The tool is designed to assist with identifying program strengths and opportunities for improvements. After asking two organizations to test the model to explore weaknesses and identify areas for refinement, NHTSA now wishes to learn from other practitioners about any improvements and refinements that could add value to the tool. This notice requests comment on the completeness and usability of the tool.

DATES: Comments are due by April 27, 2020. See the **SUPPLEMENTARY INFORMATION** section on ''Public Participation,'' below, for more information about written comments.

ADDRESSES: You may submit comments identified by the DOT docket above using any of the following methods:

Electronic Submissions: Go to *https://www.regulations.gov.* Follow the online instructions for submitting comments.

Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.

Hand Delivery: West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

Fax: 1–202–493–2251

Instructions: For detailed instructions on submitting comments, see the Public Participation heading of the **SUPPLEMENTARY INFORMATION** section of this document. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

Privacy Act: Except for Confidential Information, as discussed below, all comments received into the docket will be made public in their entirety. The comments will be searchable by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You should not include information in your comment that you do not want to be made public. You may review the DOT's complete Privacy Act Statement at *https://www.transportation.gov/privacy.*

Docket: For access to the docket to read background documents or comments received, go to *https://www.regulations.gov* or to the street address listed above. Follow the online instructions for accessing the docket.

FOR FURTHER INFORMATION CONTACT: Please contact Jennifer Davidson at *jennifer.davidson@dot.gov* or (202) 366–2163.

SUPPLEMENTARY INFORMATION: The Drug-Impaired Driving Criminal Justice Evaluation Tool is designed to allow State, local, territorial, and tribal governments to assess and strengthen their drug-impaired driving programs. The tool consists of questions divided into ten sections representative of critical criminal justice and programmatic elements. The categories include law enforcement, prosecution, judiciary, community supervision, toxicology, treatment, emergency medical services, data, legislation, and program and communications. The Excel file, which can be downloaded from NHTSA's website at *https://www.nhtsa.gov/DUIDtool,* allows individual sections to be sent to the appropriate organizational representative for completion.

The Drug-Impaired Driving Criminal Justice Evaluation Tool allows users to assess their existing programs to reduce drug-impaired driving through a systematic review of activities, policies, and procedures being implemented. The completed tool is intended purely for the use of State, local, territorial or tribal governments for self-assessment and will not be collected by NHTSA. The tool can help jurisdictions identify gaps in their drug-impaired driving programs, inform strategies to strengthen the programs, and help track progress over time against baseline results. The tool includes links to best practices and resources for strengthening drug-impaired driving programs.

The Drug-Impaired Driving Criminal Justice Evaluation Tool is designed to be completed in consultation with representatives most familiar with the relevant program areas, either individually or via group discussion (*e.g.,* with the State DWI Task Force). The tool can be completed in its entirety for a comprehensive program evaluation of the criminal justice system's ability to respond to drug-impaired driving, or where appropriate to assess one component of the criminal justice system.

The evaluation is based on the Capability Maturity Model, used by other Federal agencies, to develop and refine an organization's software or program development process. The model utilizes a five-step hierarchy of program growth and maturity. The Capability Maturity Model can serve as a benchmark and be repeated to show progress over time. After answering the questions for each subsection of the tool, raters note their program strength level for each component using a defined 0–5 point scale. Scores are tabulated on the final ''Scoring'' sheet to provide an overall view of program performance for each component and to compare against baseline results for repeat evaluations. Planning sections are included for each issue area following ratings to document program strengths, opportunities, and goals for improvement.

NHTSA conducted a limited test of the evaluation tool to obtain feedback on how to enhance and improve its value. Since making refinements recommended during testing, NHTSA is interested in learning more about potential end-users' impressions of the tool.

We believe the questions below may help guide commenters in developing their submissions.

1. Is the information provided adequate to understand how to use the tool?
2. Is the format easy to use?
3. Are there other resources that should be included?
4. Will this tool be beneficial to State, local, territorial and tribal drug-impaired driving criminal justice programs?
5. What changes are needed to make the tool more beneficial?

Public Participation:

How do I prepare and submit comments?

Your comments must be written and in English. To ensure that your comments are filed correctly in the docket, please include the docket number of this document in your comments.

Please submit one copy (two copies if submitting by mail or hand delivery) of your comments, including any attachments, to the docket following the instructions given above under **ADDRESSES**. Please note, if you are submitting comments electronically as a PDF (Adobe) file, we ask that the documents submitted be scanned using an Optical Character Recognition (OCR) process, thus allowing the agency to search and copy certain portions of your submissions.

How do I submit confidential business information?

Any submissions containing Confidential Information must be delivered to NHTSA in the following manner:

- Submitted in a sealed envelope marked ''confidential treatment requested'';
- Accompanied by an index listing the document(s) or information that the submitter would like the Departments to withhold. The index should include information such as numbers used to identify the relevant document(s) or information, document title and description, and relevant page numbers and/or section numbers within a document; and
- Submitted with a statement explaining the submitter's grounds for objecting to disclosure of the information to the public.

NHTSA also requests that submitters of Confidential Information include a non-confidential version (either redacted or summarized) of those confidential submissions in the public docket. In the event that the submitter cannot provide a non-confidential version of its submission, NHTSA requests that the submitter post a notice in the docket stating that it has provided NHTSA with Confidential Information. Should a submitter fail to docket either a non-confidential version of its submission or to post a notice that Confidential Information has been provided, we will note the receipt of the submission on the docket, with the submitter's organization or name (to the degree permitted by law) and the date of submission.

Will the Agency consider late comments?

NHTSA will consider all comments received before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, the agency will also consider comments received after that date.

How can I read the comments submitted by other people?

You may read the comments received at the address given above under COMMENTS. The hours of the docket are indicated above in the same location. You may also see the comments on the internet, identified by the docket number at the heading of this notice, at *https://www.regulations.gov.*

Authority: 23 U.S.C. 403(b).

Issued in Washington, DC.

Nanda Narayanan Srinivasan,

Associate Administrator, Research and Program Development.

[FR Doc. 2020–03917 Filed 2–26–20; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2019–0008; Notice 1]

Daimler Trucks North America, Receipt of Petition for Decision of Inconsequential Noncompliance

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

ACTION: Receipt of petition.

SUMMARY: Daimler Trucks North America (DTNA) has determined that certain model year (MY) 2017–2019 Freightliner Cascadia motor vehicles do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 108, *Lamps, Reflective Devices, and Associated Equipment.* DTNA filed a noncompliance report dated January 16, 2019. DTNA subsequently petitioned NHTSA on February 8, 2019, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This document announces receipt of DTNA's petition.

DATES: The closing date for comments on the petition is March 30, 2020.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket number and notice number cited in the title of this notice and may be submitted by any of the following methods:

- *Mail:* Send comments by mail addressed 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.
- *Hand Delivery:* Deliver comments by hand 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. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal Holidays.
- *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Follow the online instructions for submitting comments.
- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and considered. All comments and supporting materials received after the closing date will also be filed and considered to the fullest extent possible.

When the petition is granted or denied, a notice of the decision will also be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

All comments, background documentation, and supporting

materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the dockets. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000, (65 FR 19477–78).

SUPPLEMENTARY INFORMATION:

I. Overview: DTNA has determined that certain MY 2017–2019 Freightliner Cascadia motor vehicles do not fully comply with paragraph S6.2.1 of FMVSS No. 108, *Lamps, Reflective Devices, and Associated Equipment.* (49 CFR 571.108). DTNA filed a noncompliance report dated January 16, 2019, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports.* DTNA subsequently petitioned NHTSA on February 8, 2019, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance.*

This notice of receipt of DTNA petition is published under 49 U.S.C. 30118 and 30120, and does not represent any agency decision or other exercises of judgment concerning the merits of the petition.

II. Trucks Involved: Approximately 74,675 MY 2017–2019 Freightliner Cascadia motor vehicles, manufactured between May 3, 2016, and December 17, 2018, are potentially involved.

III. Noncompliance: DTNA stated that the noncompliance is that the subject vehicles are equipped with brake lights that illuminate when the low air warning light illuminates and therefore, does not meet the requirements specified in paragraph S6.2.1 of FMVSS No. 108.

IV. Rule Requirements: Paragraph S6.2.1 of FMVSS No. 108, includes the requirements relevant to this petition. No additional lamp, reflective device, or other motor vehicle equipment is permitted to be installed that impairs the effectiveness of lighting equipment required by FMVSS No. 108.

V. Summary of DTNA's Petition: The following views and arguments presented in this section, V. Summary of DTNA's Petition, are the views and arguments provided by DTNA. They have not been evaluated by the agency and do not reflect the views of the agency.

DTNA described the subject noncompliance and stated its belief that the noncompliance is inconsequential as it relates to motor vehicle safety.

DTNA submitted the following background information on how their air brake system affects the stop lamps:

DTNA's air brake system is comprised of two brake systems, primary and secondary. The primary system controls the service brakes on the drive axles and the secondary system controls the service brakes on the steer axle, and the higher pressure of these two control the trailer service brakes. These two systems are isolated from each other so that if there is an air loss in one system, the other system will still be functional to control the vehicle service brakes. When either one of the systems drops below 70 psi, the low air warning indicator light on the dash turns ON and the brake lights illuminate. It does not mean that the drive axle parking brakes are starting to apply. The air that holds off the drive axle parking brakes, is the higher of either primary or secondary air. Therefore, if the primary falls below 70 psi, the indicator light and brake lights illuminates, but the parking brakes do not start to drag since the secondary air (presumably unaffected) still remains high and holds off the parking springs. In the same manner, the trailer parking brakes are held off by the higher of either primary or secondary air. Only when both air systems drop below about 70 psi will the trailer parking brakes begin to apply.

DTNA submitted the following views and arguments in support of the petition:

1. The normal operating air pressure of the vehicle is between 110 and 130 PSI. There is a regulator that turns on the air compressor if the air pressure is below 110 PSI and turns off the air compressor when the system pressure is above 130 PSI. If the air pressure begins to drop and reaches approximately 70 PSI the air system pressure is not adequate to maintain optimum operation, a warning signal illuminates on the dash and buzzer activates to alert the driver to this condition. On these vehicles, the brake lights illuminate when the warning signal illuminates on the dash. The events contributing to a low air condition after initial vehicle startup are rare and are not expected in normal operation. If the condition was to occur during operation, the driver would be alerted to the circumstances with audible and visual low air warning and would be expected to apply the service brakes and pull over in a safe manner. Additionally, if the pressure in both air systems drops below 70 psi, the parking brakes will slowly begin to apply.

2. The Freightliner Cascadia Driver's Manual states ''If the low air pressure warning is activated, check the air pressure gauges to determine which system has low air pressure. Although the vehicle's speed can be reduced using the foot brake control pedal, either the front or rear service brakes will not be operating at full capacity, causing a longer stopping distance. Bring the vehicle to a safe stop and have the air system repaired before continuing.''

3. Brakes are commonly applied—causing the brake lights to illuminate—when a driver sees a vehicle display warning or senses that the vehicle is experiencing a problem. Reducing vehicle speed in relation to a vehicle operational problem increases safety, providing following drivers the opportunity to increase the following distance. Low air warning would likely cause the vehicle driver to immediately engage the brake system and bring the vehicle to a safe stop. Brake light illumination for a brake system low air event would help provide early warning to following drivers to slow down.

4. DTNA stated, in ''Motorcoach Brake Systems and Safety Technologies,'' Federal Motor Carrier Administration issued guidance, while directed toward Motorcoach drivers, that supports the expectation that a driver, upon receipt of a low-pressure warning, would apply brakes and pull off the roadway. FMCSA stated: ''Low Pressure Warning—In most cases, you should notice an air leak or malfunction before getting a low-pressure warning; however, when a low-pressure warning occurs, immediately bring the motorcoach to a safe stop, off of the roadway. Continuing to operate the motorcoach could result in an automatic application of the park brakes, possibly leading to a loss of control or a stop in an unsafe position.''

5. DTNA is not aware of any accidents, injuries, owner complaints or field reports related to this condition on the subject vehicles.

6. DTNA also stated that NHTSA has previously granted petitions for decisions of inconsequential noncompliance for lighting requirements where technical noncompliance exists, but does not create a negative impact on safety:

• In Docket No. 66 FR 32871 (June 18, 2001) a Petition for inconsequentiality by GM was granted by NHTSA. In this instance, certain models could have unintended CHMSL illumination briefly if the hazard warning lamp switch is depressed to its limit of travel. NHTSA

stated: ''The intended use of a hazard warning lamp and the momentary activation of a CHMSL do not provide a conflicting message. The illumination of the CHMSL is intended to signify that the vehicle's brakes are being applied and that the vehicle might be decelerating. Hazard warning lamps are intended as a more general message to nearby drivers that extra attention should be given to the vehicle. A brief illumination of the CHMSL while activating the hazard warning lamps would not confuse the intended general message, nor would the brief illumination in the absence of the other brake lamps cause confusion that the brakes were unintentionally applied.''

• In Docket No. 83 FR 7847 (Feb 22, 2018) a Petition for inconsequentiality by GM was granted by NHTSA. In this instance, under certain conditions, the parking lamps on the subject vehicles fail to meet the requirement that parking lamps must be activated when headlamps are activated in a steady burning state. NHTSA stated: ''. . . The Agency agrees with GM that in this case, this situation would have a low probability of occurrence and, if it should occur, it would neither be long-lasting nor likely to occur during a period when parking lamps are generally in use. Importantly, when the noncompliance does occur, other lamps remain functional. The combination of all of the factors, specific to this case, abate the risk to safety.''

• In Docket No. 64 FR 62609 (Sept. 02, 1999) a Petition for inconsequentiality by GM was granted by NHTSA. In this instance, a certain model equipped with an electronic turn signal was affected by random inputs that cause the internal timing of the electronic circuit to become unsynchronized causing the left front turn signal lamp to flash at a rapid rate while the left rear turn signal lamp illuminates but does not flash. These conditions can continue after the turn signal lever automatically returns to the off position. NHTSA stated: ''We have concluded that the few vehicles affected by this noncompliance, as well as the fact that the turn signals show the driver that they have failed, warrant a finding that this noncompliance is inconsequential with regard to motor vehicle safety.''

7. DTNA believes that a technical non-compliance exists, but does not create a negative impact on safety when the brake lamps illuminate during a brake system low air warning event. The brake light illumination serves to emphasize the message to following drivers that the vehicle is experiencing trouble and they should pay close attention. The Brake Air warning indicator light, on the driver's display panel, shows the driver that there is an issue with the air brake system. This would result in the driver bringing the vehicle to a safe stop and having the air system repaired before continuing.

DTNA concluded by expressing the belief that the subject noncompliance is inconsequential as it relates to motor vehicle safety, and that its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, any decision on this petition only applies to the subject vehicles that DTNA no longer controlled at the time it determined that the noncompliance existed. However, any decision on this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after DTNA notified them that the subject noncompliance existed.

Authority

49 U.S.C. 30118, 30120: Delegations of authority at 49 CFR 1.95 and 501.8.

Otto G. Matheke III,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2020–03960 Filed 2–26–20; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Renewal; Comment Request; Assessment of Fees

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a continuing information collection as required by the Paperwork Reduction Act of 1995 (PRA).

In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OCC is soliciting comment concerning the renewal of its information collection titled, ''Assessment of Fees.''

DATES: You should submit written comments by April 27, 2020.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

• *Email: prainfo@occ.treas.gov.*

• *Mail:* Chief Counsel's Office, Attention: Comment Processing, Office of the Comptroller of the Currency, Attention: 1557–0223, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

• *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

• *Fax:* (571) 465–4326.

Instructions: You must include ''OCC'' as the agency name and ''1557–0223'' in your comment. In general, the OCC will publish comments on *www.reginfo.gov* without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this information collection beginning on the date of publication of the second notice for this collection [1] by any of the following methods:

• *Viewing Comments Electronically:* Go to *www.reginfo.gov.* Click on the ''Information Collection Review'' tab. Underneath the ''Currently under Review'' section heading, from the drop-down menu select ''Department of the Treasury'' and then click ''Submit.'' This information collection can be located by searching by OMB control number ''1557–0223'' or ''Assessment of Fees.'' Upon finding the appropriate information collection, click on the

[1] Following the close of this notice's 60-day comment period, the OCC will publish a second notice with a 30-day comment period.

related ''ICR Reference Number.'' On the next screen, select ''View Supporting Statement and Other Documents'' and then click on the link to any comment listed at the bottom of the screen.

• For assistance in navigating *www.reginfo.gov,* please contact the Regulatory Information Service Center at (202) 482–7340.

• *Viewing Comments Personally:* You may personally inspect comments at the OCC, 400 7th Street SW, Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect comments.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, OCC Clearance Officer, (202) 649–5490, Chief Counsel's Office, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501*et seq.*), Federal agencies must obtain approval from the OMB for each collection of information that they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of title 44 generally requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the OCC is publishing notice of the proposed collection of information set forth in this document.

The OCC is proposing to extend OMB approval of the following information collection:

Title: Assessment of Fees.

OMB Control No.: 1557–0223.

Affected Public: Business or other for-profit.

Type of Review: Regular review.

Abstract: The OCC is requesting comment on its proposed extension, without change, of the information collection titled, ''Assessment of Fees.'' The OCC is authorized by the National Bank Act (for national banks and Federal branches and agencies) and the Home Owners Loan Act (for Federal savings associations) to collect assessments, fees, and other charges as necessary or appropriate to carry out the responsibilities of the OCC. 12 U.S.C. 16, 481, 482 and 1467. The OCC requires independent credit card national banks and independent credit card Federal savings associations (collectively, independent credit card institutions) to pay an additional assessment based on receivables attributable to accounts owned by the national bank or Federal savings association. 12 CFR 8.2(c). Independent credit card institutions are national banks or Federal savings associations that engage primarily in credit card operations and are not affiliated with a full-service national bank or full-service Federal savings association. 12 CFR 8.2(c)(3)(vi) and (vii). Under 12 CFR 8.2(c)(2), the OCC also has the authority to assess an independent credit card institution that is affiliated with a full-service national bank or full-service Federal savings association if the OCC concludes that the affiliation is intended to evade the requirements of 12 CFR part 8.

The OCC requires independent credit card institutions to report receivables attributable data to the OCC semiannually or at a time specified by the OCC. 12 CFR 8.2(c)(4). ''Receivables attributable'' are the total amount of outstanding balances due on credit card accounts owned by independent credit card institutions (the receivables attributable to those accounts) on the last day of an assessment period, minus receivables retained on the national bank or Federal savings association's balance sheet as of that day. 12 CFR 8.2(c)(3)(viii). The OCC uses the information to calculate the assessment for each national bank and Federal savings association and adjust the assessment rate for independent credit card institutions over time.

Estimated Number of Respondents: 7.

Estimated Total Annual Burden: 14 hours.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the information collection burden;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: February 21, 2020.

Theodore J. Dowd,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2020–03954 Filed 2–26–20; 8:45 am]

BILLING CODE 4810–33–P

U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION

Notice of Open Public Hearing

AGENCY: U.S.-China Economic and Security Review Commission.

ACTION: Notice of open public hearing.

SUMMARY: Notice is hereby given of the following hearing of the U.S.-China Economic and Security Review Commission. The Commission is mandated by Congress to investigate, assess, and report to Congress annually on ''the national security implications of the economic relationship between the United States and the People's Republic of China.'' Pursuant to this mandate, the Commission will hold a public hearing in Washington, DC on March 13, 2020 on ''A 'China Model?' Beijing's Promotion of Alternative Global Norms and Standards.''

DATES: The hearing is scheduled for Friday, March 13, 2020 at 9:30 a.m.

ADDRESSES: TBD, Washington, DC. A detailed agenda for the hearing will be posted on the Commission's website at *www.uscc.gov.* Also, please check the Commission's website for possible changes to the hearing schedule. *Reservations are not required to attend the hearing.*

FOR FURTHER INFORMATION CONTACT: Any member of the public seeking further information concerning the hearing should contact Brittney Washington, 444 North Capitol Street NW, Suite 602, Washington DC 20001; telephone: 202–624–1482, or via email at *bwashington@uscc.gov. Reservations are not required to attend the hearing.*

ADA Accessibility: For questions about the accessibility of the event or to request an accommodation, please contact Brittney Washington at 202–624–1482, or via email at *bwashington@uscc.gov.* Requests for an accommodation should be made as soon

as possible, and at least five business days prior to the event.

SUPPLEMENTARY INFORMATION:

Background: This is the third public hearing the Commission will hold during its 2020 report cycle. This hearing will assess the intentions behind China's efforts to revise international governance institutions, norms and values, and technical standards-setting bodies. It will examine China's vision for a revised global order, its actions in existing and newly-established international organizations to achieve its goals, and its attempts to promote new norms for the global digital economy. In so doing, the hearing will attempt to identify whether a distinguishable China model exists; if so, to what extent China is seeking to export it to other countries, and for what purpose; and the consequences of China's growing influence in global governance and standards-setting bodies for U.S. interests. The hearing will be co-chaired by Senator Carte Goodwin and Senator Jim Talent. Any interested party may file a written statement by March 13, 2020 by mailing to the contact above. A portion of each panel will include a question and answer period between the Commissioners and the witnesses.

Authority: Congress created the U.S.-China Economic and Security Review Commission in 2000 in the National Defense Authorization Act Pub. L. 106–398), as amended by Division P of the Consolidated Appropriations Resolution, 2003 (Pub. L. 108–7), as amended by Public Law 109–108 (November 22, 2005), as amended by Public Law 113–291 (December 19, 2014).

Dated: February 24, 2020.

Daniel W. Peck,

Executive Director, U.S.-China Economic and Security Review Commission.

[FR Doc. 2020–04035 Filed 2–26–20; 8:45 am]

BILLING CODE 1137–00–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0178]

Agency Information Collection Activity: Monthly Certification of On-The-Job and Apprenticeship Training

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before April 27, 2020.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or Danny S. Green, VA Clearance Officer, Office of Quality, Performance and Risk, Veterans Benefit Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *Danny.Green2@va.gov*. Please refer to ''OMB Control No. 2900–0178'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Danny S. Green at (202) 421–1354.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: 38 U.S.C. 3680(c).

Title: Monthly Certification of On-The-Job and Apprenticeship Training, VA Form 22–6553d and VA Form 22–6553d–1.

OMB Control Number: 2900–0178.

Type of Review: Revision of a currently approved collection.

Abstract: Schools and training establishments complete the form to report whether the trainee's number of hours worked and/or to report the trainee's date of termination. VA Form 22–6553d–1 is an identical printed copy of VA Form 22–6553d. VA Form 22–6553d–1 is used when the computer-generated version of VA Form 22–6553d is not available. VA uses the data collected to process a trainee's educational benefit claim.

Affected Public: Private Sector.

Estimated Annual Burden: 5,693 hours.

Estimated Average Burden per Respondent: 10 minutes.

Frequency of Response: On occasion (9 responses per respondent annually).

Estimated Number of Respondents: 3,795 (34,155 responses).

By direction of the Secretary.

Danny S. Green,

VA Clearance Officer, Office of Quality, Performance and Risk, Department of Veterans Affairs.

[FR Doc. 2020–03905 Filed 2–26–20; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Tiered Pharmacy Copayments for Medications; Calendar Year 2020 Update

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: This Department of Veterans Affairs (VA) Notice updates the information on Tier 1 medications.

FOR FURTHER INFORMATION CONTACT: Joseph Duran, Office of Community Care (10D), Veterans Health Administration (VHA), Department of Veterans Affairs, Ptarmigan at Cherry Creek, Denver, CO 80209; *Joseph.Duran2@va.gov;* telephone: (303) 370–1637 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Section 17.110 of Title 38 CFR governs copayments for medications that VA provides to Veterans. Section 17.110 provides the methodologies for establishing the copayment amount for each 30-day or less supply of medication provided by VA on an outpatient basis (other than medication administered during treatment).

Tier 1 medication means a multi-source medication that has been identified using the process described in paragraph (b)(2) of this section. Not less than once per year, VA will identify a subset of multi-source medications as Tier 1 medications. Only medications that meet all of the criteria in 38 CFR 17.110(b)(2)(i), (ii), and (iii) will be

eligible to be considered Tier 1 medications; and only those medications that meet all of the criteria in paragraph (b)(2)(i) of this section will be assessed using the criteria in paragraphs (b)(2)(ii) and (iii).

Based on the methodologies set forth in § 17.110, this Notice updates the list of Tier 1 medications for Calendar Year 2020. The Tier 1 medication list is posted on VA's Community Care website at: *https://www.va.gov/COMMUNITYCARE/revenue_ops/copays.asp* under the heading ''Tier 1 Copay Medication List.''

The following table is the Tier 1 Copay Medication List that is effective January 1, 2020 and will remain in effect until December 31, 2020.

Condition	VA product name
Arthritis and Pain	Aspirin Buffered Tablet, Aspirin Chewable Tablet, Aspirin Enteric Coated Tablet, Allopurinol Tablet, Celecoxib Capsule, Diclofenac Tablet, Ibuprofen Tablet, Meloxicam Tablet, Naproxen Tablet.
Blood Thinners and Platelet Inhibitors.	Clopidogrel Bisulfate Tablet, Warfarin Sodium Tablet.
Bone Health	Alendronate Tablet.
Cholesterol	Atorvastatin Tablet, Gemfibrozil Tablet, Lovastatin Tablet, Pravastatin Tablet, Rosuvastatin Calcium Tablet, Simvastatin Tablet.
Dementia	Donepezil Tablet.
Diabetes	Glimepiride Tablet, Glipizide Tablet, Metformin Hydrochloride (HCL) Tablet, Metformin HCL 24-hour Sustained Action (SA) Tablet, Pioglitazone HCL Tablet.
Dizziness (Vertigo)	Meclizine HCL Tablet, Meclizine HCL Chewable Tablet.
Electrolyte Supplement	Potassium SA Tablet, Potassium SA Dispersible Tablet.
Gastrointestinal Health	Omeprazole Enteric Coated (EC) Capsule, Pantoprazole Sodium EC Capsule, Ranitidine Tablet.
Glaucoma and Eye Care	Diclofenac 0.1% Solution, Dorzolamide 2%/Timolol 0.5% Solution, Latanoprost 0.005% Solution, PEG–400 0.4%/Propylene Glycol 0.3% Solution.
Heart Health and Blood Pressure	Amlodipine Tablet, Amiodarone HCL Tablet, Aspirin (see Arthritis and Pain), Atenolol Tablet, Benazepril Tablet, Carvedilol Tablet, Chlorthalidone Tablet, Clonidine Tablet, Diltiazem 24-hour Capsule, Diltiazem HCL Tablet, Enalapril Maleate Tablet, Furosemide Tablet, Hydrochlorothiazide Capsule/Tablet, Hydrochlorothiazide/Lisinopril Tablet, Hydrochlorothiazide/Losartan Tablet, Hydrochlorothiazide/Triamterene Capsule/Tablet, Isosorbide Mononitrate SA Tablet, Lisinopril Tablet, Losartan Tablet, Metoprolol Succinate SA Tablet, Metoprolol Tartrate Tablet, Nifedipine SA Tablet, Nitroglycerin Sublingual Tablet, Prazosin HCL Capsule, Propranolol HCL Tablet, Spironolactone Tablet, Verapamil HCL Tablet, Verapamil HCL SA Tablet.
Mental Health	Amitriptyline HCL Tablet, Bupropion HCL Tablet, Bupropion HCL SA (12HR–SR) Tablet, Bupropion HCL SA (24HR–XL) Tablet, Citalopram Hydrobromide Tablet, Duloxetine HCL EC Capsule, Escitalopram Oxalate Tablet, Fluoxetine Capsule/Tablet, Lithium Carbonate Capsule/Tablet, Mirtazapine Tablet, Paroxetine HCL Tablet, Sertraline HCL Tablet, Trazodone Tablet.
Respiratory Condition	Montelukast NA Tablet.
Seizures	Gabapentin Capsule/Tablet, Lamotrigine Tablet, Topiramate Tablet.
Thyroid Conditions	Levothyroxine Sodium Tablet.
Urologic (Bladder and Prostate) Health.	Alfuzosin HCL SA Tablet, Doxazosin Mesylate Tablet, Finasteride Tablet, Sildenafil Tablet, Tamsulosin HCL Capsule, Terazosin HCL Capsule.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Pamela Powers, Chief of Staff, Department of Veterans Affairs, approved this document on February 19, 2020, for publication.

Luvenia Potts,

Regulation Development Coordinator, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

[FR Doc. 2020–03834 Filed 2–26–20; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

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Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Western Distinct Population Segment of the Yellow-Billed Cuckoo; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8– ES–2013–0011; 4500030114]

RIN 1018–AZ44

Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Western Distinct Population Segment of the Yellow-Billed Cuckoo

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), revise the proposed critical habitat for the western distinct population segment of the yellow-billed cuckoo (western yellow-billed cuckoo) (*Coccyzus americanus*) under the Endangered Species Act. In total, approximately 493,665 acres (199,779 hectares) are now being proposed for designation as critical habitat in Arizona, California, Colorado, Idaho, New Mexico, Texas, and Utah. If we finalize this rule as proposed, it would extend the Act's protections to this species' critical habitat.

DATES: We will accept comments on the revised proposed rule that are received or postmarked on or before April 27, 2020. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by April 13, 2020.

ADDRESSES: You may submit comments on the revised proposed rule or draft economic analysis by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter Docket No. FWS–R8–ES–2013–0011, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R8–ES–2013–0011; U.S. Fish and Wildlife Service Headquarters, MS: JAO 1/N, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Information Requested section below for more information).

The coordinates or plot points or both from which the critical habitat maps are generated will be included in the decisional record materials for this rulemaking and are available at *http://www.regulations.gov* at Docket No. FWS–R8–ES–2013–0011, and at the Sacramento Fish and Wildlife Office at *http://www.fws.gov/sacramento* (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information that we may develop for this critical habitat designation will also be available at the U.S. Fish and Wildlife Service website and field office set out above, and may also be included in the preamble of this rule or at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Jennifer Norris, Field Supervisor, U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office, 2800 Cottage Way, Room W–2605, Sacramento, California 95825; or by telephone 916–414–6600. If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Scope of this rule. The information presented in this revised proposed rule pertains only to the western distinct population segment of the yellow-billed cuckoo (western yellow-billed cuckoo) (DPS). Any reference to the ''species'' within this document only applies to the DPS and not to the yellow-billed cuckoo as a whole unless specifically expressed. A complete description of the DPS and area associated with the DPS is contained in the proposed and final listing rules for the western yellow-billed cuckoo published in the **Federal Register** (78 FR 61621; October 3, 2013, and 79 FR 59992; October 3, 2014).

Why we need to publish a rule. Under the Endangered Species Act, any species that is determined to be an endangered or threatened species requires critical habitat to be designated, to the maximum extent prudent and determinable. Designations and revisions of critical habitat can only be completed by issuing a rule. On October 3, 2014, we finalized listing the western yellow-billed cuckoo as a threatened species (79 FR 59992). A proposed critical habitat designation was published in the **Federal Register** on August 15, 2014 (79 FR 48548). Based on information received from Federal, State, or local government agencies, Tribal entities, and the public, and our review of our previous proposed rule, we have determined to revise our previous proposal, and to propose, as discussed herein, that approximately 493,665 acres (ac) (199,779 hectares (ha)) should be designated as critical habitat for the western yellow-billed cuckoo.

The critical habitat areas we are proposing to designate in this rule constitute our current best assessment of the areas that meet the definition of critical habitat for the western yellow-billed cuckoo. Section 4(b)(2) allows the Secretary to exclude areas if the benefits of exclusion outweigh the benefits of inclusion as critical habitat, unless, based on the best available scientific and commercial data available, that exclusion would lead to extinction. In this revised proposed designation, we have identified a total of approximately 145,710 ac (58,968 ha) that we will consider for exclusion from the final designation (see Consideration of Impacts Under Section 4(b)(2) of the Act).

What this document does. This is a revised proposed rule to designate critical habitat for the western yellow-billed cuckoo. This revised proposed designation of critical habitat identifies areas that we propose to determine, based on the best scientific and commercial information available, are essential to the conservation of the species or otherwise essential for its conservation. The revised proposed critical habitat comprises 72 units and is located in the States of Arizona, California, Colorado, Idaho, New Mexico, Texas, and Utah.

Draft economic analysis. In order to consider economic impacts of designating critical habitat for the western yellow-billed cuckoo, we have examined the economic information provided in the 2014 proposed rule (see Consideration of Economic Impacts, below, for additional information) and have revised that information based on a revised economic analysis for this revised proposed critical habitat designation. We are soliciting information on the economic impact of the revised proposed designation and will continue to reevaluate the potential economic impacts between our proposed and final designation. The supporting information we used in determining the economic impacts of

the revised proposed critical habitat is summarized in this rule (see Consideration of Economic Impacts) and is available at *http://www.regulations.gov* at Docket No. FWS–R8–ES–2013–0011 and at the Sacramento Fish and Wildlife Office at *http://www.fws.gov/sacramento* (see **FOR FURTHER INFORMATION CONTACT**).

Peer review. In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from appropriate and independent knowledgeable individuals on the August 15, 2014, proposed critical habitat rule (79 FR 48548). We received responses from four individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. We reviewed the comments received from these four peer reviewers for substantive issues and new information regarding critical habitat for the western yellow-billed cuckoo. All of the peer reviewers generally concurred with our methods and conclusions and provided additional information, clarifications, and suggestions to improve the final critical habitat rule. We have incorporated some of the suggestions made by the peer reviewers into this revised proposed designation. The peer reviewer comments are available at *http://www.regulations.gov* at Docket No. FWS–R8– ES–2013–0011. We will solicit additional peer review of this revised proposed rule and respond to the peer review comments in the final rule as appropriate.

Public comment. We are seeking comments and soliciting information from the public on our revised proposed designation to make sure we consider the best available scientific and commercial information in developing our final designation. Because we will consider all comments and information we receive during the comment period, our final determination may differ from this revised proposal. We will respond to and address comments received in our final rule. Any comments previously submitted need not be resubmitted, as they will be fully considered in preparation of the final rule.

Information Requested

We intend that any final action resulting from this revised proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other concerned governmental agencies, Native American tribes, the scientific community, industry, or any other interested parties concerning this revised proposed rule. Comments previously submitted need not be resubmitted. We will consider all comments received since the August 15, 2014, proposed designation (79 FR 48548) and respond to those comments as appropriate in the final designation of critical habitat for the western yellow-billed cuckoo. For this revised proposed designation, we particularly seek comments concerning:

(1) The western yellow-billed cuckoo's biology and range; habitat requirements for feeding, breeding, and sheltering; and the locations of any additional populations.

(2) Specific information on:

(a) The amount and distribution of western yellow-billed cuckoo habitat;

(b) Information on the physical or biological features essential for conservation of the western yellow-billed cuckoo;

(c) What areas were occupied at the time of listing that contained those features and should be included in the critical habitat designation and why;

(d) Special management considerations or protection that may be needed in areas we are proposing as critical habitat, including managing for the potential effects of climate change;

(e) What areas not occupied at the time of listing are essential for the conservation of the western yellow-billed cuckoo and should be included as critical habitat and why; and

(f) Whether the description and categorization of the habitat use by the western yellow-billed cuckoo and its physical or biological features are clear and understandable.

(3) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding them outweigh the benefits of including them, pursuant to section 4(b)(2) of the Act. Please see the Service's policy regarding implementation of section 4(b)(2) of the Act published in the **Federal Register** on February 11, 2016 (81 FR 7226).

(4) We have received information regarding existing conservation easements or fee title purchase of private properties (conservation properties) within proposed critical habitat Units 65 and 67 (ID–1 Snake River and ID–3 Henry's Fork). These conservation properties are within the Bureau of Land Management's (BLM) Snake River Area of Critical Environmental Concern (ACEC) and Special Recreation Management Area, and have been conserved to help preserve open space, recreation opportunities, and wildlife habitat through a partnership involving the BLM, The Conservation Fund, The Teton Regional Land Trust, and The Nature Conservancy (TNC). We are looking for additional information, such as management plans or specific agreements, regarding these conservation properties that describe the commitment and assurances of protection of the physical or biological features for the western yellow-billed cuckoo to help us evaluate these areas for potential exclusion from final critical habitat designation under section 4(b)(2) of the Act. We are also looking for information regarding private land(s) in Unit 65 (ID–1) where landowners may be pursuing a conservation easement or fee title purchase in the future and have demonstrated a history of managing these lands for the conservation benefit of western yellow-billed cuckoo habitat.

(5) Whether we should exclude State-managed lands or lands with conservation easements from the designation (see Consideration of Exclusion of State Lands and Lands with Conservation Easements).

(6) Whether areas proposed to be designated as revised critical habitat along the United States/Mexico border in California, Arizona, New Mexico, and Texas should be excluded for national security and border security missions.

(7) Information on land ownership and land use designations and current or planned activities in the subject areas, and their possible impacts on the revised proposed critical habitat.

(8) Information on the projected and reasonably likely impacts of climate change on the western yellow-billed cuckoo and revised proposed critical habitat.

(9) Any probable economic, national security, or other relevant impacts of designating as critical habitat any particular area that may be included in the final designation and the benefits of including or excluding areas where these impacts occur, including,

(a) any incremental economic costs incurred to nonfederal entities for water withdrawals, such as State agencies or local municipalities as a result of the designation of critical habitat, and

(b) whether the Service should exclude lands that are part of Federal Water Resource Projects such as flood control basins, reservoirs, and channels that have been authorized by Congress to be constructed, operated and maintained for specific purposes such as flood risk reduction, navigation, hydropower from the designation where

such designation could conflict with the authorized project purposes.

(10) Suggestions of how the Service can use programmatic section 7 consultations for the western yellow-billed cuckoo to streamline the regulatory process.

(11) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

Please include sufficient documentation with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you present.

You may submit your comments and materials concerning this revised proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

We will post your entire comment—including your personal identifying information—on *http://www.regulations.gov.* You may request at the top of your document that we withhold personal information such as your street address, phone number, or email address from public review; however, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing this revised proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

On August 15, 2014, we proposed critical habitat for the western yellow-billed cuckoo (79 FR 48548). We reopened the public comment period on November 12, 2014 (79 FR 67154), and provided notice of the public hearing held in Sacramento, California, on December 2, 2014 (79 FR 71373). All other previous Federal actions are described in the proposed and final rules to list the western yellow-billed cuckoo as a threatened species under the Act published previously in the **Federal Register** on October 3, 2013 (78 FR 61621), and October 3, 2014 (79 FR 59992). Please see those documents for actions leading to this revised proposed designation of critical habitat.

Background

The western yellow-billed cuckoo is a migratory bird species, traveling between its wintering grounds in Central and South America and its breeding grounds in North America (Continental U.S. and Mexico) each spring and fall often using river corridors as travel routes. Habitat conditions through most of the western yellow-billed cuckoo's range is often dynamic and may change location within or between years depending on vegetation growth, tree regeneration, plant maturity, stream dynamics, and sediment movement and deposition. The species' major food resources (insects) are also similarly variable in abundance and distribution. As a result, the western yellow-billed cuckoo's use of an area is tied to the area's habitat condition and food resources, which can be variable between and within years. This variability in resources may cause the western yellow-billed cuckoo to move between areas in its wintering or breeding grounds to take advantage of habitat conditions and food availability. For a thorough discussion of the western yellow-billed cuckoo's biology and natural history, including limiting factors and species resource needs, please refer to the proposed and final rules to list this species as threatened published previously in the **Federal Register** on October 3, 2013 (78 FR 61621) and October 3, 2014 (79 FR 59992) (available at *http://www.regulations.gov* at Docket No. FWS–R8–ES–2013–0104), and the proposed critical habitat rule, which published August 15, 2014 (79 FR 48548) (available at *http://www.regulations.gov* at Docket No. FWS–R8–ES–2013–0011). It is our intent to discuss below only those topics directly relevant to the revised proposed designation of critical habitat for the western yellow-billed cuckoo. Some changes made to the 2014 proposed designation were as a result of comments received from peer reviewers, Federal agencies, State agencies, Tribal entities, the public, or our review of the previous proposed designation. We have incorporated some of the suggested changes where appropriate for this proposed revision.

Ownership Mapping Considerations

The revised proposed designation of critical habitat for the western yellow-billed cuckoo encompasses a wide geographic area and extends across seven western States (AZ, CA, CO, ID, NM, TX, and UT). Obtaining current up-to-date and consistent mapping and land ownership information for such a large area is challenging. Because of this reason and requirements to use certain land ownership information under Service policy and to be as consistent as possible in mapping across the range of the species, our mapping and land ownership efforts relied on using a single land ownership ArcGIS source file to identify land ownership (Federal, State, Tribal, local, private) where it was available. In areas where this single layer was not available (*i.e.,* Texas), or more specific information was provided by the landowner, we used other (Federal, State, County, Tribal, private) land ownership information or the more specific land ownership information provided by the landowner. We have attempted to correct any land ownership identified during public comment from the previous proposed designation. However, we expect that not all land ownership may be correctly identified, and we will continue to make changes and incorporate those land ownership changes in the final designation.

Critical Habitat

Background

For additional background information on western yellow-billed cuckoo critical habitat under section 3 and section 4 of the Act, see the *Background* section in the August 15, 2014, proposed critical habitat rule (79 FR 48549–48550).

Our regulations at 50 CFR 424.12(b) outline the steps the Secretary must take in determining areas to be designated as critical habitat. In summary, these steps are to identify the geographical area occupied by the species at the time of listing, identify the physical and biological features essential to the conservation of the species, determine the specific areas within the geographical area occupied by the species that contain the physical or biological features, and then determine which of these features within those identified areas may require special management considerations or protections. The geographical area occupied by the species at the time of listing is defined at 50 CFR 424.02 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). If designating the occupied areas that meet the definition of critical habitat would be inadequate to ensure the conservation of the species, the

Secretary may designate as critical habitat unoccupied areas that meet the definition of critical habitat at 16 U.S.C. 1532(5)(A)(ii).

Occupancy Determination

The geographical area occupied at the time of listing by the western yellow-billed cuckoo DPS extends from southern British Columbia, Canada, to southern Sinaloa, Mexico, and may occur from sea level to over 7,000 feet (ft) (2,154 meters (m)) in elevation. Due to the reclusive nature of the species, the remoteness of some areas it occupies, difficulty in conducting surveys, and inconsistent survey methodology, the majority of the species' range has not been surveyed on a regular basis or have comparable survey data to give an absolute determination of population demographics, distribution, and occupancy. However, despite these survey challenges, some key areas throughout the DPS where the species is known to occur and breed more regularly, such as on the Sacramento, Kern, Verde, Colorado, San Juan, Salt, Snake, San Pedro, Gila, and Rio Grande Rivers, and several other smaller areas have been surveyed more consistently and give some indication of persistence and site fidelity. The majority of these sites are located in California and Arizona. The last statewide surveys (encompassing a large proportion of the major rivers and tributaries) for California and Arizona were conducted between 1998 and 2000 (Arizona (1998 to 1999), and California (1999 to 2000)). Therefore, we based our analysis of occupancy on detection records starting in 1998 and ending in 2014, when we listed the DPS as a threatened species. Although prior survey efforts and records of western yellow-billed cuckoo have been conducted outside California and Arizona, these efforts have been more localized or not consistent. The 1998–2014 timeframe was chosen because it includes the last statewide western yellow-billed cuckoo surveys in areas where the majority of individuals within the DPS occur and represents the best available information on long-term occupancy.

Specific Areas Outside the Geographical Area Occupied by the DPS

We are not currently proposing to designate any areas outside the geographical area occupied by the species at the time of listing because the occupied areas identified for designation provide sufficient representation of habitat (*i.e.,* ecological diversity) and redundancy (*i.e.,* the duplication and distribution of resilient populations across the range of the species allowing for the ability of a species to withstand catastrophic events) throughout the range of the DPS for the conservation of the species. All areas proposed as western yellow-billed cuckoo critical habitat are within the geographical area occupied by the DPS at the time of listing (2014) and contain the features essential to the conservation of the species. However, due to increased survey efforts since listing, we did receive some additional post-listing occupancy information for the species. We used this post-listing survey information to confirm frequency and continued occupation of certain areas, but not to identify new areas outside the geographical area occupied by the species. Based on habitat at the sites and occupancy of the species near these sites, we propose to determine occupancy of these sites to be same as at the time of listing and not new occupancy since the time of listing due to our knowledge of habitat conditions and occupancy information in surrounding areas.

Although we believe that the available evidence is sufficient for us to conclude that the units were occupied by the western yellow-billed cuckoo at the time the species was listed, for the purposes of this rulemaking, we also propose to determine that the revised proposed designation alternatively meets the definition of critical habitat in section 3(5)(A)(ii) of the Act in that the identified areas are also essential for the conservation of the species. Our rationale for this proposed determination is outlined below.

The western yellow-billed cuckoo is migratory, difficult to observe, and elusive in behavior, and chooses nesting areas based on habitat conditions and localized and variable prey outbreaks. In addition, western yellow-billed cuckoo breeding habitat is typically dynamic. For example, some breeding habitat that is not suitable one year may become suitable the next due to increased rainfall or flooding events. Other areas currently suitable and occupied may become degraded due to age or other environmental condition (*e.g.,* water availability, lack of food resource). Therefore, in our proposed determination of the extent of critical habitat, we took into account this need to accommodate the dynamic nature of existing habitat. Further, the species needs habitat areas that are arranged spatially to maintain connectivity and allow dispersal within and between units that provide for redundancy.

All of the areas that support the western yellow-billed cuckoo face threats including habitat fragmentation and degradation, altered hydrology, livestock grazing, nonnative vegetation, human disturbance, and the effects of climate change. Providing for a variety of habitat (*i.e.,* representation) primarily where the U.S. core breeding population occurs in Arizona and New Mexico (redundancy) may provide for amelioration against these threats and provide for the conservation of the species.

Therefore, given the threatened status and the relatively small number of extant western yellow-billed cuckoo breeding locations within the DPS and the need to protect the species' habitat variability and distribution, a critical habitat designation limited to areas confirmed to be occupied by breeding birds through specific surveys at the time of listing would be inadequate to provide for the conservation of the species. Accordingly, we propose to determine that the areas alternatively meet the definition of critical habitat under section 3(5)(A)(ii) of the Act, meaning that we consider these areas to be essential for the conservation of the species, as they represent the various ecological (representation) and distributional aspects (redundancy) and provide for connectivity and dispersal areas for the species when not used for breeding.

Habitat Outside the United States

Within the identified geographical area occupied at the time of listing (see Figure 2 in the final listing rule (79 FR 59999, October 3, 2014), the habitat areas used by the species are located from southern British Columbia, Canada, to southern Sinaloa, Mexico. Because we do not designate as critical habitat areas outside the United States (50 CFR 424.12(g)), we did not examine areas in Canada and Mexico; however, conservation of habitat that meets the conditions described in this designation in Canada and especially in Mexico may be important to recovery of the species. Similarly, we did not examine habitat areas on the wintering grounds in South America and the intervening areas in Central America or the Caribbean that are used as stop-over sites during migration, yet these areas may also be important for recovery of the species.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and its implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, the Secretary shall designate critical habitat at the time the species is determined to be an endangered or threatened species. The regulations at 50 CFR 424.12(a)(1) state

that the Secretary may, but is not required to, determine that a designation would not be prudent in the following circumstances: (1) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species; (ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act; (iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States; (iv) No areas meet the definition of critical habitat; or (v) The Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.

There is currently no imminent threat of take attributed to collection or vandalism identified under Factor B for this species, and identification and mapping of critical habitat is not expected to initiate any such threat. In our listing determination for the western yellow-billed cuckoo, we determined that the present or threatened destruction, modification, or curtailment of habitat or range is a threat to the western yellow-billed cuckoo and that those threats in some way can be addressed by section 7(a)(2) consultation measures. The breeding range of the species occurs largely in the jurisdiction of the United States, and we are able to identify areas that meet the definition of critical habitat. Therefore, because none of the circumstances enumerated in our regulations at 50 CFR 424.12(a)(1) has been met and because there are no other circumstances the Secretary has identified for which this designation of critical habitat would be not prudent, we have determined that the designation of critical habitat is prudent for the western yellow-billed cuckoo.

Critical Habitat Determinability

Having determined that designation is prudent under section 4(a)(3) of the Act, we must find whether critical habitat for the western yellow-billed cuckoo is determinable. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist: (i) Data sufficient to perform required analyses are lacking, or (ii) The biological needs of the species are not sufficiently well known to identify any area that meets the definition of ''critical habitat.'' When critical habitat is not determinable, the Act allows the Service an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)). We reviewed the available information pertaining to the biological needs of the species and habitat characteristics where this species is located. We conclude that this information is sufficient for us to conduct both the biological and economic analyses required for the critical habitat determination; that this and other information represent the best scientific data available; and that the designation of critical habitat is now determinable for the western yellow-billed cuckoo.

Conservation Strategy and Selection 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 to consider for designation as critical habitat. We look for areas that meet those habitat requirements (*i.e.,* contain the physical and biological features essential for the conservation of the species) within the geographical area occupied by the species at the time of listing and for any areas outside the geographical area occupied by the species that are essential for the conservation of the species.

To determine and select appropriate occupied areas that contain the physical or biological features essential to the conservation of the species or areas otherwise essential for the conservation of the western yellow-billed cuckoo, we developed a conservation strategy for the species. The goal of our conservation strategy for the western yellow-billed cuckoo is to recover the species to the point where the protections of the Act are no longer necessary. The role of critical habitat in achieving this conservation goal is to identify the specific areas within the western yellow-billed cuckoo's range that provide essential physical and biological features, without which areas range-wide resiliency, redundancy, and representation could not be achieved. This, in turn, requires an understanding of the fundamental parameters of the species' biology and ecology based on well-accepted conservation-biology and ecological principles for conserving species and their habitats, such as those described by Carroll *et al.* (1996, pp. 1–12); Meffe and Carroll (1997, pp. 347–383); Shaffer and Stein (2000, pp. 301–321); Natural Resources Conservation Service (NRCS) 2004 (entire); Tear *et al.* (2005, pp. 835–849) and Wolf *et al.* (2015, pp. 200–207); and more general riparian and avian conservation management prescriptions such as those described in Service 1985; Gardner *et al.* 1999; Wyoming Partners in Flight 2002; Rich *et al.* 2004; Riparian Habitat Joint Venture (RHJV) 2004; Shuford and Gardali 2008; and Griggs 2009.

Conservation Strategy

In developing our conservation strategy for determining what areas to include as critical habitat for the western yellow-billed cuckoo, we focused on the western yellow-billed cuckoo's breeding habitat. Breeding habitat includes areas for nesting and foraging and also provides for dispersal habitat when breeding or food resources may not be optimal. Breeding habitat is widely spread across the species' range and typically provides the physical and biological features essential to the conservation of the species without which range-wide resiliency, redundancy, and representation of the species could not be achieved. As explained further below, this focus led to the inclusion of breeding habitat within three general habitat settings as part of the conservation strategy. The three general settings include: (1) Large river systems (mainstem rivers and their tributaries) in the southern and central portions of New Mexico, Arizona, and along the California border with Arizona (generally referred to as the Southwest); (2) locations within southern Arizona not associated with major river systems or their tributaries; and (3) large river systems outside the Southwest (as identified in (1) above) that occur in different ecological settings that are being consistently used as breeding areas by western yellow-billed cuckoo (such as areas in parts of California, Utah, Idaho, or Colorado).

As discussed above, the western yellow-billed cuckoo is a migratory species that travels long distances to take advantage of localized food resource outbreaks or habitat availability. Maintaining breeding areas (which includes nesting habitat, foraging habitat, and dispersal habitat) throughout the range of the western yellow-billed cuckoo allows for within-year and year-to-year movements to take advantage of any spatial and temporal changes in habitat resources and food abundance. We consider this necessary to conserve the species because of the

dynamic nature of habitat used by the species. Identifying habitat across the species' range: (a) Helps maintain a robust, well-distributed population and enhances survival and productivity of the western yellow-billed cuckoo as a whole; (b) facilitates interchange of individuals between units; and (c) promotes recolonization of any sites within the current range of the species that may experience declines or local extirpations due to low productivity or temporary habitat loss or changes in resource availability; and allows for use of areas not being used as breeding as habitat for movement and dispersal.

The western yellow-billed cuckoo breeding coincides with moist and humid conditions that support abundant prey resources occurring in the temperate zones of the western United States and northern Mexico during the late spring and summer. Breeding areas of the western yellow-billed cuckoo occur primarily in riparian woodlands along perennial rivers or intermittent or ephemeral drainages containing vegetative structure, canopy cover, and appropriate environmental conditions. These areas provide suitable nesting habitat and adjacent foraging habitat with adequate food resources on a consistent basis to successfully produce and fledge young.

In general, the north-south migratory pathway of the western yellow-billed cuckoo funnels through northern Mexico into the American southwest, with a significant portion of returning birds establishing breeding territories along large river systems (mainstem rivers and their tributaries) in the southern and central portions of New Mexico, Arizona, and along the California border with Arizona. A large proportion of breeding western yellow-billed cuckoos also occur in large river systems in northwestern Mexico, primarily in Sonora and Sinaloa, with smaller numbers in Chihuahua and Western Durango, and the tip of Baja California. While returning western yellow-billed cuckoos also establish breeding territories throughout portions of the western States north of Arizona and New Mexico, these large southwestern and Mexican river systems (including but not limited to the Lower Colorado, Salt, Virgin, San Pedro, Gila, Verde, and Rio Grande Rivers) serve as core breeding habitats for the western yellow-billed cuckoo as it returns from wintering grounds in South America. These core areas together provide a consistent, robust supply of resources necessary for the maintenance and expansion of western yellow-billed cuckoos. We consider the large river systems (mainstem rivers and their tributaries) in the southern and central portions of New Mexico, Arizona, and along the California border with Arizona to be core areas for conservation of the western yellow-billed cuckoo, and they constitute the first part of our conservation strategy in determining its critical habitat. The core mainstem rivers and streams along with their major tributaries and adjacent habitats contain the physical or biological features essential for the conservation of the western yellow-billed cuckoo.

However, these managed large river systems may not provide sufficient breeding habitat for the western yellow-billed cuckoo in all years (for example, in low flow years the amount of breeding habitat along rivers is diminished), and unregulated smaller tributaries supported or influenced by monsoonal weather patterns may assist in supporting breeding western yellow-billed cuckoos during low flow or drought conditions. Thus, the second part of our conservation strategy includes areas within southern Arizona not associated with major river systems or their tributaries as identified above. In southern Arizona, western yellow-billed cuckoo also use drier habitats for breeding sites in the desert, foothill, and mountain ephemeral drainages of southern Arizona and northwestern Mexico (including but not limited to desert grasslands and scrub, and Madrean evergreen woodlands). These areas receive moisture from the seasonal North American Monsoon weather systems and other summer tropical storm events. During the breeding season, these habitats experience a ''flush'' of vegetation and concurrent insect population eruptions. A portion of the DPS uses these wet-seasonal or monsoonal habitats in southern Arizona and Mexico for breeding habitat. Use of these types of sites by the western yellow-billed cuckoo provides additional resiliency to the species due to the different weather patterns and hydrological regimes that produce the habitat conditions suitable for breeding. The availability of these additional resilient sites in southern Arizona and northwestern Mexico other than the large southwestern and Mexican river systems described above increases the overall redundancy for the species. Therefore, the southwestern monsoon-driven drainages with sufficient resources for western yellow-billed cuckoo foraging and successful breeding are essential for the overall resiliency and redundancy of the DPS, and is therefore essential to allow for conservation of the western yellow-billed cuckoo across its range.

Finally, while large riverine riparian systems in the core area of the American southwest are fundamentally important for their ability to contribute to the resiliency of the western yellow-billed cuckoo due to the abundance of birds in these areas, similar systems throughout the western yellow-billed cuckoo range are also likely important contributors to local resiliency and maintaining distribution of the western yellow-billed cuckoo across its range. These large river systems outside the southwest that are being consistently used as breeding areas by western yellow-billed cuckoo have been identified as the third part of our conservation strategy for determining critical habitat. These areas are located in habitats identified as being within different ecological settings, eco-types, or physio-geographic provinces and provide for additional redundancy and representation for the western yellow-billed cuckoo across its breeding range. The physical and biological features of large river systems in differing habitats with sufficient resources for western yellow-billed cuckoo foraging and successful breeding are likely important for contributing to the western yellow-billed cuckoo's overall resiliency, redundancy, and representation, and are therefore essential for conservation of the western yellow-billed cuckoo across its range. Habitats and environmental settings in the arid Southwest differ significantly from those in central California or higher elevation areas of Utah, Idaho, or Colorado. By identifying known breeding habitat of appropriate size throughout the species' range, we provide habitat where yellow-billed cuckoos are most likely to persist and potentially increase in numbers.

Selection Criteria and Methodology Used To Determine Critical Habitat

As discussed above, to assist in determining which areas to identify as critical habitat for the western yellow-billed cuckoo, we focused our selection on areas known to have breeding or suspected breeding. To do this, we selected those areas that are occupied on a continuous or nearly continuous basis each year during the breeding season. These areas were selected because they contain the physical and biological features essential to the conservation of the species necessary for western yellow-billed cuckoos to produce offspring, have ample foraging habitat, vegetative structure, environmental conditions, and prey. By selecting breeding areas as critical habitat across the western yellow-billed

cuckoo's range, we will assist in conserving the ability of the species to continue to occupy these areas. Moreover, the breeding habitat is most likely to be essential to the conservation of the species because of the importance of breeding for survival and recovery of the species.

We considered an area to be a breeding area if it was occupied by the western yellow-billed cuckoo in one of the following two ways:

- If western yellow-billed cuckoos were present in the area on one or more days between June 1 and September 30 (considered to be the primary breeding period) in at least two years between 1998 and 2014; and
- If western yellow-billed cuckoo were confirmed to be a pair and nesting (or there was evidence of nesting behavior) was observed in at least one year between 1998 and 2014, regardless of the time of year. Thus, if the mated pair or evidence of nesting behavior was discovered prior to June 1, the area was considered to be a breeding area.

In addition to these fundamental criteria established for breeding areas across the DPS range, we identified exceptions to the criteria for areas in the Southwest (Arizona and New Mexico). This was to take into account the greater contribution of the breeding areas for the DPS within the Southwest and because of the migratory nature of the species moving up from Mexico through the Southwest, either to or from other breeding areas. The exceptions to the criteria include:

- Areas in the Southwest were not considered to be breeding areas if the area contains only two western yellow-billed cuckoo records from different years, one of which was in September, and no pairs were detected. (Although western yellow-billed cuckoos are still breeding in September in Arizona, a September detection may or may not signify breeding.); and
- Areas in the Southwest were not considered to be breeding areas if western yellow-billed cuckoos previously detected during protocol surveys were absent in all subsequent visits during the same breeding season.

Another aspect of our strategy was to avoid selection of small and isolated riparian areas in the designation. Because of having limited resources, these small sites are not always occupied and typically support one to two breeding pairs but not every year. In addition, small and isolated areas are more susceptible to stochastic or catastrophic events such as flooding from major storms, prolonged drought, or wildfire. One of the goals of the conservation strategy is to include those areas that are considered core areas and contribute significantly to the overall population by producing a relatively large numbers of birds. These small isolated areas are not considered part of our conservation strategy. Although these areas may be important and assist in recovery of the species, we propose to determine that small, isolated sites with sufficient habitat for only one or two pairs of western yellow-billed cuckoos would not contribute significantly and are not essential to the conservation of the DPS and therefore not being considered as critical habitat.

As described above, to delineate the proposed units of critical habitat, we first looked to those areas being used as breeding areas. We defined what we considered breeding areas as those areas that contained seasonal occurrences of the western yellow-billed cuckoo between 1998 and 2014, at the timeframe in which breeding typically occurs for the species in the United States (June–September). In limited instances, this timeframe was expanded into May if the information available confirmed breeding activity during this earlier timeframe. These breeding occurrences (location points where breeding or breeding activity was confirmed) were then plotted on maps along with information on vegetation cover, topography, and aerial imagery. We then delineated habitat around that location, as well as riparian habitat upstream and downstream from the occurrence location.

We used reports prepared by the U.S. Geological Survey (USGS), U.S. Forest Service (USFS), National Park Service (NPS), Bureau of Land Management (BLM), Bureau of Reclamation (Reclamation), the Salt River Project, State wildlife agencies, State natural diversity data bases, Cornell Lab of Ornithology (eBird data), researchers, nongovernment organizations, universities, and consultants, as well as available information in our files, to determine the location of areas used for breeding within the geographical area occupied by the western yellow-billed cuckoo at the time of listing. As stated above, since 2014, we have become aware of additional areas occupied by the species with evidence of breeding. We still consider these areas to have been occupied by the species at the time of listing, based on habitat conditions and occupancy of nearby areas.

When delineating the critical habitat boundary, we included the surrounding contiguous suitable habitat (including along the stream course and in uplands for foraging) upstream and downstream until a break in the vegetation of 0.25 miles (mi) (0.62 kilometers (km)) or more is reached. This distance was used because the western yellow-billed cuckoo rarely traverses distances across breaks in the vegetation greater than 0.25 mi (0.62 km) in their daily foraging activities (Laymon 1980, pp. 6–8; Hughes 2015, p. 12). Upland habitat surrounding river, stream, or drainages was also included within the designation because the area is used for foraging. In some instances, we included breaks in habitat to combine one or more areas if we determined that: (1) The gap in vegetation was within minor variances of this distance; (2) the habitat on the other side of the gap was a continuation of similar or better suitable habitat and included breeding occupancy as identified above; or (3) the gap in vegetation was determined to be a consequence of natural stream dynamics essential to the continuing function of the hydrologic processes of the occupied areas. By providing breaks in habitat and combining areas, we allow for regeneration of vegetation in these areas, which is often more productive and provides additional food resources for the species and allows for appropriate habitat conditions for use when dispersing to other breeding locations.

Delineating the boundary of critical habitat was accomplished by evaluating aerial imagery, occurrence records, and vegetation information, until a break in the vegetation of 0.25 mi (0.62 km) or more was reached, at which point the upstream or downstream and lateral extent of the area was reached. In California, western yellow-billed cuckoos forage mainly within the riparian woodland habitat or directly adjacent uplands when breeding (Laymon 1980, pp. 6–8; Hughes 2015, p. 12). In New Mexico, similar foraging activity has been observed (Sechrist *et al.* 2009, pp. 24–50). The foraging activity in Madrean evergreen woodland habitat (in Arizona and New Mexico) where breeding activity has also been observed has not been studied. However, based on foraging behavior in other habitats in the west, we expect the foraging distance to remain relatively close to the nesting habitat. For determining the upland extent of habitat within southwestern breeding habitat, we delineated woodland habitat in the drainage bottom and adjacent hillside. In addition, riparian corridors along streams, especially in highly developed areas, can in some instances be very narrow, highly degraded, and be characterized as a patchwork of vegetated and nonvegetated areas.

Whether these habitat areas were included or combined into a single larger unit depended on the extent of

use of the areas by western yellow-billed cuckoo, the relative amount of habitat gained if the multiple patches were included or combined, the relationship of the area to the overall designation, and the ease or complexity of removing all nonhabitat from the designation. In addition, by combining these areas, they then better meet an appropriate scale of analysis, given the data as is described in our regulations for determining critical habitat (50 CFR 424.12(b)(1)). For example, if a break in habitat occurred between an area with high occupancy with sufficient habitat and an area with low occupancy, the adjacent area may not have been included. Alternatively, if two smaller areas with relatively low occupancy were adjacent to each other, those areas most likely would have been combined to form a single, larger, more manageable area.

To distinguish between the western yellow-billed cuckoo more typical breeding habitat in riparian areas throughout the range from breeding habitat recently found in more arid areas of the Southwest, we use the terms ''rangewide breeding habitat'' and ''southwestern breeding habitat,'' respectively (see Space for Individual and Population Growth and for Normal Behavior below). In rangewide breeding habitat, we generally selected low-gradient streams containing the physical and biological features that were greater than 200 ac (81 ha)) in size. Areas smaller than 200 ac (81 ha) tend to be isolated and may contain sufficient habitat for only one or two pairs of western yellow-billed cuckoos and tend to be occupied sporadically. In considering the extent of each area, in some cases we included the entire streambed as well as the presently vegetated areas. Streams, especially those with intermittent flows, migrate within the streambed depending on flows and other natural fluvial processes. The vegetated areas within the streambed may also move to coincide with the stream movement. As a result, the whole area may not be contiguously vegetated. In these low-gradient rangewide riparian breeding habitats (*i.e.,* cottonwood, willow), areas that currently contain less than 200 ac (81 ha) of riparian habitat were not selected. However, in some areas of the Southwest, the physical or biological features for areas used as breeding habitat vary from other locations in the range of the western yellow-billed cuckoo. These areas occur in Arizona and New Mexico and are associated with summer monsoonal moisture and are smaller, narrower habitat areas that may extend into upland areas (areas dominated by mesquite and oak) with higher gradient. Selection of these areas depended upon the amount of use of the area by the species and its relative proximity to other selected areas. As a result, these habitat sites were selected on a case-by-case basis to provide for the variability of habitat use by the species in these areas.

We have not included critical habitat units within Oregon or Washington because the species has been extirpated as a breeder from those States since at least the 1940s (Littlefield 1988, p. 2; Washington Department of Fish and Wildlife 2013, pp. 200–201), and recent observations of the species, although promising, have not coincided for the most part with suitable breeding habitat and appear to be dispersing but not breeding birds. We also did not include occupied areas within Montana, Nevada, and Wyoming. The reasons for not including critical habitat in these States is that we believe that sufficient areas already have been identified within this revised proposed designation and these areas do not meet our conservation strategy for designating critical habitat. The conservation strategy focuses on areas with confirmed breeding. No confirmed breeding has been identified in Montana or Wyoming. In Nevada, the only known areas where the western yellow-billed cuckoo has confirmed breeding is in the southern part of the State near the borders of California and Arizona. These habitats are essentially the same as those identified in the southwest in Arizona and New Mexico, but do not significantly contribute to population numbers for the western yellow-billed cuckoo. Should we receive information during the public comment period that supports designating as critical habitat areas not included in the revised proposed units (see Revised Proposed Critical Habitat Designation, below), we will reevaluate our current revised proposal.

Sources of data reviewed or cited for this species in the development of critical habitat include peer-reviewed articles, information maintained by universities and State agencies, existing State management plans, species-specific reports, habitat information sources, climate change studies, incidental detections, and numerous survey efforts conducted throughout the species' range, including but not limited to the more recent information below: Corman and Magill 2000; Dockens and Ashbeck 2011; Salt River Project 2011a; Beason 2012; Dettling and Seavy 2012; Gardali *et al.* 2012; Johnson *et al.* 2012; McCarthy 2012; McNeil *et al.* 2012; Sechrist *et al.* 2012; Greco 2013; IPCC 2013a; Johnson *et al.* 2013c; McNeil *et al.* 2013b; Pederson *et al.* 2013; Rohwer and Wood 2013; Scribano 2013; Sechrist *et al.* 2013; Stromberg *et al.* 2013; Wallace *et al.* 2013; WestLand Resources 2013a, b, c; American Birding Association 2014,; Ault *et al.* 2014; Garfin *et al.* 2014; IPCC 2014; Melillo *et al.* 2014; Orr *et al.* 2014; Stanek 2014; Villarreal *et al.* 2014; Dettling *et al.* 2015; Griffen 2015; Hughes 2015; MacFarland and Horst 2015, 2017; Van Dooremolen 2015; WestLand Resources 2015 a,b,c,d,e; Arizona Game and Fish Department 2016–2018; Cornell Lab of Ornithology 2016–2018; Corson 2018; RiversEdge West 2007–2018; and Sferra *et al.* 2019. For additional information, see References Cited, below.

The amount and distribution of critical habitat that we are proposing will give the western yellow-billed cuckoo the opportunity to potentially: (1) Maintain its existing distribution; (2) move between areas depending on food, resource, and habitat availability; (3) increase the size of the population to a level where it can withstand potentially negative genetic or demographic impacts; and (4) maintain its ability to withstand local- or unit-level environmental fluctuations or catastrophes.

When determining the revised proposed critical habitat boundaries, we made every effort to avoid including developed areas, such as lands covered by buildings, pavement, and other structures, because such lands lack physical or biological features for the western yellow-billed cuckoo. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this revised proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these nonhabitat lands would not trigger consultation under section 7 of the Act with respect to critical habitat and the requirement of no adverse modification, unless the specific action would affect the physical or biological features of designated habitat surrounding or adjacent to the nonhabitat areas.

The critical habitat designation is defined by the maps, as modified by any accompanying regulatory text, presented at the end of this document in the Proposed Regulation Promulgation section. We include more detailed

information on the boundaries of the critical habitat designation in the unit descriptions below. We will make the coordinates or plot points or both on which each map is based available to the public on the internet at *http://www.regulations.gov* at Docket No. FWS–R8–ES–2013–0011, and at the Sacramento Fish and Wildlife Office at *http://www.fws.gov/sacramento* (see **FOR FURTHER INFORMATION CONTACT**, above).

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 that are essential to the conservation of the species and which may require special management considerations or protection. For example, essential physical features for various species 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, we 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 physical or biological features required for the western yellow-billed cuckoo from studies of this species' habitat, ecology, and life history as described below. Additional information can be found in the proposed and final listing rules published in the **Federal Register** on October 3, 2013 (78 FR 61621), and October 3, 2014 (79 FR 59992), respectively. The physical or biological features identified here focus primarily on breeding habitat and secondarily on foraging habitat because most of the habitat relationship research data derive from studies of these activities. Much less is known about migration, stop-over, or dispersal habitat within the breeding range; however, for these purposes, western yellow-billed cuckoos do use a variety of habitats that may or may not be used for breeding. As a result, we do not think that habitat for these purposes is limiting and we have not specifically identified areas for these purposes in our designation. As stated above, the species' use of an area for breeding purposes depends on food availability and habitat conditions. If those conditions are not adequate (*i.e.,* prey not present, environmental conditions not favorable), the species may still use the area for the other purposes identified above. Due to the species' capabilities and behavioral response to resource availability, we conclude that conservation of sufficient habitat for breeding will also provide sufficient habitat for the other activities. Although the wintering and nesting habitat for the western yellow-billed cuckoo that occurs outside of the United States is not considered for critical habitat designation, some information on breeding, migration, and wintering habitat outside the United States is provided. We propose to determine that the following physical or biological features are essential to the conservation of the western yellow-billed cuckoo.

Space for Individual and Population Growth and for Normal Behavior

General breeding (nesting) habitat conditions. The western yellow-billed cuckoo occurs and breeds during the breeding season (generally from May through September) in a subset of its historical range in the western United States. The western yellow-billed cuckoo uses nesting sites in riparian habitat where conditions are typically cooler and more humid than in the surrounding environment (Gaines and Laymon 1984, p. 75; Laymon 1998, pp. 11–12; Corman and Magill 2000, p. 16). Riparian habitat characteristics, such as dominant tree species, size and shape of habitat patches, tree canopy structure, vegetation height, and vegetation density, are important parameters of western yellow-billed cuckoo breeding habitat. Western yellow-billed cuckoos are found across the DPS in riparian woodlands along low-gradient streams with large patches of cottonwood (*Populus* spp.) and willow (*Salix* spp.) riparian vegetation usually with an overstory and understory component of other tree species, including but not limited to boxelder (*Acer negundo*); ash (*Fraxinus* spp.); walnut (*Juglans* spp.); and sycamore (*Platanus* spp.) (Gaines 1974b, pp. 7–9; Gaines and Laymon 1984, pp. 59–66; Groschupf 1987 pp. 5, 8–11, 16–18; Laymon and Halterman 1989, pp. 274–275; Corman and Magill 2000, pp. 5, 10, 11, 15, 16; Dettling and Howell 2011a, pp. 27–28). In California, the species is typically found in riparian woodland areas along low-gradient streams with large patches of cottonwood (*Populus* spp.) and willow (*Salix* spp.) riparian vegetation with an overstory and understory component of other tree species, including but not limited to boxelder (*Acer negundo*); Oregon ash (*Fraxinus latifolia*); California black walnut (*Juglans californica*); California sycamore (*Platanus racemosa*); Fremont cottonwood (*Populus fremontii*); and valley oak (*Quercus lobata*) (Gaines 1974b, pp. 7–9; Gaines and Laymon 1984, pp. 59–66; Laymon and Halterman 1989, pp. 274–275; Dettling and Howell 2011a, pp. 27–28).

In addition to the riparian trees found across the species' range, the vegetation making up the breeding habitat of the western yellow-billed cuckoo in some areas, especially in the more arid Southwest, includes some other native and nonnative xero-riparian and upland non-riparian trees and large shrubs, such as, but not limited to: Mesquite (*Prosopis* spp.), hackberry (*Celtis reticulata* and *C. ehrenbergiana*), soapberry (*Sapindus saponaria*), oak (*Quercus* spp.), acacia (*Acacia* spp., *Senegalia greggi*), mimosa (*Mimosa* spp.), greythorn (*Ziziphus obtusifolia*), desert willow (*Chilopsis linearis*), juniper (*Juniperus* spp.), Arizona cypress (*Cupressus arizonica*), pine (*Pinus* spp.), alder (*Alnus rhombifolia* and *A. oblongifolia*), wolfberry (*Lycium* spp.), Russian olive (*Elaeagnus angustifolia*), and tamarisk (*Tamarix* spp.) (Groschupf 1987 pp. 5, 8–11, 16–18; Corman and Magill 2000, pp. 10, 15, 16; Corson 2018, pp. 5, 6–20; Sferra *et al.* 2019, p. 3).

Western yellow-billed cuckoo nests have been documented in Fremont cottonwood, Goodding's black willow (*Salix gooddingii*), red willow (*Salix laevigata*), coyote willow (*Salix exigua*), Arizona sycamore, mesquite, tamarisk, hackberry, boxelder, soapberry, Arizona walnut, acacia, ash, alder, seep willow (*Baccharis salicifolia*), English walnut (*Juglans regia*), oak, juniper, and Arizona cypress (Laymon 1980, pp. 6–8; Laymon 1998, p. 7; Hughes 1999, p. 13; Corman and Magill 2000, p. 16; Halterman 2001, p. 11; Halterman 2002,

p. 12; Halterman 2003, p. 11; Halterman 2004, p. 13; Corman and Wise-Gervais 2005, p. 202; Halterman 2005, p. 10; Halterman 2007, p. 5; Holmes *et al.* 2008, p. 21; McNeil *et al.* 2013, pp. I–1–I–3; Tucson Audubon 2015, p. 44; Groschupf 2015, entire; MacFarland and Horst 2015, pp. 9–12; Sferra *et al.* 2019, p. 3).

Western yellow-billed cuckoos have also been found nesting in orchards adjacent to riparian habitat during the breeding season (Laymon 1980, pp. 6–8; Laymon 1998, p. 5). Five pairs of western yellow-billed cuckoos were found nesting along the Sacramento River in a poorly groomed English walnut orchard that provided numerous densely foliaged horizontal branches on which western yellow-billed cuckoos built their nests (Laymon 1980, pp. 6–8). These western yellow-billed cuckoos that nested in the orchard did not forage there, but flew across the river to forage in riparian habitat. Kingsley (1989, p. 142) described western yellow-billed cuckoos as being abundant in the pecan groves in Green Valley and Sahuarita, Arizona, with an estimated density of one nesting pair per 10 ac (4 ha). We consider these agricultural nesting sites to be the exception rather than the preferred nesting habitat for the species due to the paucity of reports identifying such nesting. In mapping the boundaries of the proposed critical habitat, we avoided identifying agricultural lands within the proposed designation. Any agricultural lands inadvertently within the boundary of the proposed designation would not be considered critical habitat because it does not contain the physical or biological features. We request comment on whether any unit of its proposed designation of critical habitat inadvertently includes agricultural lands.

Tamarisk is also a riparian species that may be associated with breeding under limited conditions in the Southwest. Western yellow-billed cuckoos will sometimes build their nests and forage in tamarisk, but there is usually a native vegetation component within the occupied habitat (Gaines and Laymon 1984, p. 72; Johnson *et al.* 2008a, pp. 203–204). See ''Tamarisk'' section below for further discussion of tamarisk as habitat.

Older studies were geographically limited in their scope but nevertheless established a suite of habitat characteristics that became the archetype for western yellow-billed cuckoo breeding habitat. However, habitat conditions across the DPS range vary considerably, and more recent investigations that included other areas within the western yellow-billed cuckoo's breeding range found that large areas of riparian woodland vegetation are not the only areas used by the species for nesting. We describe both the rangewide and southwestern breeding habitat below with particular emphasis on describing the southwestern habitat, because it is less well known as providing habitat for the western yellow-billed cuckoo.

Rangewide breeding habitat. As stated above, rangewide breeding habitat exists primarily in riparian areas along low-gradient streams, with large patches of cottonwood and willow riparian vegetation with an overstory and understory component. The vegetation is often characterized as riparian woodlands. More specifically, rangewide breeding habitat is characterized as having broad floodplains and open riverine valleys that provide wide floodplain conditions. The general habitat characteristics are areas that are often greater than 325 feet (ft) (100 meter (m)) wide, contain low-gradient rivers and streams (surface slope usually less than 3 percent), are part of floodplains created where rivers and streams enter upstream portions of reservoirs or other water impoundments, or are in areas associated with irrigated upland terraces adjacent to water courses or riparian floodplains. The habitat is usually dominated by willow or cottonwood, but sometimes by other riparian species. The habitat has above-average canopy closure (greater than 70 percent), and a cooler, more humid environment than the surrounding riparian and upland habitats. The plant species most often associated with rangewide breeding habitat are identified above (see General Breeding (nesting) Habitat Conditions), and each may be dominant depending on location. These areas contain the moist conditions that support riparian plant communities made up of overstory and understory components that provide breeding sites, shelter, cover, and food resources for the western yellow-billed cuckoo. However, all foraging needs may not be provided within areas of critical habitat. Western yellow-billed cuckoo use rangewide breeding habitat as described above throughout the DPS, including where it occurs in the Southwest and the states of Sonora and Sinaloa, Mexico.

Southwestern breeding habitat. In parts of the Southwestern United States and the states of Sonora and Sinaloa, Mexico, western yellow-billed cuckoo breeding habitat is more variable than in the rest of its range. Southwestern breeding habitat includes riparian woodland (including mesquite bosque) and desert scrub and desert grassland drainages with a tree component, and Madrean evergreen woodland (oak-dominated) drainages (particularly in southern Arizona). In areas where water is especially limited, but is nonetheless productive in terms of food and cover for western yellow-billed cuckoos, breeding habitat often consists of narrow, patchy, and/or sparsely vegetated drainages surrounded by arid-adapted vegetation. Due to more arid conditions, southwestern breeding habitat contains a greater proportion of xeroriparian and nonriparian tree species than elsewhere in the DPS. Riparian trees (including xeroriparian) in these ecosystems may even be more sparsely distributed and less prevalent than nonriparian trees.

Southwestern breeding habitat may be less than 325 ft (100 m) wide due to narrow canyons or limited water availability that do not allow for development of wide reaches of habitat. Southwestern breeding habitat is often but not always 200 ac (81 ha) or more in size, and may consist of a series of smaller patches separated by openings. Occurring in both low- and high-gradient drainages, slope does not appear to be a factor in whether or not western yellow-billed cuckoos select these areas for nesting. Often interspersed with large openings, southwestern breeding habitat includes narrow stands of trees, small groves of trees, or sparsely scattered trees. As such, the canopy closure is variable, and where trees are sparsely scattered, it may be dense only at the nest tree. The North American Monsoon brings high humidity and rainfall to some of these habitats especially in the ephemeral drainages in southeastern Arizona where winters are mild and warm wet summers are associated with the monsoon and other tropical weather events (Wallace *et al.* 2013a, entire; Erfani and Mitchell 2014, pp. 13,096–13,097).

Riparian drainages in southwestern breeding habitat bisect other habitats and often contain a mix of habitats such as riparian and Madrean evergreen woodland tree species, riparian broadleaf and mesquite-bosque, riparian and desert grassland tree and large shrub species, or riparian and desert scrub tree and large shrub species. More than one vegetation type within and adjacent to the drainage may contribute toward nesting habitat. For example, mesquite, with deeper roots that can reach the water table, often flanks the upland perimeter of more water-dependent cottonwood-willow riparian habitat. Drainage bottoms in these habitats consist of both riparian and

nonriparian trees and may be dominated by cottonwood, willow, xeroriparian tree species (*e.g.,* hackberry, ash, sycamore, walnut), or oak (Sogge *et al.* 2008, pp. 148–149; Johnson *et al.* 2012, pp. 20–21; WestLand Resources, Inc. 2013a, pp. 3–5; Villarreal *et al.* 2014, p. 58; Griffin 2015, pp. 17–25; MacFarland and Horst 2015, pp. iiii, 2, 5–7; Westland Resources, Inc. 2015a, pp. 3–4; Westland Resources, Inc. 2015b, pp. 3–4; Westland Resources, Inc. 2015c, entire).

Common riparian trees (including xeroriparian trees) include cottonwood, willow, mesquite, boxelder, sycamore, ash, alder, walnut, soapberry, desert willow, hackberry, Arizona cypress, tamarisk, and Russian olive. Common nonriparian trees and large shrubs include oak, pinyon, juniper, acacia, greythorn, mimosa, mesquite (upland), and sometimes other pine species (NatureServe 2013, pp. 11–18, 42–113, 132–140). In Arizona, occupied habitat within a single drainage may include both rangewide breeding habitat and southwestern breeding habitat, transitioning from large stands of gallery riparian forest to mesquite woodland, or narrow or patchy stands of more xeroriparian habitat. These drainages include but are not limited to parts of the Gila River, upper Verde River, Blue River, Eagle Creek, Tonto Creek, San Francisco River, Aravaipa Creek, San Pedro River, lower Cienega Creek, and the Rio Grande (Corman and Magill 2000, pp. 37–48; Sogge *et al.* 2008, pp. 148–149; Johnson *et al.* 2012, pp. 20–21; Cornell Lab of Ornithology 2016 (eBird data); Arizona Game and Fish Department 2018, entire).

In southeastern Arizona, occupied southwestern breeding habitat contains a more arid mix of both southwestern riparian and Madrean evergreen woodland tree species, riparian broadleaf trees and mesquite bosque, riparian and desert grassland tree and large shrub species, or riparian and desert scrub tree and large shrub species. This habitat is found in drainages in the Santa Catalina Mountains, Rincon Mountains, Santa Rita Mountains, Patagonia Mountains, Huachuca Mountains, Pajarito/Atascosa Mountains, Whetstone Mountains, Dragoon Mountains, and Buenos Aires National Wildlife Refuge, among others (Corman and Magill 2000, pp. 37–48; WestLand Resources, Inc. 2013a, pp. 3–5; Westland Resources, Inc. 2013b, pp. 1–9; Griffin 2015, pp. 17–25; MacFarland and Horst 2015, pp. i–iii, 2, 5–7; Tucson Audubon 2015, p. 44; WestLand Resources, Inc. 2015a, pp. 3–4; WestLand Resources, Inc. 2015b, pp. 3–4; WestLand Resources, Inc. 2015d, entire; Cornell Lab of Ornithology 2016 (eBird data), Corson 2018, pp. 5, 20; Rorabaugh 2019, *in litt,* entire; Sferra *et al.* 2019, pp. 3–6). In Sonora and Sinaloa, Mexico, western yellow-billed cuckoos also breed in similar riparian habitat bisecting mesquite-dominated woodlands, and semidesert and desert scrub and grassland habitats (Russell and Monson 1998, p. 131). We summarize information on southwestern breeding habitat that is made up of southwestern riparian, desert scrub and grassland drainages with a tree component, and Madrean evergreen woodland drainage habitats below.

Southwestern riparian habitat. This more arid riparian woodland occurs in perennial and intermittent drainages and floodplains. The extent of riparian vegetation is often narrower, patchier, and sparser than in breeding habitat elsewhere due to limited water for riparian tree regeneration and survival. Trees may occur in narrow linear reaches, in small and patchy groves, or sparsely scattered along the drainage or floodplain. This habitat is often composed of a greater proportion of more arid-adapted riparian tree species and/or is more sparsely vegetated than rangewide riparian breeding habitat. The proportion of cottonwood and willow declines as water becomes more limited. Southwestern riparian breeding habitat may transition into xeroriparian habitat within a single drainage. Narrow or patchy riparian breeding habitat is often found intersecting desert scrub, desert grassland, and Madrean evergreen woodland breeding habitat.

Remnant mesquite bosques, historically extensive throughout the Southwest along major rivers, still occupy some wide floodplains in parts of Arizona and New Mexico. These remnant mesquite bosques include parts of the lower Colorado River, Gila, Salt, San Pedro, Santa Cruz, and Rio Grande Rivers. In Sonora, Mexico, mesquite bosques where western yellow-billed cuckoos have nested have also been greatly reduced (Russell and Monson 1988, p. 131). Southwestern mesquite bosque breeding habitat is often found flanking the outer edge of riparian habitat, where the water table is too deep for cottonwood and willow trees. For example, Arizona's upper San Pedro River contains extensive reaches of mesquite bosque breeding habitat adjacent to the cottonwood and willow dominated breeding habitat in a broad floodplain.

Arid conditions and water management in the Southwest often influences stream flows into and downstream of reservoirs, limiting riparian vegetation regeneration, growth, and survival. In Arizona and New Mexico, narrow or patchy riparian breeding habitat can be found adjacent to heavily managed floodplains (such as areas within Caballo Reservoir and the Lower Rio Grande for example (White *et al.* 2018, pp. 26–27)). Hydrologically perennial systems become intermittent or ephemeral due to reservoir management or water delivery requirements. For example, water abundance at Caballo Reservoir and downstream on the Lower Rio Grande varies from year to year and timing of release may not occur prior to or throughout the western yellow-billed cuckoo breeding season. As a result, riparian (including xeroriparian) habitat may persist only as narrow bands or scattered patches along the bankline or as small in-channel islands, or sections of undisturbed native willows within the reservoir. Habitat within these areas may be as small as approximately 30 ac (12 ha) and are typically composed of either willow, tamarisk, or a mix of the two (White *et al.* 2018, pp. 26–27). Adjacent habitat may include mowed nonnative vegetation typically less than 1 ft (0.3 m) tall or higher terraces within the floodplain with mesquite or other drought tolerant vegetation.

Desert scrub and desert grassland drainages (with a tree component). These Southwestern breeding habitats include drainages with a tree component intersecting desert scrub and desert grassland in intermittent and ephemeral drainages. Tree and large shrub species such as mesquite, hackberry, acacia, mimosa, and or greythorn are always present (NatureServe 2013, pp. 88, 134). Riparian (including xeroriparian) trees and large shrubs may have a minor presence in the drainage bottoms. Tree density ranges from sparse to dense in the drainage bottom and adjacent hillside.

Madrean evergreen woodland drainage habitat. This plant community is dominated by evergreen oak species, but often contains other tree species such as mesquite, juniper, acacia, and hackberry (Brown 1994, pp. 59–62) and is found in southeastern Arizona and southwestern New Mexico's mountain ranges, and resembles habitat found in the Sierra Madre Occidental of Mexico. Western yellow-billed cuckoos breed in the intermittent and ephemeral drainages bisecting Madrean evergreen woodlands in the bajadas, foothills, and mountains of southeastern Arizona (Corman and Magill 2000, pp. 37–48; WestLand Resources, Inc. 2013a, pp. 3–5; Westland Resources 2013b, pp. 1–9; American Birding Association 2014, entire; Cornell Lab of Ornithology 2015

(eBird data); Griffin 2015, pp. 17–25; MacFarland and Horst 2015, pp. i–iii, 2, 5–7; WestLand Resources, Inc. 2015a, pp. 3–4; WestLand Resources, Inc. 2015b, pp. 3–4; Westland Resources, Inc. 2015c, entire; Dillon *et al.* 2018, pp. 31–33; White *et al.* 2018, pp. 26–27; Sferra *et al.* 2019, pp. 3, 9–11). Riparian (including xeroriparian) trees and large shrubs may be present, but are often sparsely distributed or in a narrow band along the drainage bottom. The hillsides immediately adjacent to the tree-lined drainages range from dense woodlands to sparsely treed savannahs with a variety of grasses, contributing toward foraging and breeding habitat for the western yellow-billed cuckoo (Brown 1994, pp. 59–62; Corman and Magill 2000, pp. 37–48; Westland Resources, Inc. 2013a, pp. 3–5; Westland Resources, Inc. 2013c, pp. 1–9; American Birding Association 2014, entire; Cornell Lab of Ornithology 2015 (eBird data); Arizona Game and Fish Department 2015, entire; MacFarland and Horst 2015, pp. 9–12; Westland Resources, Inc. 2015a, pp. 3–4; Westland Resources, Inc. 2015b, pp. 3–4; Westland Resources, Inc. 2015c, entire; Corson 2018, entire).

In 2015, western yellow-billed cuckoos were found in the Coronado National Forest using the Madrean evergreen woodland drainages dominated by oak trees, often with mesquite trees flanking the riparian strip (MacFarland and Horst 2015, pp. 1, 7). The drainages often merge into the surrounding vegetation of juniper. In the wettest reaches of the drainages, the oaks are interspersed with Arizona sycamore, hackberry, willows, occasionally cottonwoods, and a few other infrequently occurring species such as Arizona ash and Arizona walnut (MacFarland and Horst 2015, p. 1). Total canopy cover in occupied habitat was about 52 percent, with oaks as the predominant overstory species recorded (overall average 35 percent), followed by mesquite (20 percent), and juniper (16 percent). The most frequent riparian overstory species were sycamore (3 percent) followed by hackberry (5 percent) and willow (2 percent). The average height of the most prevalent overstory tree species at each point recorded was 20 ft (6.1 m). Habitat occupied during the breeding season (which we also refer to as territories even though western yellow-billed cuckoos may not defend habitat (Hughes 2015, p. 3)) tended to have a higher percentage of mesquites in the community composition, while unoccupied survey points had a higher percentage of junipers (MacFarland and Horst 2015, pp. 9–10). Western yellow-billed cuckoo detections ranged in elevation from 3,564 to 5,480 ft (1,086 to 1,670 m) (MacFarland and Horst 2015, p. 10).

Few western yellow-billed cuckoo detection records in southwestern New Mexico exist between 1998 and 2014 in Madrean evergreen woodland and mesquite woodlands (including other thorn trees and shrubs) habitat similar to southeastern Arizona (Cornell Lab of Ornithology 2016 (eBird)). Much of the southwestern New Mexico habitat is privately owned and is not visited as frequently by birders as is southeastern Arizona. No protocol surveys have been conducted in these areas. Based on the best available survey information, we have not identified confirmed breeding or breeding occupancy in Madrean evergreen woodland and mesquite woodlands in New Mexico. Therefore, no critical habitat is proposed in similar southwestern habitat in southwestern New Mexico because it does not meet our conservation strategy for designating critical habitat.

Tamarisk. Tamarisk, also known as saltcedar, is a common nonnative shrubby tree found occurring along or within stream courses in western yellow-billed cuckoo riparian habitat in southwestern breeding habitat. Tamarisk, as a component of wildlife habitat, is often characterized as being poor habitat for many species of wildlife, but it can be a valuable substitute where the hydrology has been altered to the extent that native woodland habitat can no longer exist (Service 2002, pp. K–11–K–14; Sogge *et al.* 2008, pp. 148–152; Shafroth *et al.* 2010b, entire). The spread of tamarisk and the loss of native riparian vegetation is primarily a result of land and water management actions. Tamarisk does not invade and out-compete native vegetation in the Southwest (Service 2002, p. H–11). Rather, human actions have facilitated tamarisk dispersal to new locales, and created opportunities for its establishment by clearing vegetation, modifying physical site conditions, altering natural river processes, and disrupting biotic interactions (Service 2002, p. H–11). Because the presence and relative dominance of tamarisk is greatly influenced by hydrologic regime and depth to groundwater, native riparian vegetation in tamarisk-dominated systems is unlikely to reestablish unless the hydrologic regime is restored (Stromberg *et al.* 2007, pp. 381–391).

Johnson *et al.* (2008a, pp. 203–204) conducted Arizona surveys in historically occupied western yellow-billed cuckoo riparian habitat in the late 1990s and found 85 percent of all western yellow-billed cuckoo detections in habitat dominated by cottonwood with a strong willow and mesquite understory, 11.5 percent within mixed native and tamarisk habitats, 3.5 percent within mixed native and Russian olive habitats, and only 5 percent within tamarisk-dominated habitats (Johnson *et al.* 2010, pp. 204–205). Even in the tamarisk-dominated habitat, cottonwoods were still present at all but two of these sites.

Although tamarisk monocultures generally lack the structural diversity of native riparian habitat, western yellow-billed cuckoos may use these areas for foraging, dispersal, and breeding, especially if the tamarisk-dominated sites retain some native trees. Tamarisk contributes cover, nesting substrate, temperature amelioration, increased humidity, and insect production where native habitat regeneration and survivability has been compromised by altered hydrology (*e.g.,* reduced flow or groundwater availability) and hydrologic processes (*e.g.,* flooding and sediment deposition). In parts of the western yellow-billed cuckoo's range, some tamarisk-dominated sites are used for nesting and foraging including parts of the Bill Williams, Verde, Gila, Salt, and Rio Grande Rivers (Groschupf 1987, pp. 9, 15; Corman and Magill 2000, pp. 11, 14–16, Leenhouts *et al.* 2006, p. 15; Sogge *et al.* 2008, p. 148; Sechrist *et al.* 2009, p. 55; Dockens and Ashbeck 2011a, pp. 1, B–26; Dockens and Ashbeck 2011b, pp. 8, D–2; Jarnevich *et al.* 2011, p. 170; McNeil *et al.* 2013b, p. I–1; Arizona Game and Fish Department 2014, pp. 1–5; Jakle 2014, entire; Orr *et al.* 2014, p. 25; Salt River Project 2014, entire; Service 2014, p. 63; Arizona-Sonora Desert Museum 2016, entire; Dillon *et al.* 2018 pp. 31–33; White *et al.* 2018 pp. 26–27; and Parametrix, Incorporated (Inc.) and Southern Sierra Research Station 2019, p. 5–1).

Past restoration efforts favored nonnative tamarisk removal without regard for its habitat suitability for the western yellow-billed cuckoo. In areas where tamarisk is a major component (or part of the understory), its removal may not be appropriate or recommended because western yellow-billed cuckoo habitat selection may be based on overstory/understory structure and not on specific vegetation types (Sechrist *et al.* 2009, p. 53). In some areas, if tamarisk is removed, the remaining habitat may be rendered unsuitable because it is more exposed, hotter, and drier.

Another issue in regards to tamarisk is the introduction of biocontrol agents

to remove tamarisk. In 2001, the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) released various species of the nonnative tamarisk leaf beetle (*Diorhabda* sp.) in an effort to control tamarisk invasion (APHIS 2005, p. 4–5). Since 2001, the tamarisk leaf beetle has expanded rapidly and its distribution now encompasses much of the western United States (RiversEdge West, 2018, entire). This expansion of tamarisk defoliation will lead to habitat degradation and may render areas unsuitable for occupancy by the western yellow-billed cuckoo (Sogge *et al.* 2008, p. 150). Defoliation during the breeding season also exposes eggs and nestlings to heat exposure and predation from decreased cover, as was documented in 2008 in St. George, Utah, with the exposure-caused failure of an active southwestern willow flycatcher nest (Paxton *et al.* 2011, p. 257). In defoliated areas of the Rio Grande, canopy cover was still within the natural range of variation; however, the canopy cover was composed of dead leaves as opposed to live leaves, which changed the microclimate (Dillon and Ahlers 2018, pp. 26–27). Ultimately, the sampled areas with the most tamarisk and subsequent defoliation activity reflected the areas with the highest temperature extremes (Dillon and Ahlers 2018, pp. 26–27).

Some tamarisk removal and native tree replacement projects are under way to offset the arrival of tamarisk leaf beetles and subsequent defoliation (Service 2016b, pp. 4–15). If these projects are unsuccessful in sustaining native woodland habitat of at least the same habitat value as habitat that was removed, the end result will be a net loss of habitat. Another nonnative species identified as a biocontrol agent, the tamarisk weevil (*Coniatus* sp.) has also been found in the wild in Arizona, California, Nevada, and Utah (Eckberg and Foster 2011, p. 51; Eichhorst *et al.* 2017, entire). The impact of the tamarisk weevil has not been well studied and currently has not been shown to significantly impact tamarisk-dominated habitats used by the western yellow-billed cuckoo.

Breeding (nesting) habitat and home range size. In rangewide western yellow-billed cuckoo habitat, the habitat used for breeding and nesting by the species varies in size and shape. The available information indicates that the species requires large tracts of habitat for breeding and foraging during the nesting season (home range). The larger the extent of habitat, the more likely it will provide suitable habitat for the western yellow-billed cuckoos and be occupied by nesting pairs (Laymon and Halterman 1989, pp. 274–275). Rangewide breeding habitat can be relatively dense contiguous stands or irregularly shaped mosaics of dense vegetation with more sparse or open areas.

Along the Colorado River in California and Arizona, western yellow-billed cuckoos tend to favor larger riparian habitat sites for nesting (Laymon and Halterman 1989, p. 275): sites less than 37 ac (15 ha) are considered unsuitable nesting habitat; sites between 37 ac (15 ha) and 50 ac (20 ha) in size were rarely used as nest sites; and habitat patches or aggregates of patches from 50 to 100 ac (20 to 40 ha) in size were considered marginal habitat (Laymon and Halterman 1989, p. 275). Habitat areas between 100 ac (40 ha) and 200 ac (81 ha), although considered suitable, are not consistently used by the species in California. The optimal size of habitat patches (aggregates of trees that may be interspersed with openings, sparse understory or canopy, or open floodplains) for the western yellow-billed cuckoo are generally greater than 200 ac (81 ha) in extent and have dense canopy closure and high foliage volume of willows and cottonwoods in at least a portion of the overall habitat patch (Laymon and Halterman 1989, pp. 274–275) and thus provide adequate space for nesting and foraging.

In rangewide riparian breeding habitat and mixed riparian habitat in California, Arizona, and New Mexico, the home ranges used by the western yellow-billed cuckoo during the breeding season varied greatly but averaged over 100 ac (40 ha) (Laymon and Halterman 1987, pp. 31–32; Halterman 2009, p. 93; Sechrist *et al.* 2009, p. 55; McNeil *et al.* 2010, p. 75; McNeil *et al.* 2011, p. 37; McNeil *et al.* 2012, p. 69; McNeil *et al.* 2013a, pp. 133–134; McNeil *et al.* 2013b, pp. 49–52). On the Rio Grande in New Mexico, Sechrist *et al.* (2009, p. 55) estimated a large variation in home range size, ranging from 12 to 697 ac (5 to 282 ha), and averaging 202 ac (82 ha). On the upper San Pedro River in Arizona, Halterman (2009, pp. 67, 93) also estimated a large variation in home range size, ranging from 2.5 to 556 ac (1 to 225 ha), and averaging 126 ac (51 ha). In the intermountain west (Idaho, Utah, Colorado), the western yellow-billed cuckoo breeds in similar habitats as described above but are more scattered and in lower density (Parrish *et al.* 1999, p. 197; Taylor 2000, pp. 252–253; Idaho Fish and Game 2005, entire; Wiggins 2005, p. 15). These measures suggest that the amount of habitat required to support nesting western yellow-billed cuckoos even in rangewide riparian breeding habitat is variable.

Home range size is unknown in southwestern breeding habitat, including in more xeroriparian woodland, desert scrub and desert grassland drainages with a tree component and in Madrean evergreen woodland. Whether the area is considered marginal, suitable, or optimal depends on numerous factors and is variable across the species' range. Breeding habitat in more arid regions of the Southwest may be made up of a series of adjacent or nearly adjacent habitat patches, less than 200 ac (81 ha) each, which combined make up suitable breeding habitat for the species. Often interspersed with large openings, these habitat patches include narrow stands of trees, small groves of trees, or sparsely scattered trees. For example, in the Agua Fria River in central Arizona, occupied habitat consists not only of mature cottonwood and willow gallery forest (multi-aged and multi-height forest) found in rangewide breeding habitat, but also smaller patches of young willows that are limited to narrow riparian corridors with mesquite on the adjacent terrace characteristic of southwestern breeding habitat (Prager and Wise 2015, p. 13). In the bajadas, foothills, and mountain drainages of southeastern Arizona, scattered overstory trees, small patches of trees, or narrow stands of trees contain suitable breeding habitat (MacFarland and Horst 2015, entire, Corson 2018, pp. 5, 6–20; Sferra *et al.* 2019, entire).

Although large expanses of habitat are better than small patches for the species, small habitat patches should be evaluated when managing for the western yellow-billed cuckoo. The optimal minimum breeding habitat patch size of 200 ac (81 ha) may not be applicable for much of the Southwest, where breeding habitat may be narrower and patchier and areas of less than 40 ac (16 ha) may be used for breeding (Sechrist *et al.* 2009, p. 55; White *et al.* 2018, pp. 14–37). These smaller sites support fewer western yellow-billed cuckoos, but collectively they may be important for achieving recovery.

Western yellow-billed cuckoos appear to stage in southern Arizona or northern Mexico pre- and post-breeding, suggesting that this region is important to the DPS (McNeil *et al.* 2015, pp. 249, 251). Some individuals also roam widely (several hundred miles), apparently assessing food resources prior to selecting a nest site (Sechrist *et al.* 2012, pp. 2–11). A plausible explanation for prolonged presence in southern Arizona and northwestern Mexico pre- and post-breeding may be

that western yellow-billed cuckoos are taking advantage of increased insect production in the monsoonal area. Identifying and maintaining habitat across the species' range is important to allow the species to take advantage of variable environmental conditions for successful breeding opportunities.

Foraging area. Western yellow-billed cuckoos select a nesting site based on optimizing the near-term foraging potential of the neighborhood (Wallace *et al.* 2013a, p. 2102). Given that western yellow-billed cuckoos are larger birds with a short hatch-to-fledge time, the adults must have access to abundant food sources to successfully rear their offspring. Optimal foraging habitat contains a mixture of overstory and understory vegetation (typically cottonwoods and willows) that provides for diversity and abundance of prey. Western yellow-billed cuckoos generally forage within the tree canopy, and the higher the foliage volume the more likely western yellow-billed cuckoos are to use a site for foraging (Laymon and Halterman 1985, pp. 10–12). Foraging areas can be less dense with lower levels of canopy cover and often have a high proportion of cottonwoods in the canopy. Foraging areas can also include riparian habitat with a high abundance of tamarisk.

The foraging distance and size of foraging habitat required by western yellow-billed cuckoo varies on prey availability and other environmental conditions and may vary annually and from site to site. A foraging area during the breeding season may overlap with other western yellow-billed cuckoo foraging areas if multiple nest sites are within a single area. Hughes (2015, p. 3) suggests that adjacent nesting western yellow-billed cuckoos use time spacing (*i.e.,* no overlap in egg dates) to partition resources, allowing many nesting pairs to share localized short-term abundance of food. In a study in rangewide breeding habitat in the Sacramento Valley, California, the mean size of foraging areas for 4 pairs of western yellow-billed cuckoos was approximately 48 ac (19 ha) (range 27 to 70 ac (11 to 28 ha)) of which about 25 ac (10 ha) was considered usable habitat for foraging (Laymon 1980, p. 20; Hughes 1999, p. 7).

In the southwestern United States and northern Mexico, western yellow-billed cuckoo foraging habitat is usually more arid than adjacent occupied nesting habitat. Western yellow-billed cuckoos not only forage within woodland breeding habitat, but they also forage in almost any adjacent habitat. Desert vegetation in intermittent and ephemeral drainages or adjacent upland areas may require direct precipitation to flourish (Wallace *et al.* 2013a, p. 2,102). Other desert areas with spring-fed habitat may provide similar habitat conditions. Both are important features of western yellow-billed cuckoo foraging habitat in the arid Southwest. In Arizona and New Mexico, adjacent foraging habitat includes several types of semidesert scrub, desert scrub, chaparral, semidesert grassland, and desert grassland (Brown and Lowe 1982, entire; Brown 1994, entire; Brown *et al.* 2007, pp. 4–5). An exception to the habitat characteristics identified above occurs in New Mexico along the Rio Grande, where 29 percent of all estimated territories in the period 2009–2014 were located in understory vegetation (considered less than 6 m (15 ft) in height) that lacked a canopy component (considered less than 25 percent cover), but included a New Mexico olive (*Forestiera neomexicana*) component (Hamilton 2014, p. 3–84). Of these understory areas, roughly half were dominated by exotic species (primarily tamarisk) (Carstensen *et al.* 2015, pp. 57–61). Western yellow-billed cuckoos in New Mexico have also been observed foraging in adjacent habitat up to 0.5 mi (0.8 km) away from nest sites (Sechrist *et al.* 2009, p. 49). In the intermountain west (Idaho, Utah, Colorado), the western yellow-billed cuckoo breeds in similar habitats as described above but are more scattered and in lower density (Parrish *et al.* 1999, p. 197; Taylor 2000, pp. 252–253; Idaho Fish and Game 2005, entire; Wiggins 2005, p. 15).

Movement corridors and connectivity of habitat. The western yellow-billed cuckoo is a neotropical migratory species that travels between North, Central, and South America each spring and fall (Sechrist *et al.* 2012, p. 5; McNeil *et al.* 2015, p. 244; Parametrix, Inc. and Southern Sierra Research Station 2019, pp. 97–108). As such, it needs movement corridors of linking habitats and stop-over sites along migration routes and between breeding areas (Faaborg *et al.* 2010, pp. 398–414; Allen and Singh 2016, p. 9). During movements between nesting attempts, western yellow-billed cuckoos have been found at riparian sites with small groves or strips of trees, sometimes less than 10 ac (4 ha) in extent (Laymon and Halterman 1989, p. 274). The habitat features at stop-over and foraging sites are typically similar to the features at breeding sites, but may be smaller in size, may be narrower in width, and may lack understory vegetation. Western yellow-billed cuckoos may be using nonbreeding areas as staging areas or taking advantage of local foraging resources (Sechrist *et al.* 2012, pp. 7–9; McNeil *et al.* 2015, pp. 250–252). As a result, western yellow-billed cuckoos use nonbreeding or intermittently used breeding areas as staging areas, movement corridors, connectivity between habitats, or foraging sites (taking advantage of local foraging resources). However, because these nonbreeding habitat areas are not limiting, we have not specifically identified them as critical habitat.

Therefore, based on the information above, for the majority of habitat within the species' range, we identify rivers and streams of lower gradient and more open valleys with a broad floodplain, containing riparian woodland habitat with an overstory and understory vegetation component made up of various plant species (most often dominated by willow or cottonwood) to be physical or biological features essential to the conservation of the western yellow-billed cuckoo. In more arid regions of the southwestern United States, we also identify reaches of more xeroriparian habitat (including mesquite bosques), desert scrub, and desert grassland drainages with a tree component, and Madrean evergreen woodland drainages in low- to high-gradient drainages to be a physical or biological feature essential to the conservation of this species. These habitat types provide space for breeding, nesting, and foraging for the western yellow-billed cuckoo. These habitat features also provide for migratory or stopover habitat and movement corridors for the western yellow-billed cuckoo. Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Food. Western yellow-billed cuckoos eat large insects but also prey on small vertebrates such as frogs (*e.g., Hyla* spp.; *Pseudacris* spp.; *Rana* spp.) and lizards (*e.g., Lacertilia* sp.) (Hughes 1999, p. 8). The diet of the western yellow-billed cuckoo on the South Fork Kern River in California showed the majority of the prey to be the big poplar sphinx moth larvae (*Pachysphinx occidentalis*) (45 percent), tree frogs (24 percent), katydids (22 percent), and grasshoppers (Order *Othoptera*) (9 percent) (Laymon and Halterman 1985, pp. 10–12; Laymon *et al.* 1997, p. 7). Minor prey at that site and other sites includes beetles (Order *Coleoptera* sp.), dragonflies (Order *Odonata*), praying mantis (Order *Mantidae*), flies (Order *Diptera*), spiders (Order *Araneae*), butterflies (Order *Lepidoptera*), caddis flies (Order *Trichoptera*), crickets (Family *Gryllidae*), and cicadas (Family Cicadidae) (Laymon *et al.* 1997, p. 7;

Hughes 1999, pp. 7–8). In Arizona, cicadas are an important food source (Halterman 2009, p. 112). Western yellow-billed cuckoos on the Buenos Aires National Wildlife Refuge in Arizona were observed eating tent caterpillars, caterpillars of unidentified species, katydids, and lizards (Griffin 2015, pp. 19–20). At upper Empire Gulch in southeastern Arizona, a western yellow-billed cuckoo was photographed in a tree in gallery riparian forest with a leopard frog (*Rana* spp.) in its bill on July 21, 2014 (Barclay 2014, entire; Leake 2014a, b, entire). In the intermountain west (Idaho, Utah, Colorado), the western yellow-billed cuckoo feeds on similar insect species (Parrish *et al.* 1999, p. 197; Idaho Fish and Game 2005, p. 2; Wiggins 2005, p. 18).

Western yellow-billed cuckoos depend on an abundance of large, nutritious insect and vertebrate prey to survive and raise young. In portions of the southwestern United States, high densities of prey species may be seasonally found, often for brief periods of time, during the vegetation growing season. The arrival and nesting of western yellow-billed cuckoos typically coincides with the availability of prey, which is later than in the eastern United States (eBird data). Desiccated riparian sites produce fewer suitable insects than moist sites. In areas that typically receive rains during the summer monsoon, an increase in humidity, soil moisture, and surface water flow are important triggers for insect reproduction and western yellow-billed cuckoo nesting (Wallace *et al.* 2013a, p. 2,102). Western yellow-billed cuckoos select a nesting site based on optimizing the near-term foraging potential of the habitat (Wallace *et al.* 2013a, p. 2,102). Given that western yellow-billed cuckoos are large birds with a short hatch-to-fledge time, the adults must have access to abundant food sources to successfully rear their offspring (Laymon 1980, p. 27). The variability of monsoon precipitation across a region may result in areas with favorable conditions for western yellow-billed cuckoo nesting in one year and less favorable in a different year. In years of high insect abundance, western yellow-billed cuckoos lay larger clutches (three to five eggs rather than two), a larger percentage of eggs produce fledged young, and they breed multiple times (two to three nesting attempts rather than one) (Laymon *et al.* 1997, pp. 5–7).

Therefore, we identify the presence of abundant, large insect fauna (*e.g.,* cicadas, caterpillars, katydids, grasshoppers, crickets, large beetles, dragonflies, and moth larvae) and small vertebrates (frogs and lizards) during nesting season of the western yellow-billed cuckoo to be a physical or biological feature essential to the conservation of the species.

Water and humidity. Rangewide breeding habitat for western yellow-billed cuckoo is largely associated with perennial rivers and streams that support the expanse of vegetation characteristics needed by breeding western yellow-billed cuckoos. Throughout the western yellow-billed cuckoo's range, winter precipitation (as rain or snow) provides water flow to the larger streams and rivers in the late spring and summer. In southwestern breeding habitat, western yellow-billed cuckoos also breed in ephemeral and intermittent drainages, some of which are associated with monsoonal precipitation events. Hydrologic conditions at western yellow-billed cuckoo breeding sites can vary between years. At some locations during low rainfall years, water flow may be reduced or absent, or soils may not become saturated at appropriate times. During high rainfall years, streamflow may be extensive and the riparian vegetation can be inundated and soil saturated for extended periods of time.

The North American Monsoon (monsoon) is a large-scale weather pattern that causes high humidity and a series of thunderstorms during the summer in northwestern Mexico and the southwestern United States (Erfani and Mitchell 2014, pp. 13,096–13,097; National Weather Service 2019, p. 4). It supplies about 60–80 percent of the annual precipitation for northwestern Mexico, 45 percent for New Mexico, and 35 percent for Arizona (Erfani and Mitchell 2014, p. 13,096). The monsoon typically arrives in early to mid-July in Arizona and New Mexico, where much of the rainfall occurs in the mountains (Erfani and Mitchell 2014, pp. 13,096–13,097; National Weather Service 2019, p. 2). The southwestern United States, at the northern edge of the monsoon's range, receives less and more variable rainfall than northwestern Mexico (National Weather Service 2019, p. 2).

Humid conditions created by the North American Monsoon (Erfani and Mitchell 2014, pp. 13,096–13,097; National Weather Service 2019, p. 2) and related surface and subsurface moisture appear to be important for the western yellow-billed cuckoo. The species is restricted to nesting in moist riparian habitat or in drainages that bisect semi-desert, desert grasslands, semi-desert, desert scrub, and Madrean evergreen woodland in the portions of the western United States and northern Mexico because of humidity requirements for successful hatching and rearing of young (Hamilton and Hamilton 1965, p. 427; Gaines and Laymon 1984, pp. 75–76; Rosenberg *et al.* 1991, pp. 203–204; Corman and Magill 2000, pp. 37–48; Westland Resources, Inc. 2013a, pp. 3–5; Westland Resources, Inc. 2013c, pp. 1–9; American Birding Association 2014, entire; Arizona Game and Fish Department 2018, entire; Cornell Lab of Ornithology 2018, (eBird data); Westland Resources, Inc. 2015a, pp. 3–4; Service 2018, entire).

Western yellow-billed cuckoos have evolved larger eggs and thicker eggshells, which help them cope with potential higher egg water loss in the hotter, drier conditions of the Southwest (Hamilton and Hamilton 1965, pp. 426–430; Ar *et al.* 1974, pp. 153–158; Rahn and Ar 1974, pp. 147–152). Nest sites have lower temperatures and higher humidity compared to areas along the riparian forest edge or outside the forest (Launer *et al.* 1990, pp. 6–7, 23). Recent research on the lower Colorado River has confirmed that western yellow-billed cuckoo nest sites had significantly higher daytime relative humidity (6–13 percent higher) and significantly lower daytime temperatures (2–4 degrees Fahrenheit (1–2 degrees Celsius) lower) than average forested sites (McNeil *et al.* 2011, pp. 92–101; McNeil *et al.* 2012, pp. 75–83).

Seasonal precipitation results in vegetative regeneration in the intermittent and ephemeral drainages and adjacent desert scrub, desert grassland, and Madrean evergreen woodlands of the southwestern United States. High summer monsoonal humidity and rain lead to summer flow events in drainages and increased vegetative growth and associated insect production during the breeding season. The North American Monsoon promotes growth of shallow-rooted understory vegetation in mesquite-dominated woodlands, Madrean evergreen woodlands, desert scrub drainages, desert grassland drainages, and adjacent desert and grassland vegetation (Brown 1994, pp. 59–62; Wallace *et al.* 2013a, p. 2,102). The hydrologic processes in Madrean evergreen woodlands, semi-desert and desert scrub drainages, and semi-desert and desert grassland drainages of southeastern Arizona are different than the rest of the range of the western yellow-billed cuckoo. These upland habitats on gently rolling hillsides are interspersed with intermittent or ephemeral drainages. Humidity brought on by the summer monsoon may be an especially important trigger for breeding western

yellow-billed cuckoos in this otherwise dry landscape.

Nesting continues through August and frequently into September in southeastern Arizona, likely in response to the increased food resources associated with the seasonal summer rains (Corman and Wise-Gervais 2005, p. 202). For example, the big poplar sphinx moth is an earth pupator (larvae burrow in the ground, and pupae emerge under certain environmental conditions) (Oehlke 2017, p. 5). The sphinx moth has a receptor that detects the water content of air to sense changes in humidity and when conditions are favorable for feeding and breeding (McFarland 1973, pp. 199–208; von Arx *et al.* 2012, p. 9,471). In riparian woodland habitat soil, moisture and humidity cue the sphinx moths to emerge. In Arizona, summer monsoonal precipitation mimics typical riparian woodland soil moisture conditions, which cue the sphinx moth to emerge from the soil. Although sphinx moths are just one of the foods eaten by western yellow-billed cuckoos, we use these moths to illustrate that the unique monsoonal conditions in southeastern Arizona contributing toward food production are an important factor in western yellow-billed cuckoo presence in southeastern Arizona.

A large proportion of the remaining occupied habitat persists in hydrologically altered systems in the Southwest where the timing, magnitude, and frequency of natural flow have changed (Service 2002, pp. J1–J34). Hydrologically altered systems, with less dynamic riverine process than unaltered systems, can support suitable western yellow-billed cuckoo habitat if suitable woodland vegetation as described above is present. As discussed above and in the October 3, 2014, **Federal Register** listing the western yellow-billed cuckoo (79 FR 59992), human actions have cleared vegetation, modified physical site conditions, altered natural river processes, and disrupted biotic interactions along much of the western yellow-billed cuckoo habitat in the west (Service 2002, p. H–11). In the intermountain west (Idaho, Utah, Colorado), similar losses and degradation of habitat have occurred (Parrish *et al.* 1999, pp. 200–201; Idaho Fish and Game 2005, p. 3; Wiggins 2005, pp. 22–27). Habitat conditions are greatly influenced by hydrologic regime and depth to groundwater, and native riparian vegetation in altered systems is unlikely to reestablish unless the hydrologic regime is restored (Stromberg *et al.* 2007, pp. 381–391). However, these altered systems, which often cannot support the native plant species and structural diversity of unaltered systems, can support more adapted nonnative tree species like tamarisk or Russian olive. Western yellow-billed cuckoos occupy nonnative habitat interspersed with native habitat on the Colorado, Bill Williams, Verde, Gila, Santa Cruz, San Pedro, and Rio Grande Rivers (Corman and Magill 2000, pp. 15–16, 37–48; Sonoran Institute 2008, pp. 30–34; Dockens and Ashbeck 2011a, p. 6; Dockens and Ashbeck 2011b, p. 10; McNeil *et al.* 2013b, p. I–1; Arizona Game and Fish Department 2016, entire; Parametrix, Inc. and Southern Sierra Research Station 2019, p. 5–1).

Subsurface hydrologic conditions are equally important to surface water conditions in determining riparian vegetation patterns. Depth to groundwater plays an important part in the distribution of riparian vegetation and western yellow-billed cuckoo habitat. Riparian forest trees need access to shallow groundwater to grow to the appropriate size and density to provide habitat for nesting, foraging, and migrating western yellow-billed cuckoos. Goodding's willows and Fremont cottonwoods do not regenerate successfully if the groundwater levels fall below 6 ft (2 m) from the surface (Shafroth *et al.* 2000, pp. 66–75). Goodding's willows cannot survive if groundwater levels drop below 10 ft (3 m), and Fremont cottonwoods cannot survive if groundwater drops below 16 ft (5 m) (Stromberg and Tiller 1996, p. 123). Abundant and healthy riparian vegetation decreases and habitat becomes stressed and less productive when groundwater levels are lowered (Stromberg and Tiller 1996, pp. 123–127).

Therefore, based on the information above, we identify seasonally or perennially flowing rivers, streams, and drainages; elevated subsurface groundwater tables; vegetative cover that provides important microhabitat conditions for successful breeding and prey (high humidity and cooler temperatures); seasonal precipitation (winter and summer) in the Southwest; and high summer humidity as physical and biological features essential to the conservation of the western yellow-billed cuckoo.

Conditions for germination and regeneration of vegetation. The abundance and distribution of fine sediment deposited on floodplains during flood events is critical for the development, abundance, distribution, maintenance, and germination of riparian tree species. This sediment deposition must be accompanied by sufficient surface moisture for seed germination and sufficient groundwater levels for survival of seedlings and saplings (Stromberg 2001, pp. 27–28). The lack of stream flow processes, which deposit such sediments and clear out woody debris, may lead riparian forested areas to senesce (age and become less productive) and to become degraded and not able to support the varied vegetative structure required for western yellow-billed cuckoo nesting and foraging.

In unmanaged hydrologic systems (natural riverine systems), associated with rangewide breeding habitat, this variability of water flow results in removal of stream banks and deposition of soil and sediments. These sediments provide areas for vegetation (especially cottonwood and willow) to colonize and provide diverse habitat for the western yellow-billed cuckoo. In managed hydrologic systems (systems controlled by dams), stream flow is often muted and does not provide the magnitude of these removal and deposition events except during flood events depending on stream-bank composition (Fremier *et al.* 2014, pp. 4–6). However, if these systems are specifically managed to mimic more natural conditions, some removal and deposition can occur. The range and variation of stream flow frequency, magnitude, duration, and timing that will establish and maintain western yellow-billed cuckoo habitat can occur in both managed and unmanaged flow conditions depending on the interaction of the water feature and its floodplain or the physical characteristics of the landscape.

However, successional vegetation change that produces suitable habitat consisting of varied vegetative structure can also occur in managed river and reservoir systems (and in human-altered river systems) when managed to mimic natural stream flows, but sometimes with different vegetation species composition, at different timing, frequency, and magnitude than natural riverine systems. For example, varying amounts of western yellow-billed cuckoo habitat are available from month-to-month and year-to-year as a result of dam operations. During dry years, when lake levels may be low, vegetation can be established and mature into habitat for the western yellow-billed cuckoo. In wet years, this vegetation can be flooded for extended periods of time and be stressed or killed. This is particularly true of areas upstream of reservoirs like Lake Isabella in California, Roosevelt and Horseshoe Reservoirs in Arizona, and Elephant Butte Reservoir in New Mexico, all of which have relatively large western yellow-billed cuckoo populations. The

filling and draw-down of reservoirs often mimics the flooding and drying events associated with intact riparian woodland habitat and river systems providing habitat for the western yellow-billed cuckoo.

In southern Arizona and New Mexico, where water is less available and releases do not mimic the natural hydrograph, riparian habitat is often narrower, patchier, sparser, and composed of more xeroriparian and nonriparian trees and large shrubs than in a free flowing river. Habitat regeneration opportunities occur less frequently than in natural systems or managed systems that mimic the natural hydrograph. Prolonged drying and flooding from reservoir management can also affect food resources and habitat suitability for western yellow-billed cuckoos. For example, food availability is affected when prolonged inundation reduces survivability of ground-dwelling insects such as sphinx moth pupa or katydid eggs (Peterson *et al.* 2008, pp. 7–9). Likewise, prolonged drying reduces the vegetation available for prey insects to consume, so less insect biomass is available for western yellow-billed cuckoos.

In the southwestern United States, the North American Monsoon season, which peaks in July and August when western yellow-billed cuckoos are breeding, provides about 45 percent and 35 percent of the annual precipitation for New Mexico and Arizona, respectively (Erfani and Mitchell 2014, p. 13,096). The increased humidity and rains promote rapid and dense herbaceous growth (forbs, grasses, and vines) in occupied habitat in riparian (including xeroriparian) drainages intersecting desert scrub and desert grassland, and Madrean evergreen woodlands. In southeastern Arizona, Madrean evergreen woodland habitat receives half of the annual precipitation during the growing season from May through August (Brown 1994, pp. 60, 62).

Therefore, based on the information above, we identify flowing perennial rivers and streams and deposited fine sediments as physical and biological features essential to the conservation of the western yellow-billed cuckoo. These conditions may occur in either natural or regulated human-altered riverine systems. We also identify intermittent and ephemeral drainages and immediately adjacent upland habitat (which receive moisture as a result of summer monsoon events and other seasonal precipitation) that promote seed germination and regeneration as essential physical or biological features of western yellow-billed cuckoo habitat.

Cover or shelter. Riparian woodland (including mesquite bosques), desert scrub, and desert grassland drainages with a tree component, and Madrean evergreen woodland vegetation provides the western yellow-billed cuckoo with cover and shelter while foraging and nesting. Placing nests in dense vegetation provides cover from predators that would search for adult western yellow-billed cuckoos, their eggs, nestlings, and fledged young. For example, northern harriers (*Circus cyaneus*) prey on western yellow-billed cuckoo nestlings in open riparian vegetation at restoration sites. Dense vegetation in the habitat patch makes it difficult for northern harriers to prey on species like the western yellow-billed cuckoo (Laymon 1998, pp. 12–14). As noted above, shelter provided by the vegetation also contributes toward providing nesting sites, temperature amelioration, and increased humidity, all of which assist in benefiting the life history of western yellow-billed cuckoo.

Therefore, we identify riparian trees, including but not limited to willow, cottonwood, alder, walnut, sycamore, boxelder, ash, mesquite, and tamarisk, that provide cover and shelter for nesting, foraging, and dispersing western yellow-billed cuckoos as physical or biological features essential to the conservation of the western yellow-billed cuckoo. In more arid riparian woodland, desert scrub, and desert grassland drainages with a tree component, and Madrean evergreen woodland drainages of southeastern Arizona, in addition to the riparian species above we identify oak, upland mesquite, hackberry, sycamore, acacia, juniper, greythorn, mimosa, soapberry, Arizona cypress, desert willow, and pine that provide cover and shelter for nesting, foraging, and dispersing western yellow-billed cuckoos as physical or biological features essential to the conservation of the western yellow-billed cuckoo.

Sites for breeding, reproduction, or rearing (or development) of offspring. Nest site characteristics in rangewide riparian woodland breeding habitat have been compiled from 217 western yellow-billed cuckoo nests on the Sacramento and South Fork Kern Rivers in California, and the Bill Williams and San Pedro Rivers in Arizona. Western yellow-billed cuckoos generally nest in thickets dominated by willow trees along floodplains greater than 200 ac (81 ha) in extent and greater than 325 ft (100 m) in width. Nests are placed on well-foliaged branches closer to the tip of the branch than the trunk of the tree (Hughes 1999, p. 13). Nests are built from 4 ft to 73 ft (1 m to 22 m) above the ground (average 22 ft (7 m)). Nests at the San Pedro River averaged higher (29 ft (9 m)) than either the Bill Williams River (21 ft (6 m)) or the South Fork Kern River (16 ft (5 m)). Nest trees ranged from 10 ft (3 m) to 98 ft (30 m) in height and averaged 35 ft (11 m). In older stands, heavily foliaged branches that are suitable for nesting often grow out into small forest openings or over sloughs or streams, making for ideal nest sites. In younger stands, nests are more often placed in vertical forks or tree crotches. Nest sites in rangewide riparian breeding habitat are placed in willows (72 percent of 217 nests), in generally willow-dominated sites. Nests have also been documented in other riparian tree species, including Fremont cottonwood (13 percent), mesquite (7 percent), tamarisk (4 percent), netleaf hackberry (*Celtis laevigata* var. *reticulata*) (2 percent), English walnut (*Juglans regia*) (1 percent), boxelder (less than 1 percent), and soapberry (*Sapindus saponaria*) (less than 1 percent) (Laymon 1980, p. 8; Laymon 1998, p. 7; Hughes 1999, p. 13; Corman and Magill 2000, p. 16; Halterman 2001, p. 11; Halterman 2002, p. 12; Halterman 2003, p. 11; Halterman 2004, p. 13; Corman and Wise-Gervais 2005, p. 202; Halterman 2005, p. 10; Halterman 2007, p. 5; Holmes *et al.* 2008, p. 21).

Canopy cover directly above the nest is generally dense (averages cover is 89 percent) and is denser at the South Fork Kern River (93 percent) and Bill Williams River (94 percent) than at the San Pedro River (82 percent). Canopy closure in a plot around the nest averages 71 percent and was higher at the Bill Williams River (80 percent) than at the South Fork Kern River (74 percent) or San Pedro River (64 percent) (Laymon *et al.* 1997, pp. 22–23; Halterman 2001, pp. 28–29; Halterman 2002, p. 25; Halterman 2003, p. 27; Halterman 2004, p. 42; Halterman 2005, p. 32; Halterman 2006, p. 34). In the intermountain west (Idaho, Utah, Colorado), the western yellow-billed cuckoo breeds in similar habitats as described above but are more scattered and in lower density (Parrish *et al.* 1999, pp. 196–197; Taylor 2000, pp. 252–253; Idaho Fish and Game 2005, entire; Wiggins 2005, p. 15). Optimal breeding habitat in rangewide riparian breeding habitat contains willow-dominated groves with dense canopy closure and well-foliaged branches for nest building with nearby foraging areas consisting of a mixture of cottonwoods and willows with a high volume of healthy foliage.

In a study on the lower Colorado River, yellow-billed cuckoos nested in cottonwoods (n = 95, 57.5 percent), Goodding's willows (n = 49, 29.7

percent), honey mesquite (*Prosopis glandulosa*) (n = 13, 7.9 percent), tamarisk (n = 5, 3.0 percent), coyote willow (n = 2, 1.2 percent), and seep willow (n = 1, 0.7 percent) (Parametrix, Inc. and Southern Sierra Research Station 2019, Table 24 p. 89). Trees or shrubs used as nest substrates ranged in height from 2.5 m (8.2 ft) to 25.0 m (82 ft) (mean = 12.3 m (40.4 ft)). Nest heights ranged from 1 m (3.3 ft) to 20 m (66 ft) (mean = 7.6 m (24.8 ft)) (Parametrix, Inc. and Southern Sierra Research Station 2019, pp. ES–3, 88). Cottonwood, willow, and mesquite were planted. Tamarisk was not planted and is uncommon within the revegetation sites.

Some historical records document western yellow-billed cuckoo presence during the breeding season in extensive mesquite bosques on the Santa Cruz River and in the semi-desert grasslands and desert scrub xeroriparian drainages of Canelo Hills; and in the Madrean evergreen woodlands mountain drainages of the Atascosa, Pajarito, Santa Rita, Patagonia, Huachuca, and Chiricahua Mountains of Southeastern Arizona (Groschupf (1987, pp. 11, 14, 16; Corman and Magill 2000, pp. 26–29, 37). In Arizona in the late 1990s, western yellow-billed cuckoos were documented in Sycamore Canyon and Pena Blanca Canyon in the Atascosa Mountains, Canelo Hills, and in the desert scrub and grassland xeroriparian drainages in the Altar Valley on Buenos Aires National Wildlife Refuge (Corman and Magill (2000, pp. 38, 40–44, 48, 51). The first oak nest documented in a Madrean evergreen woodland drainage was found in the lower Santa Rita Mountains in 2014 (Tucson Audubon 2015, p. 44).

In a study to confirm western yellow-billed cuckoo breeding in ephemeral xeroriparian drainages in Madrean evergreen woodland, desert and semi-desert scrub, and semi-desert grassland habitats, 18 nests were found in 15 drainages in the lower Santa Catalina, lower Santa Rita, Patagonia, and lower Atascosa Mountains; and in the bajadas and foothill drainages of Buenos Aires National Wildlife Refuge (Sferra *et al.* 2019, pp. 9–10). Trees where nests were placed varied in size and amount of cover, ranging from small to large trees and from well-concealed nests to partially exposed nests (Service 2018, entire). All but one nest was located along the drainage bottoms (See section on southwestern breeding (nesting) habitat for general Madrean evergreen woodland breeding habitat characteristics).

Therefore, we identify rangewide riparian woodland generally containing willow and cottonwood, usually within floodplains greater than 200 ac (81 ha) in extent and greater than 325 ft (100 m) in width, with one or more densely foliaged nesting areas, to be a physical or biological feature essential to the conservation of the species. In some areas, we also identify southwestern breeding habitat (riparian habitat (including xeroriparian and mesquite bosques), desert scrub and desert grassland drainages with a tree component, and Madrean evergreen woodland drainages) that may be less than the 200 ac (81 ha) area, 325 ft (100 m) width with one or more nesting and foraging sites to be a physical or biological feature essential to the conservation of the species.

Effects of climate change. The available information on the effects of climate change has led us to predict that there will be altered environmental conditions across the western United States (the breeding range of the western yellow-billed cuckoo) (Hoerling *et al.* 2012, pp. 3–15). In the southwestern United States, northern Mexico, California, Intermountain West, and Pacific Northwest, climate change information is generally leading us to predict an overall warmer, drier climate, with periodic episodic precipitation events that, depending on site conditions, are expected to have adverse effects on habitat of the western yellow-billed cuckoo (Enquist *et al.* 2008, pp. 1–32; Gardali *et al.* 2012, pp. 8–10; Munson *et al.* 2012, pp. 1,083–1,095). In rivers that depend on snowmelt, these changes are expected to result in more winter flooding and reduced summer stream flows (Dominguez *et al.* 2012, pp. 1–7). The amount of surface and groundwater available to regenerate and sustain riparian forests is expected to decline overall with persistent drought, favor the spread of tamarisk and other nonnative vegetation, and increase fire frequency (Westerling *et al.* 2006, pp. 942–943; McCarthy 2012, pp. 23–25).

Precipitation events under most climate change scenarios within the range of the DPS will decrease in frequency and increase in severity (Dominguez *et al.* 2012, pp. 4–7; Melillo *et al.* 2014, pp. 70–81). Impacts to habitat from climate change will exacerbate impacts from impoundments, channelization, and alteration of river flows across the western United States and Mexico, and from conversion of habitat from native to mostly nonnative vegetation (Glenn and Nagler 2005, p. 439; Bradley *et al.* 2009, pp. 1514–1519; IPCC 2014, pp. 4–11).

Changing climate is expected to place added stress on the species and its habitat. This change may reduce available nesting sites and patch size and affect prey abundance as a result of lower humidity in riparian areas from reduced moisture retention, through periods of prolonged desiccation, and through increased likelihood of scouring flood events (Melillo *et al.* 2014, p. 75). In addition, evidence shows that climate change may disrupt the synchrony of nesting western yellow-billed cuckoos and their food supply, causing further population decline and curtailment of its occupied range (Durst 2004, pp. 40–41; Scott *et al.* 2004, p. 70; Visser and Both 2005, pp. 2,561–2,569). For a more thorough discussion of climate change and the impacts it has on habitat for the western yellow-billed cuckoo, see the final rule to list the species as threatened published in the **Federal Register** on October 3, 2014 (79 FR 59992 at 60023).

Physical or Biological Features for the Western Yellow-Billed Cuckoo

According to 50 CFR 424.12(b)(1)(ii), we identify physical and biological features essential to the conservation of the species at an appropriate level of specificity using the best available scientific data. This analysis will vary between species and may include consideration of the appropriate quality, quantity, and spatial and temporal arrangements of such features in the context of the life history, status, and conservation needs of the species.

Based on our current knowledge of the habitat characteristics required to sustain the species' life-history processes including breeding, foraging, and dispersing, we propose to determine that the specific physical or biological features essential to the conservation of the western yellow-billed cuckoo are composed of three components below:

Physical or Biological Feature 1—Riparian woodlands; mesquite woodlands (mesquite-thorn-forest), and Madrean evergreen woodland drainages. This physical or biological feature includes breeding habitat found throughout the DPS range as well as additional breeding habitat characteristics unique to the Southwest.

a. *Rangewide breeding habitat (including areas in the Southwest).* Rangewide breeding habitat is composed of woodlands within floodplains or in upland areas or terraces often greater than 325 ft (100 m) in width and 200 ac (81 ha) or more in extent with an overstory and understory vegetation component in contiguous or nearly contiguous patches adjacent to intermittent or perennial watercourses. The slope of the watercourses is

generally less than 3 percent but may be greater in some instances. Nesting sites within the habitat have an above-average canopy closure (greater than 70 percent), and have a cooler, more humid environment than the surrounding riparian and upland habitats.

b. *Southwestern breeding habitat.* Southwestern breeding habitat is composed of more arid riparian woodlands (including mesquite bosques), desert scrub and desert grassland drainages with a tree component, and Madrean evergreen woodlands (oak and other tree species), in perennial, intermittent, and ephemeral drainages. These more arid riparian woodland drainages also bisect other habitat types, including Madrean evergreen woodland, native and nonnative desert grassland, and desert scrub. More than one habitat type within and adjacent to the drainage may contribute toward nesting habitat. Southwestern breeding habitat is more water-limited, contains a greater proportion of xeroriparian and nonriparian plant species, and is often narrower, more open, patchier, or sparser than elsewhere in the DPS and may persist only as narrow bands or scattered patches along the bankline or as small in-channel islands. The habitat contains a tree or large-shrub component with a variable overstory canopy and understory component that is sometimes less than 200 ac (81 ha). Riparian trees (including xeroriparian) in these ecosystems may even be more sparsely distributed and less prevalent than nonriparian trees. Adjacent habitat may include managed (mowed) nonnative vegetation or terraces of mesquite or other drought-tolerant species within the floodplain. In narrow or arid ephemeral drainages, breeding habitat commonly contains a mix of nonriparian vegetation found in the base habitat as well as riparian (including xeroriparian) trees.

Physical or Biological Feature 2—Adequate prey base. Presence of prey base consisting of large insect fauna (for example, cicadas, caterpillars, katydids, grasshoppers, large beetles, dragonflies, moth larvae, spiders), lizards, and frogs for adults and young in breeding areas during the nesting season and in post-breeding dispersal areas.

Physical or Biological Feature 3—Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat. This physical or biological feature includes hydrologic processes found in rangewide breeding habitat as well as additional hydrologic processes unique to the Southwest in southwestern breeding habitat:

a. *Rangewide breeding habitat hydrologic processes (including the Southwest):* Hydrologic processes (either natural or managed) in river and reservoir systems that encourage sediment movement and deposits and promote riparian tree seedling germination and plant growth, maintenance, health, and vigor (*e.g.,* lower-gradient streams and broad floodplains, elevated subsurface groundwater table, and perennial rivers and streams). In some areas where habitat is being restored, such as on terraced slopes above the floodplain, this may include managed irrigated systems that may not naturally flood due to their elevation above the floodplain.

b. *Southwestern breeding habitat hydrologic processes:* In southwestern breeding habitat, elevated summer humidity and runoff resulting from seasonal water management practices or weather patterns and precipitation (typically from North American Monsoon or other tropical weather events) provide suitable conditions for prey species production and vegetation regeneration and growth. Elevated humidity is especially important in southeastern Arizona, where cuckoos breed in intermittent and ephemeral drainages.

Because the western yellow-billed cuckoo exists in noncontiguous areas across a wide geographical and elevational range and its habitat is subject to dynamic events, the areas described below are essential to the conservation of the western yellow-billed cuckoo because they provide opportunities for breeding, allow for connectivity between habitat, assist in dispersal, provide redundancy to protect against catastrophic loss, and provide representation of the varying habitat types used for breeding, thereby helping to sustain the species. The physical or biological features essential to the conservation of the western yellow-billed cuckoo are present in the areas proposed to be designated, but the specific quality of habitat for nesting, migration, and foraging will vary in condition and location over time due to plant succession and the dynamic environment in which they exist. As a result, the areas that are proposed for designation may not contain at any one time all of the physical and biological features that have been identified for the western yellow-billed cuckoo, but all areas contain at least one.

We define revised proposed critical habitat as areas that contain at least physical or biological feature number 1 (including mesquite bosques); desert scrub and desert grassland drainages with a tree component; or Madrean evergreen woodland drainages. Based on use of the areas as breeding, we conclude that all of the areas identified contain all or most of the physical or biological features, but in some cases, these features are less prevalent, or their presence is variable over time due to the changing nature of habitat from hydrologic processes. As stated above, all critical habitat units within the revised proposed critical habitat are considered to have been occupied at the time of listing.

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. Here we describe the type of special management considerations or protection that may be required for the physical or biological features identified for the western yellow-billed cuckoo above. The specific critical habitat units and subunits where these management considerations or protection are identified in table 2 below.

A detailed discussion of activities influencing the western yellow-billed cuckoo and its habitat can be found in the final listing rule (79 FR 59992, October 3, 2014). The above-described physical or biological features (PBFs) may require special management considerations or protection to reduce the following threats or potential threats: Disruption of hydrologic processes that are necessary to maintain a healthy riparian system; unauthorized or uncontrolled grazing; loss of habitat from development activities and extractive uses (sand or gravel extraction); degradation of habitat as a result of expansion of nonnative vegetation; destruction of habitat by uncontrolled wildfire; reduction of prey insect abundance by the unauthorized or improper application of pesticides; removal of habitat by biocontrol insects; and habitat loss and degradation from invasive nonnative pest insects. More specific activities which may need special management are identified in table 2, below.

Special management considerations or protection are required within critical habitat areas to address these threats. Management activities that could ameliorate these threats include (but are not limited to) the following: Monitoring and regulating stream flows below reservoirs to mimic natural

flooding and other hydrologic processes to help maintain habitat; establishing permanent conservation easements or land acquisition to protect the species and its habitat; minimizing habitat disturbance, fragmentation, and destruction through use of best management practices; and providing appropriate buffers around western yellow-billed cuckoo habitat.

Changes Between Previous Proposal and Current Revised Proposal

On August 15, 2014, we proposed approximately 546,335 ac (221,094 ha) in 80 units for the western yellow-billed cuckoo (79 FR 48548). We are now proposing approximately 493,665 ac (199,779 ha) in 72 units as critical habitat in Arizona, California, Colorado, Idaho, New Mexico, Texas, and Utah. Approximately 164,248 ac (66,484 ha) of areas previously proposed as critical habitat are no longer being proposed as critical habitat (30 percent reduction of previous proposal). Based on new information and our conservation strategy, we are also proposing new areas totaling approximately 26,061 ac (10,547 ha) (5 percent). The remainder 467,604 ac (189,233 ha) are areas we previously proposed in 2014. This change and other changes below were partly the result of comments and information received on the previous proposal (from peer reviewers; Federal, State, and local land management agencies; and the public), corrections, and our reevaluation of the areas considered as essential to the conservation of the species. The comments and information received on the 2014 proposal are available online at *https://www.regulations.gov/docket?D=FWS-R8-ES-2013-0011.* Summaries of more specific changes are outlined below.

(1) *Revision of the Physical or Biological Features:* As outlined above in the Critical Habitat section, we revised our definition of the physical or biological features essential to the conservation of the species to describe and incorporate more accurately the habitat used by the western yellow-billed cuckoo for breeding, especially in the monsoonal breeding habitat. These changes were made as a result of comments received on habitat use of the western yellow-billed cuckoo and a reevaluation of the types of habitat used and habitat requirements of the western yellow-billed cuckoo across its range, specifically in regard to western yellow-billed cuckoos using monsoonal type habitats in addition to what has been considered more typical riparian habitats. Because of the variable ecological conditions, characteristics, and use of habitat by the western yellow-billed cuckoo across the species' range, information obtained from the comments received indicated that we needed to be more specific about the habitat differences and habitat requirements for the species and include that range of habitat in the revised proposal (see Physical or Biological Features for the Western Yellow-Billed Cuckoo).

(2) *Reevaluation of Conservation Strategy for Determining Critical Habitat:* In development of this revised proposed designation, we reevaluated our conservation strategy for determining which areas to consider as critical habitat for the western yellow-billed cuckoo to better reflect the biological information and conservation needs of the species (see *Conservation Strategy and Selection Criteria Used To Identify Critical Habitat*). In our reevaluation we took into account the importance of the Southwest as the main breeding area for the western yellow-billed cuckoo as well as including areas of differing habitat and distribution.

(3) *Landownership Identification:* We received numerous comments from Federal, State, local, and private landowners regarding discrepancies in land ownership identifications. In response to these comments, we have attempted to the best of our ability to reconcile these discrepancies by using information provided in the docket or using newer land ownership information where available. We are currently asking for any updated landownership information during the public comment period for this proposed rule (see Ownership Mapping Considerations).

Revised Proposed Critical Habitat Designation

We are proposing 72 units as critical habitat for the western yellow-billed cuckoo. The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the western yellow-billed cuckoo. Table 1 below identifies the units (in acres (hectares)) within the geographical area occupied by the species at the time of listing that contain the physical or biological features that support multiple life-history processes for the western yellow-billed cuckoo. Land areas identified as ''Other'' include county, city, unclassified, or unknown land ownerships.

TABLE 1—REVISED PROPOSED CRITICAL HABITAT UNITS FOR WESTERN YELLOW-BILLED CUCKOO

Unit name	Unit	Federal		State		Tribal		Other		Total	
		AC	HA	AC	HA	AC	HA	AC	HA	AC	HA
CA–AZ 1 Colorado River 1	1	31,351	12,687	4,207	1,702	22,315	9,031	24,265	9,820	82,138	33,240
CA–AZ 2 Colorado River 2	2	15,189	6,146	2	1	4,732	1,915	3,668	1,484	23,589	9,546
AZ 1 Bill Williams River	3	2,640	1,068					749	303	3,389	1,371
AZ 2 Alamo Lake	4	1,840	745					953	386	2,793	1,130
AZ 3 Hassayampa River	5	12	5					896	362	908	367
AZ 4 Agua Fria River	6	1,802	729	235	95			1,300	527	3,336	1,350
AZ 5 Upper Verde Creek	7	2,504	1,013	821	332	191	77	2,531	1,024	6,047	2,447
AZ 6 Oak Creek	8	596	241	160	65			1,475	597	2,231	903
AZ 7 Beaver Creek	9	1,491	603			3	1	588	238	2,082	842
AZ 8 Lower Verde/West Clear Ck	10	570	231	32	13	43	17	1,534	621	2,178	882
AZ 9A Horseshoe Dam	11	2,743	1,110							2,743	1,110
AZ 9B Horseshoe Dam	11	1,194	483					37	15	1,231	498
AZ 10 Tonto Creek	12	2,529	1,023					1,141	462	3,669	1,485
AZ 11 Pinal Creek	13	30	12					389	157	419	169
AZ 12 Bonita Creek	14	828	335					101	40	928	375
AZ 13 San Francisco River	15	1,192	482					135	55	1,327	537
AZ 14 Upper San Pedro River	16	17,958	7,267	1,903	770			11,199	4,532	31,060	12,569
AZ 15 Lower San Pedro/Gila River	17	2,957	1,197	2,282	925	729	295	17,431	7,055	23,400	9,470
AZ 16 Sonoita Creek	18			926	375			1,563	632	2,488	1,007
AZ 17 Upper Cienega Creek	19	4,630	1,874	574	232					5,204	2,106
AZ 18 Santa Cruz River	20	505	204	4	2			9,034	3,656	9,543	3,862

TABLE 1—REVISED PROPOSED CRITICAL HABITAT UNITS FOR WESTERN YELLOW-BILLED CUCKOO—Continued

Unit name	Unit	Federal		State		Tribal		Other		Total	
		AC	HA	AC	HA	AC	HA	AC	HA	AC	HA
AZ 19 Black Draw	21	896	362	134	54	.....	.....	570	231	1,599	647
AZ 20 Gila River 1	22	779	315	215	87	10,183	4,121	9,547	3,863	20,724	8,387
AZ 21 Salt River	23	2,469	999	.....	.....	.....	.....	121	49	2,590	1,048
AZ 22 Lower Cienega Creek	24	.....	.....	759	307	.....	.....	1,601	648	2,360	955
AZ 23 Blue River	25	1,025	415	.....	.....	.....	.....	.....	.....	1,025	415
AZ 24 Pinto Creek South	26	368	149	.....	.....	.....	.....	5	2	373	151
AZ 25 Aravaipa Creek	27	622	252	116	47	392	159	2,199	890	3,329	1,347
AZ 26 Gila River 2	28	1,953	791	206	83	1,436	581	4,994	2,021	8,588	3,475
AZ 27 Pinto Creek North	29	415	168	.....	.....	.....	.....	12	5	427	173
AZ 28 Mineral Creek	30	1	0	198	80	.....	.....	180	73	380	154
AZ 29 Big Sandy River	31	5,269	2,132	1,453	588	236	96	13,221	5,351	20,179	8,166
NM 1 San Francisco River	32	738	299	10	4	.....	.....	1,291	522	2,039	825
NM 2 Gila River	33	974	394	201	81	.....	.....	3,002	1,215	4,177	1,690
NM 3A Mimbres River	34	.....	.....	.....	.....	.....	.....	260	105	260	105
NM 3B Mimbres River	34	.....	.....	.....	.....	.....	.....	285	115	284	115
NM 4 Upper Rio Grande 1	35	.....	.....	.....	.....	1,313	531	517	209	1,830	741
NM 5 Upper Rio Grande 2	36	.....	.....	.....	.....	1,173	475	.....	.....	1,173	475
NM 6A Middle Rio Grande	37	.....	.....	7	3	6,273	2,539	958	388	7,238	2,929
NM 6B Middle Rio Grande	37	11,802	4,776	21,907	8,865	2,257	913	25,376	10,270	61,343	24,825
NM 7 Upper Gila River	38	1,086	440	188	76	.....	.....	3,453	1,397	4,727	1,913
NM 8A Caballo Delta North	39	190	77	.....	.....	.....	.....	.....	.....	190	77
NM 8B Caballo Delta South	39	155	63	.....	.....	.....	.....	.....	.....	155	63
NM 9 Animas	40	.....	.....	.....	.....	.....	.....	608	246	608	246
NM 10 Selden Cyn/Radium Springs	41	20	8	.....	.....	.....	.....	218	88	237	96
AZ 30 Arivaca Wash/San Luis	42	4,662	1,887	89	36	.....	.....	1,014	410	5,765	2,333
AZ 31 Florida Wash	43	449	182	255	103	.....	.....	43	18	747	302
AZ 32 California Gulch	44	376	152	.....	.....	.....	.....	182	73	558	226
AZ 33 Sycamore Canyon	45	601	243	.....	.....	.....	.....	0	0	601	243
AZ 34 Madera Canyon	46	1,419	574	.....	.....	.....	.....	313	127	1,732	701
AZ 35 Montosa Canyon	47	496	201	.....	.....	.....	.....	3	1	499	202
AZ 36 Patagonia Mountains	48	1,059	429	8	3	.....	.....	845	341	1,912	774
AZ 37 Canelo Hills	49	1,381	559	1	1	.....	.....	1,440	583	2,822	1,142
AZ 38 Arivaca Lake	50	567	229	417	169	.....	.....	381	154	1,365	553
AZ 39 Peppersauce Canyon	51	317	128	.....	.....	.....	.....	32	13	349	141
AZ 40 Pena Blanca Canyon	52	483	196	.....	.....	.....	.....	.....	.....	484	196
AZ 41 Box Canyon	53	317	128	184	74	.....	.....	34	14	536	217
AZ 42 Rock Corral Canyon	54	190	77	25	10	.....	.....	.....	.....	214	87
AZ 43 Lyle Canyon	55	716	290	.....	.....	.....	.....	577	234	1,293	523
AZ 44 Parker Canyon Lake	56	1,424	576	.....	.....	.....	.....	75	31	1,499	607
AZ 45 Barrel Canyon	57	755	306	.....	.....	.....	.....	164	66	920	372
AZ 46 Gardner Canyon	58	4,320	1,748	290	117	.....	.....	471	191	5,081	2,056
AZ 47 Brown Canyon	59	726	294	228	92	.....	.....	159	65	1,113	451
AZ 48 Sycamore Canyon/Patagonia	60	604	245	.....	.....	.....	.....	.....	.....	604	245
AZ 49 Washington Gulch	61	361	146	.....	.....	.....	.....	226	91	587	237
AZ 50 Paymaster Spring/Mowry	62	390	158	.....	.....	.....	.....	512	207	903	365
CA 1 Sacramento River	63	2,123	859	485	197	.....	.....	32,800	13,274	35,406	14,328
CA 2 South Fork Kern River	64	88	35	419	170	.....	.....	2,133	863	2,640	1,068
ID 1 Snake River 1	65	3,694	1,494	1,763	713	2,527	1,023	1,672	676	9,655	3,907
ID 2 Snake River 2	66	5,862	2,372	1,940	785	.....	.....	3,641	1,473	11,442	4,630
ID 3 Henry's Fork/Teton Rivers	67	756	305	511	206	.....	.....	3,374	1,366	4,641	1,878
CO 1 Colorado River	68	32	13	417	169	.....	.....	3,553	1,438	4,002	1,620
CO 2 North Fork Gunnison	69	115	47	.....	.....	.....	.....	2,211	895	2,326	941
UT 1 Green River 1	70	4,657	1,885	4,411	1,785	14,611	5,913	4,702	1,903	28,381	11,486
UT 2 Green River 2	71	40	17	632	256	.....	.....	462	187	1,135	459
TX 1 Terlingue Creek/Rio Grande	72	7,792	3,153	.....	.....	.....	.....	121	49	7,913	3,202
Totals	.....	168,095	68,023	48,615	19,673	68,414	27,687	208,547	84,397	493,665	199,779

Note: Area sizes do not sum due to rounding.

We also provide information on special management considerations or protection that may be required for the physical or biological features essential to the conservation of the species within each of those units. The special management considerations include actions to address the main threats to western yellow-billed cuckoo habitat and are grouped into three categories: (1) Threats from alteration of hydrology; (2) threats from floodplain encroachment; and (3) other identified threats. These threats and special management considerations are summarized in table 2. See end of table for definition of codes.

TABLE 2—THREATS TO HABITAT AND POTENTIAL SPECIAL MANAGEMENT CONSIDERATIONS

Unit	Name of unit	Threats from alteration of hydrology	Threats from floodplain encroachment	Other threats	Special mgt.
1 ...	CA/AZ–1 Colorado River 1	A, B, C	E, F, G, H, I, J	K, L, M, N, P	R, S, T.

TABLE 2—THREATS TO HABITAT AND POTENTIAL SPECIAL MANAGEMENT CONSIDERATIONS—Continued

Unit	Name of unit	Threats from alteration of hydrology	Threats from floodplain encroachment	Other threats	Special mgt.
2 ...	CA/AZ–2 Colorado River 2	A, B, C	E, F, G, H, I, J	K, L, M, N, P	R, S, T.
3 ...	AZ–1 Bill Williams River	A, B, C	.....	K, M, N, P	R, T.
4 ...	AZ–2 Alamo Lake	B, C, D	F	K, M, N, P, Q	R, S, T.
5 ...	AZ–3 Hassayampa River	B, C	E, F, G, H, I, J	K, L, M, N, P	R, S, T.
6 ...	AZ–4 Agua Fria River	A, B, C	F, G, I	K, L, M, N, P	R, S, T.
7 ...	AZ–5 Upper Verde River	B, C	F, G, I	K, M, N, P	R, S, T.
8 ...	AZ–6 Oak Creek	B, C	F, G, I	K, M, N, P, Q	R, S, T.
9 ...	AZ–7 Beaver Creek	B, C	F, G, I	K, M, N, P	R, S, T.
10	AZ–8 Lower Verde R./West Clear Creek	A, B, C	F, G, I	K, M, N, P	R, S, T.
11	AZ–9A Horseshoe Dam	A, B, C, D	I	K, M, N,P,Q	R, S, T.
11	AZ–9B Horseshoe Dam	A, B, C, D	I	K, M, N,P,Q	R, S, T.
12	AZ–10 Tonto Creek	B, C, D	F, G, I	K, M, N, P, Q	R, S, T.
13	AZ–11 Pinal Creek	B, C	F, G, I, J	K, L, M, N, P	R, S, T.
14	AZ–12 Bonita Creek	B, C	F, I	K, M, N, P, Q	R, S, T.
15	AZ–13 San Francisco River	B, C	F, I	K, M, N, P	R, S, T.
16	AZ–14 Upper San Pedro River	B, C	E, F, G, I	K, L, M, N, P, Q	R, S, T.
17	AZ–15 Lower San Pedro and Gila Rivers	A, B, C	E, F, G, H, I	K, L, M, N, P	R, S, T.
18	AZ–16 Sonoita Creek	B, C, D	F, G, I	K, M, N, P, Q	R, S, T.
19	AZ–17 Upper Cienega Creek	B, C	F, G, I	K, M, N, O, P, Q	R, S, T.
20	AZ–18 Santa Cruz River	B, C	E, F, G, H, I	K, L, M, N, P	R, S, T.
21	AZ–19 Black Draw	B, C	F	K, M, N, P	R, S, T.
22	AZ–20 Gila River 1	A, B, C	E, F, G, H	K, L, M, N, P	R, S, T.
23	AZ–21 Salt River	A, B, C, D	F, G, I	K, M, N, P	R, S, T.
24	AZ–22 Lower Cienega Creek	B, C	E, F, G, I, J	K, L, M, N, O, P	R, S, T.
25	AZ–23 Blue River	A, B, C	G, I, J	K, M, N, P	R, S, T.
26	AZ–24 Pinto Creek South	A, B, C	F, G, I, J	K, N, P	R, S, T.
27	AZ–25 Aravaipa Creek	B, C	E, F, I, J	K, M, N, P	R, S, T.
28	AZ–26 Gila River 2	A, B, C	F, G, I, J	K, N, P	R, S, T.
29	AZ–27 Pinto Creek North	B, C	F, I, J	K, N, P	R, S, T.
30	AZ–28 Mineral Creek	B, C	E, F	K, O, P, Q	R, S, T.
31	AZ–29 Big Sandy River	B, C	E, F,G, I,	K, L, N, P, Q	R, S, T.
32	NM–1 San Francisco River	B, C	E, F, G, H, I	K, L, M, N	R, S, T.
33	NM–2 Gila River	B, C	E, F, G, I, J	K, L, M, N	R, S, T.
34	NM–3A Mimbres River	B, C	F, I	K, M, N	R, S, T.
34	NM–3B Mimbres River	B, C	F, I	K, M, N	R, S, T.
35	NM–4 Upper Rio Grande 1	A, B, C	E, F, G, H, I	K, L, M, N	R, S, T.
36	NM–5 Upper Rio Grande 2	A, B, C	E, F, G, H, I, J	K, L, M, N	R, S, T.
37	NM–6A Middle Rio Grande	A, B, C, D	E, F, G, H, I, J	K, L, M, N	R, S, T.
37	NM–6B Middle Rio Grande	A, B, C, D	E, F, G, H, I, J	K, L, M, N	R, S, T.
38	NM–7 Upper Gila River	B, C	E, F, G, I, J	K, L, M, N	R, S, T.
39	NM–8A Caballo Delta North	A, B, C, D	E, F, G, I	K, L, M, N, O, P, Q	R, S, T.
39	NM–8B Caballo Delta South	A, B, C, D	E, F, G, I	K, L, M, N, O, P, Q	R, S, T.
40	NM–9 Animas	B, C	F	O, P	T.
41	NM–10 Selden Canyon and Radium Springs	A, B, C	E, F, G, H, I	L, M, N, O, P, Q	R, S, T.
42	AZ–30 Arivaca Wash and San Luis Wash	B, C	F, I	K, M, N, P	R, S, T.
43	AZ–31 Florida Wash	B, C	E, F, G, I, J	K, M, N, P	R, S, T.
44	AZ–32 California Gulch	B, C	F, G, I	K, M, N, O, P, Q	R, S, T.
45	AZ–33 Sycamore Canyon	A, B, C	F, G, I	K, M, N, O, P, Q	R, S, T.
46	AZ–34 Madera Canyon	B, C	F, G, I	K, M, N, O, P, Q	R, S, T.
47	AZ–35 Montosa Canyon	B, C	F, I	K, M, N, O, P, Q	R, S, T.
48	AZ–36 Patagonia Mountains.				
49	AZ–37 Canelo Hills.				
50	AZ–38 Arivaca Lake	A, B, C	F, G, I, J	K, M, N, O, P, Q	R, S, T.
51	AZ–39 Peppersauce Canyon	B, C	F, G, I	K, M, N, O, P, Q	R, S, T.
52	AZ–40 Pena Blanca Canyon	B, C	F, I	K, M, N, O, P, Q	R, S, T.
53	AZ–41 Box Canyon	B, C	F, G, I	K, M, N, O, P, Q	R, S, T.
54	AZ–42 Rock Corral Canyon	B, C	F, I	K, M, N, O, P, Q	R, S, T.
55	AZ–43 Lyle Canyon	B, C	F, I	K, M, N, O, P, Q	R, S, T.
56	AZ–44 Parker Canyon Lake	A, B, C	F, G, I	K, M, N, O, P, Q	R, S, T.
57	AZ–45 Barrel Canyon	A, B, C	F, G, I	K, M, N, O, P, Q	R, S, T.
58	AZ–46 Gardner Canyon	B, C	I	K, M, N, O, P, Q	R, S,T.
59	AZ–47 Brown Canyon	B, C	F, I	K, N, O, P, Q	R, S, T.
60	AZ–48 Sycamore Canyon	B, C	F, I	K, N, O, P, Q	R, S, T.
61	AZ–49 Washington Gulch	B, C	F, I	K, N, O, P, Q	R, S, T.
62	AZ–50 Paymaster Spring	B, C	F, I	K, N, O, P, Q	R, S, T.
63	CA–1 Sacramento River	A, B, C	E, F, G, H, I, J	K, L, M, N	R, S, T.
64	CA–2 South Fork Kern River	A, B, C, D	E, F, G, H, I	K, L, M, N	R, S, T.
65	ID–1 Snake River 1	A, B, C, D	E, F, G, H, I	K, L, M, N	R, S, T.
66	ID–2 Snake River 2	A, B, C	E, F, G, H, I	K, L, M, N	R, S, T.
67	ID–3 Henry's Fork and Teton Rivers	A, B, C	E, F, G, H, I	K, L, M, N	R, S, T.
68	CO–1 Colorado River	A, B, C	E, F, G, H, I, J	K, L, M, N	R, S, T.
69	CO–2 North Fork Gunnison R	B, C	E, F, G, H, I, J	K, L, M, N	R, S, T.
70	UT–1 Green River 1	A, B, C	E, F, G, H, I, J	K, L, M, N	R, S, T.
71	UT–2 Green River 2	A, B, C	E, F, G, H, I, J	K, L, M, N	R, S, T.
72	TX–2 Terlingua Creek and Rio Grande	A, B, C	.....	K, M, N	R, S, T.

Definition of Codes

Threats from alteration of hydrology:
(A) Change in hydrology from upstream dams;
(B) surface water diversions;
(C) groundwater extraction; and
(D) fluctuating reservoir levels.
Threats from floodplain encroachment:
(E) Agricultural activities;
(F) other development (residential, commercial, etc.);
(G) bank stabilization;
(H) levee construction and maintenance;
(I) road and bridge construction and maintenance; and
(J) gravel mining.
Other threats:
(K) Overgrazing;
(L) pesticide drift;
(M) woodcutting;
(N) recreational activities (unauthorized off-highway-vehicle use);
(O) on- or off-site mining (other than gravel mining);
(P) impacts from human-caused wildfires;
(Q) disturbance from human foot traffic, vehicular traffic, and associated noise.
Special management considerations:
(R) Manage hydrology to mimic natural flows and floodplain/drainage processes;
(S) prevent encroachment into floodplain/drainage;
(T) control expansion of nonnative vegetation where control benefits native vegetation (the positive and negative impacts of nonnative vegetation removal should be carefully evaluated if it is a component of existing habitat (*i.e.,* tamarisk) in areas of altered hydrology); and
(U) control invasive nonnative pest insects and manage habitat loss and degradation from areas infested.

It should be noted that the effects of climate change may influence streamflow, groundwater, wildfire, nonnative vegetation and other aspects of western yellow-billed cuckoo habitat within the proposed critical habitat. Because climate change is not a single threat but a condition that influences other impacts to habitat, we did not identify climate change as a single threat component.

Unit Descriptions

Below we present brief descriptions of the revised proposed units, their extent, and reasons why they are essential. For readers interested in the underlying information and data supporting these unit descriptions (*e.g.,* cited literature, permit reports, and other survey efforts), these will be included in the supporting materials posted on *http://www.regulations.gov* at Docket No. FWS–R8–ES–2013–0011.

Unit 1: CA/AZ–1 Colorado River 1; Imperial, Riverside, and San Bernardino Counties, California, and Yuma and La Paz Counties, Arizona

Revised proposed critical habitat Unit CA/AZ–1 is 82,138 ac (33,240 ha) in extent including a 150-mi (242-km) stretch of the Colorado River in Arizona and California. Approximately 31,351 ac (12,687 ha) is in Federal ownership; 4,207 ac (1,702 ha) is in State ownership; 22,315 ac (9,031 ha) is in Tribal ownership; and 24,265 ac (9,820 ha) is in other ownership. This unit contains areas where habitat restoration efforts have been conducted and monitored. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit is considered to have been occupied at the time of listing and is used by the western yellow-billed cuckoo during the breeding season. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

The unit supports a small existing number of breeding western yellow-billed cuckoos. Habitat restoration has been and continues to be implemented at Palo Verde Ecological Reserve and several other locations under the Lower Colorado River Multi-species Conservation Program (Parametrix, Inc. and Southern Sierra Research Station 2016, pp. 1–2). This program includes conservation measures to avoid, minimize, and mitigate the potential effects from water diversions and other covered activities on species and their habitat (Lower Colorado River Multi-Species Conservation Program 2004, pp. 1–4, 1–5). The use of flood irrigation and staggered planting at revegetation sites has produced multi-storied cottonwood and willow habitat. Breeding western yellow-billed cuckoos are colonizing these restoration sites during the breeding season as soon as they provide suitable breeding habitat, often within 2 to 5 years of planting (Parametrix, Inc. and Southern Sierra Research Station 2016, p. 34). The main nesting tree species in this unit include Goodding's willow, Fremont cottonwood, and tamarisk (Parametrix, Inc. and Southern Sierra Research Station 2016, p. 2). Other trees or large shrubs also used for nesting include honey mesquite (*Prosopis glandulosa* and *P. pubescens*), seep willow, and coyote willow (*S. exigua*) (Parametrix, Inc. and Southern Sierra Research Station 2016, p. 2). Altered hydrology has contributed to the establishment of tamarisk. Although tamarisk is not as desirable as native habitat, it contributes toward habitat suitability in areas where the native tree density can no longer be sustained.

Unit 2: CA/AZ–2 Colorado River 2; San Bernardino County, California and Mohave County, Arizona

Revised proposed critical habitat unit CA/AZ–2 is 23,589 ac (9,546 ha) in extent. It is a 23-mi (37-km)-long continuous segment of the Colorado River between the Interstate 40 Bridge, including Topock Marsh in San Bernardino County, California, and upstream to the Arizona-Nevada border in Mojave County, Arizona. Approximately 15,189 ac (6,146 ha), is in Federal ownership; 2 ac (less than 1 ha) is in State ownership; 4,732 ac (1,915 ha), is in Tribal ownership; and 3,668 ac (1,484 ha) is in other ownership. The site has a small existing number of western yellow-billed cuckoos. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit is considered to have been occupied at the time of listing and is used by the western yellow-billed cuckoo during the breeding season. Habitat restoration efforts (such as tree planting) to augment existing habitat are currently being implemented within the unit and the habitat is being used by the species. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

Unit 3: AZ–1 Bill Williams; Mohave and La Paz Counties, Arizona

Revised proposed critical habitat unit AZ–1 is 3,389 ac (1,371 ha) in extent and is an 11-mi (18-km)-long continuous segment of the Bill Williams River, a tributary to the Colorado River, from the upstream end of Lake Havasu upstream to Castaneda Wash in Mojave and La Paz Counties, Arizona.

Approximately 2,640 ac (1,068 ha), is in Federal ownership and 749 ac (303 ha) is in other ownership. This site is important for breeding western yellow-billed cuckoos as one of the historically largest and most stable breeding areas (Gaines and Laymon 1984, p. 71; Johnson *et al.* 2008a, p. 106). The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit is considered to have been occupied at the time of listing and is used by the western yellow-billed cuckoo during the breeding season. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

Unit 4: AZ–2 Alamo Lake; Mohave and La Paz Counties, Arizona

Revised proposed critical habitat unit AZ–2 totals 2,793 ac (1,130 ha) in extent and is 9 mi (15 km) of continuous stream made up of a 6-mi (10-km)-long continuous segment of the Santa Maria River and a 3-mi (5-km)-long continuous segment of the Big Sandy River that feeds into the Santa Maria River above Alamo Lake State Park in Mojave and La Paz Counties, Arizona. Approximately 1,840 ac (745 ha) is in Federal ownership, and 953 ac (386 ha) is in other ownership. This is a regular nesting area for western yellow-billed cuckoos, meaning that the species has been sighted nesting here multiple times in the 1998–2014 period. The site provides a movement corridor to habitat sites farther north. Tamarisk, a nonnative species that reduces the habitat's value, is a major component of habitat in this unit. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit is considered to have been occupied at the time of listing and is used by the western yellow-billed cuckoo during the breeding season. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

Unit 5: AZ–3 Hassayampa River; Maricopa County, Arizona

Revised proposed critical habitat unit AZ–3 is 908 ac (367 ha) in extent and is an approximately 7-mi (11-km)-long continuous segment of the Hassayampa River in the vicinity of Wickenburg in Maricopa County, Arizona. Approximately 12 ac (5 ha) is in Federal ownership, and 896 ac (362 ha) is in other ownership. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit is considered to have been occupied at the time of listing and is used by the western yellow-billed cuckoo during the breeding season. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

Much of the private land in this revised proposed unit is within TNC's Hassayampa River Preserve, which is occupied by yellow-billed cuckoos during the breeding season. During protocol surveys in two portions of this unit in 2015, approximately five territories were detected (Kondrat-Smith 2015, entire; Kondrat-Smith 2016, entire). The exact number of territories is unknown because the birds were unmarked. Included in the five territories were two pairs that were detected feeding nestlings. Western yellow-billed cuckoos are frequently documented at this site during the breeding season, as is indicated in detections in 6 years between 2000 and 2014 (Cornell Lab of Ornithology 2016 (eBird data) and 2 years between 1998 and 1999 (Corman and Magill 2000, pp. 42–43). Habitat is gallery woodland with cottonwood, willow, and mesquite (Kondrat-Smith 2016, entire). Very little tamarisk is present in much of the site because the river scours out frequently, preventing tamarisk from becoming established.

Unit 6: AZ–4, Agua Fria River; Yavapai County, Arizona

Revised proposed critical habitat unit AZ–4 is 3,336 ac (1,350 ha) in extent and is made up of a 17-mi (27-km)-long continuous segment of the Agua Fria River (called Ash Creek above the confluence with Sycamore Creek), which is joined by a 5-mi (8-km)-long continuous segment of a tributary called Sycamore Creek. Other portions of tributaries part of this unit include Silver Creek, Indian Creek, and Little Ash Creek. Together they form a total of 22 mi (35.4 km) of continuous segments located approximately 2.5 mi (4.0 km) east of Cordes Lakes in Yavapai County, Arizona. Approximately 1,802 ac (729 ha) is in Federal ownership; 235 ac (95 ha) is in State ownership; and 1,300 ac (527 ha) is in other ownership. This site has consistently been used by numerous breeding pairs of western yellow-billed cuckoos. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit is considered to have been occupied at the time of listing and is used by the western yellow-billed cuckoo during the breeding season. The site also provides migration stopover habitat for western yellow-billed cuckoos moving farther north. Tamarisk, a nonnative species that reduces the habitat's value, is a major component of habitat in this unit. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

Unit 7: AZ–5, Upper Verde River; Yavapai County, Arizona

Revised proposed critical habitat unit AZ–5 is 6,047 ac (2,447 ha) in extent. Approximately 2,504 ac (1,013 ha) is in Federal ownership; 821 ac (332 ha) is in State ownership; 191 ac (77 ha) is in Tribal ownership; and 2,531 ac (1,024 ha) is in other ownership. The western yellow-billed cuckoo has been detected during the breeding season. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit is considered to have been occupied at the time of listing and is used by the western yellow-billed

cuckoo during the breeding season. This site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos.

This unit extends from the confluence of the Verde River with Oak Creek southeast to I–17 at the northern end of Unit 10, AZ–8 Lower Verde River and West Clear Creek, because western yellow-billed cuckoo surveys conducted have documented occupancy (Agyagos 2016b, entire; Johnson and Rakestraw 2016, p. 7). Detections downstream of the Oak Creek and Verde River confluence include the Sheep's Crossing site, near the Thousand Trails RV Park. A 1,969-ft (600-m)-long survey was conducted in 2015 (Johnson and Rakestraw 2016, p. 6). Habitat is primarily cottonwood and willow, with a trace of ash, tamarisk, and Russian olive (Agyagos 2016b, entire). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

Unit 8: AZ–6 Oak Creek; Yavapai and Coconino Counties, Arizona

Revised proposed critical habitat unit AZ–6 is 2,231 ac (903 ha) in extent and is a 28-mi (45-km)-long continuous segment of Oak Creek from the vicinity of the Town of Cornville at Spring Creek in Yavapai County upstream to State Highway 179 Bridge within the City of Sedona in Coconino County, Arizona. Approximately 596 ac (241 ha), is in Federal ownership; 160 ac (65 ha) is in State ownership; and 1,475 ac (597 ha) is in other ownership. This is an addition of 908 ac (368 ha) compared to the 2014 proposed designation because western yellow-billed cuckoos have been detected in the expanded area of this unit, especially in the Cornville area (Corman and Magill 2000, p. 42; Agyagos 2016a, entire).

This unit is considered to have been occupied at the time of listing and is used by the western yellow-billed cuckoo during the breeding season. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

This unit contains the Lower Oak Creek Important Bird Area (IBA), where western yellow-billed cuckoos are identified as a breeding bird (National Audubon Society 2016a, entire). Vegetation is a mix of riparian gallery (cottonwood/willow/sycamore), and mesquite and hackberry woodland (National Audubon Society 2016a, entire). This unit was extended to the confluence with the Verde River because western yellow-billed cuckoos have been detected in this reach, habitat contains at least one PBF (PBF 1), and it provides connecting habitat between Oak Creek and the Verde River. The reach from Cornville to the confluence with the Verde River contains the best broad-valley floodplain and mesquite bosque habitat on Oak Creek (Agyagos 2016a, entire). The Oak Creek confluence with the Verde River consists of an approximately 98-ft (30-m)-wide riparian area, with mesquite habitat adjacent to the riparian vegetation (Johnson and Rakestraw 2016, p. 6). Sycamore and boxelder are the dominant trees at the confluence, with scattered cottonwood and some willow and tamarisk trees.

Unit 9: AZ–7 Beaver Creek; Yavapai County, Arizona

Revised proposed critical habitat unit AZ–7 is 2,082 ac (842 ha) in extent and is a 23-mi (37-km)-long continuous segment of Beaver Creek from the confluence with the Verde River near Camp Verde upstream to above the Town of Rimrock in Yavapai County, Arizona. Approximately 1,491 ac (603 ha) is in Federal ownership; 3 ac (1 ha) is in Tribal ownership; and 588 ac (238 ha) is in other ownership. Numerous western yellow-billed cuckoos have consistently used this site during the breeding season. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. The unit is considered to have been occupied at the time of listing, and is used by the western yellow-billed cuckoo during the breeding season. The site also provides migratory stopover habitat for western yellow-billed cuckoos moving farther north. Tamarisk is a component of habitat in this unit and may provide understory or nesting habitat for the western yellow-billed cuckoo. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

Unit 10: AZ–8 Lower Verde River and West Clear Creek; Yavapai County, Arizona

Revised proposed critical habitat unit AZ–8 is 2,178 ac (882 ha) in extent. Approximately 570 ac (231 ha) is in Federal ownership; 32 ac (13 ha) is in State ownership; 43 ac (17 ha) is in Tribal ownership; and 1,534 ac (621 ha) is in other ownership. The unit is considered to have been occupied at the time of listing, and is used by the western yellow-billed cuckoo during the breeding season. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit also provides a movement corridor as well as migratory stop-over habitat for western yellow-billed cuckoos. Dominant vegetation is cottonwood, willow, and tamarisk (Verde Valley Birding Trail 2016, entire). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

Altered hydrology has contributed to the establishment of tamarisk, a nonnative species that reduces the habitat's value. Tamarisk is still used by the western yellow-billed cuckoo and is a component of habitat in this unit.

Unit 11: AZ–9A and AZ–9B Horseshoe Dam; Gila, Maricopa, and Yavapai Counties, Arizona

Revised proposed critical habitat in these two subunits is 3,974 ac (1,608 ha) (AZ–9A = 2,743 ac (1,110 ha); AZ–9B = 1,231 ac (498 ha)) in extent and is a 33-mi (54-km)-long continuous segment of the Verde River immediately upstream of Horseshoe Dam and a continuous segment of the Verde River immediately downstream of Horseshoe Dam in Yavapai County, Arizona. Approximately 3,937 ac (1,593 ha) is in Federal ownership, and 37 ac (15 ha) (occurring within AZ–9B) is in other ownership. The unit is considered to have been occupied at the time of listing, and is used by the western yellow-billed cuckoo during the breeding season. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the

prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit also provides a movement corridor as well as migratory stop-over habitat for western yellow-billed cuckoos. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

The extended reaches contain breeding habitat where western yellow-billed cuckoos, including pairs, have been documented in multiple years (Arizona Game and Fish Department 2016, entire; Salt River Project 2011, pp. 18, 19; Dockens 2015, entire). This unit includes part of the Salt and Verde Riparian Ecosystem IBA, with western yellow-billed cuckoos identified as a breeding bird (National Audubon Society 2016b, entire). Western yellow-billed cuckoos were also documented during the breeding season downstream of Horseshoe Dam in the mixed mesquite and cottonwood-willow woodland at Mesquite Campground on the Tonto National Forest in 2009 and 2011 (Arizona Game and Fish Department 2016, entire). Riparian cottonwood-willow galleries and mixed riparian stands exist both above and below Horseshoe Dam, although some of these stands occur as narrow strands along the Verde River (Salt River Project 2008, p. 61). Habitat consists of contiguous to patchy cottonwood, willow, tamarisk, and mesquite (Salt River Project 2011, p. 18; Dockens 2015, entire). Altered hydrology has contributed to the establishment of tamarisk. Although tamarisk is not as desirable as native habitat, it contributes toward habitat suitability in areas where the native tree density can no longer be sustained.

Unit 12: AZ–10 Tonto Creek; Gila County, Arizona

Revised proposed critical habitat unit AZ–10 is 3,669 ac (1,485 ha) in extent and is made up of a 6-mi (10-km)-long continuous segment of Tonto Creek upstream from the lakebed at Theodore Roosevelt Lake in Gila County, Arizona. Approximately 2,529 ac (1,023 ha) is in Federal ownership, and 1,141 ac (462 ha) is in other ownership. Numerous western yellow-billed cuckoos have consistently bred in this unit. The unit is considered to have been occupied at the time of listing, and is used by the western yellow-billed cuckoo during the breeding season. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. The site also provides a movement corridor and migratory stopover habitat for western yellow-billed cuckoos moving farther north. Tamarisk is a component of habitat in this unit and may provide understory or nesting habitat for the western yellow-billed cuckoo. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

Unit 13: AZ–11 Pinal Creek; Gila County, Arizona

Revised proposed critical habitat unit AZ–11 is 419 ac (169 ha) in extent and is a 3-mi (5-km)-long continuous segment of Pinal Creek north of the Town of Globe in Gila County, Arizona. Approximately 30 ac (12 ha) is in Federal ownership, and 389 ac (157 ha) is in other ownership. This site has been consistently occupied by western yellow-billed cuckoos during the breeding season. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. The unit is considered to have been occupied at the time of listing, and is used by the western yellow-billed cuckoo during the breeding season. The site also provides a movement corridor between larger habitat patches. Tamarisk is a component of habitat in this unit and may provide understory or nesting habitat for the western yellow-billed cuckoo. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

Unit 14: AZ–12 Bonita Creek; Graham County, Arizona

Revised proposed critical habitat unit AZ–12 is 928 ac (375 ha) in extent and is a 6-mi (10-km)-long continuous segment of the Gila River that includes a continuous segment of a tributary called Bonita Creek located northeast of the Town of Thatcher in Graham County, Arizona. Approximately 828 ac (335 ha) is in Federal ownership, and 101 ac (40 ha) is in other ownership. This site has been consistently occupied by western yellow-billed cuckoos during the breeding season. The unit is considered to have been occupied at the time of listing, and is used by the western yellow-billed cuckoo during the breeding season. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. The site also provides a movement corridor between larger habitat patches. Tamarisk is a component of habitat in this unit and may provide understory or nesting habitat for the western yellow-billed cuckoo. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

Unit 15: AZ–13 San Francisco River; Greenlee County, Arizona

Revised proposed critical habitat unit AZ–13 is 1,327 ac (537 ha) in extent and is a 4-mi (6-km)-long continuous segment of the San Francisco River that includes a continuous segment of a tributary called Dix Creek located approximately 6 mi (9.6 km) west of the border with New Mexico in Greenlee County, Arizona. Approximately 1,192 ac (482 ha) is in Federal ownership, and 135 ac (55 ha) is in other ownership. This unit has been consistently occupied by western yellow-billed cuckoos during the breeding season. The unit includes suitable western yellow-billed cuckoo breeding habitat that provides at least one of the physical or biological features essential to the conservation of the species (PBF 1), is considered to have been occupied at the time of listing, and is used by the western yellow-billed cuckoo during the breeding season. The site also provides a movement corridor between larger habitat patches. Tamarisk is a component of habitat in this unit and may provide understory or nesting habitat for the western yellow-billed cuckoo. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

Unit 16: AZ–14 Upper San Pedro River; Cochise County, Arizona

Revised proposed critical habitat Unit AZ–14 is 31,060 ac (12,569 ha) in extent and is an 84-mi (135-km)-long segment of the Upper San Pedro River from the border with Mexico north to the vicinity of the Town of Saint David in Cochise County, Arizona. Approximately 17,958 ac (7,267 ha) is in Federal ownership; 1,903 ac (770 ha) is in State ownership; and 11,199 ac (4,532 ha) is in other ownership. The unit is considered to have been occupied at the time of listing and is used by the western yellow-billed cuckoo during the breeding season. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

This unit was expanded from the 2014 proposed designation to include adjacent mesquite bosque on the San Pedro River and its tributaries, where western yellow-billed cuckoos also nest and forage (Halterman 2006, p. 31, Swanson 2014, entire; Cornell Lab of Ornithology 2016 (eBird data)). Western yellow-billed cuckoos have been found nesting in mesquite bosque as far away as 0.3 mi (0.5 km) from the adjacent upper San Pedro River (Halterman 2006, p. 31). This unit has one of the largest remaining breeding groups of the western yellow-billed cuckoo and contains a large number of breeding pairs.

Much of this mesquite habitat is composed of large mature trees. Western yellow-billed cuckoos were documented during 2014 surveys on the Babocomari River portion of this unit in habitat that is not as dense as on the San Pedro River, including narrow habitat with low stature and scattered riparian and mesquite trees (Swanson 2014, entire). Altered hydrology has contributed to the establishment of tamarisk in parts of this unit. Although tamarisk is not as desirable as native habitat, it contributes toward habitat suitability in areas where the native tree density can no longer be sustained.

Most of this unit lies within the San Pedro Riparian National Conservation Area and the San Pedro Riparian National Conservation Area IBA (National Audubon Society 2016c, entire). The IBA supports 100 species of breeding birds, and 250 species of migrant and wintering birds (National Audubon Society 2016c, entire). The 40 mi (64 km) of the upper San Pedro River was designated by Congress as a Riparian National Conservation Area in 1988. The primary purpose for the special designation is to protect and enhance the desert riparian ecosystem, a rare remnant of what was once an extensive network of similar riparian systems throughout the American Southwest.

Unit 17: AZ–15 Lower San Pedro and Gila Rivers; Pima, Pinal and Gila Counties, Arizona

Revised proposed critical habitat unit AZ–15 is 23,400 ac (9,470 ha) in extent and is a 59-mi (95-km)-long segment of the Lower San Pedro River from above the Town of Mammoth in Pima County downstream to its confluence with the Gila River, where it continues downstream to below the Town of Kearny in Pinal County, Arizona. Approximately 2,957 ac (1,197 ha) is in Federal ownership; 2,282 ac (925 ha) is in State ownership; 729 ac (295 ha) is in Tribal ownership; and 17,431 ac (7,055 ha) is in other ownership. This is an important breeding area for western yellow-billed cuckoos and is consistently occupied by a number of pairs during the breeding season. The unit is considered to have been occupied at the time of listing, and is used by the western yellow-billed cuckoo during the breeding season. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. The site also provides a movement corridor and migratory stopover location for western yellow-billed cuckoos moving farther north. Tamarisk is a component of habitat in this unit and may provide understory or nesting habitat for the western yellow-billed cuckoo.

Unit 18: AZ–16 Sonoita Creek; Santa Cruz County, Arizona

Revised proposed critical habitat Unit AZ–16 is 2,488 ac (1,007 ha) in extent and is a 16-mi (26-km)-long segment of Sonoita Creek from the Town of Patagonia downstream to a point on the creek approximately 4 mi (6 km) east of the Town of Rio Rico in Santa Cruz County, Arizona. Approximately 926 ac (375 ha) is in State ownership, and 1,563 ac (632 ha) is in other ownership. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. Western yellow-billed cuckoos have been documented during the breeding season within the entire unit every year between 1998 and 2014 (Arizona Game and Fish Department 2015, entire, Cornell Lab of Ornithology 2016 (eBird data)). This unit is considered to have been occupied at the time of listing. This site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

The perennial flow in Sonoita Creek supports a diverse gallery cottonwood and Goodding's willow forest that includes walnut, mesquite, ash, hackberry, and various willow species (National Audubon Society 2016d, entire). The Patagonia-Sonoita Creek TNC Preserve IBA lies within this unit, under conservation stewardship by TNC and Tucson Audubon Society (National Audubon Society 2016d, entire).

Unit 19: AZ–17, Upper Cienega Creek; Pima County, Arizona

Revised proposed critical habitat Unit AZ–17 is 5,204 ac (2,106 ha) in extent and is an 11-mi (17.5-km)-long segment of Cienega Creek. Approximately 4,630 ac (1,874 ha) is in Federal ownership, and 574 ac (232 ha) is in State ownership. This unit is considered to have been occupied at the time of listing, and is used by the western yellow-billed cuckoo during the breeding season. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood

timing. This unit also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. This unit connects Gardner Canyon (AZ–46) with upper Cienega Creek. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

Unit 20: AZ–18 Santa Cruz River; Santa Cruz County, Arizona

Revised proposed critical habitat Unit AZ–18 is 9,543 ac (3,862 ha) in extent and is a 27-mi (43-km)-long segment of the Santa Cruz River in the vicinity of the Town of Tubac in Santa Cruz County, Arizona. Approximately 505 ac (204 ha) is in Federal ownership; 4 ac (2 ha) is in State ownership; and 9,034 ac (3,656 ha) is in other ownership. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit is considered to have been occupied at the time of listing and is used by the western yellow-billed cuckoo during the breeding season, including a concentration of nesting yellow-billed cuckoos within the Tumacacori area. Some portions of the unit are considered disturbed and may not contain all the physical or biological features essential to the conservation of the species, but due to our mapping constraints some of these areas were left within the boundaries of the unit. These disturbed areas not containing the physical or biological features would not be considered critical habitat. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

This unit is within the Upper Santa Cruz IBA, with western yellow-billed cuckoos identified as a breeding species (National Audubon Society 2016e, entire). The Upper Santa Cruz River IBA is a linear riparian corridor from Tumacacori National Historical Park downstream (northward) through the Tucson Audubon-held conservation easement (National Audubon Society 2016e, entire). This reach of river has the highest groundwater levels and perennial river flow, primarily treated wastewater, but with some groundwater seep augmentation. The IBA boundaries are defined by the riparian vegetation, including the mesquite bosques that border the broadleaf gallery forest. The IBA also includes all the National Historical Park and Tucson Audubon-held conservation easement lands.

Unit 21: AZ–19 Black Draw; Cochise County, Arizona

Revised proposed critical habitat Unit AZ–27 is 1,599 ac (647 ha) in extent. Approximately 896 ac (362 ha) is in Federal ownership; 134 ac (54 ha) is in State ownership; and 570 ac (231 ha) is in other ownership. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit is considered to have been occupied at the time of listing and is used by the western yellow-billed cuckoo during the breeding season (Arizona Game and Fish Department 2016, entire; Radke 2016, entire). The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. Occupied habitat is primarily cottonwood, Goodding's willow, and some mesquite (Cajero 2016, entire). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

Unit 22: AZ–20, Gila River 1; Graham County, Arizona

Revised proposed critical habitat Unit AZ–20 is 20,724 ac (8,387 ha) in extent and 27 mi (43 km) in length. Approximately 779 ac (315 ha) is in Federal ownership; 215 ac (87 ha) is in State ownership; 10,183 ac (4,121 ha) is in Tribal ownership; and 9,547 ac (3,863 ha) is in other ownership. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit is considered to have been occupied at the time of listing and is used by the western yellow-billed cuckoo during the breeding season. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

This unit includes tributaries to the Gila River including Eagle Creek to the confluence with East Eagle Creek where western yellow-billed cuckoos were detected in 2015 and 2016. Riparian habitat in overstory and understory along this survey reach is primarily cottonwood and sycamore (Westland Resources 2015e, entire). Habitat at this detection site is about 164 ft (50 m) wide in most places, with adjacent rolling hill grasslands. Some portions of the grasslands adjacent to the riparian habitat that is within the boundary of proposed critical habitat and used as foraging areas by the western yellow-billed cuckoo are grazed (Andreson 2016, entire).

Unit 23: AZ–21 Salt River; Gila County, Arizona

Revised proposed critical habitat unit AZ–21 is 2,590 ac (1,048 ha) in extent and is a 5-mi (8-km)-long continuous segment of the Salt River upstream from the lakebed at Theodore Roosevelt Lake in Gila County, Arizona. Approximately 2,469 ac (999 ha) of this unit is Federal ownership, and 121 ac (49 ha) is in other ownership. This unit is consistently occupied by western yellow-billed cuckoos during the breeding season. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit is considered to have been occupied at the time of listing. The site also provides a movement corridor between larger habitat patches. Tamarisk is a component of habitat in this unit and may provide understory or nesting habitat for the western yellow-billed cuckoo. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

Unit 24: AZ–22 Lower Cienega Creek, Pima County, Arizona

Revised proposed critical habitat unit AZ–22 is 2,360 ac (955 ha) in extent and is an 11-mi (18-km)-long continuous segment of Cienega Creek about 15 mi (24 km) southeast of Tucson in Pima

County, Arizona. Approximately 759 ac (307 ha) is in State ownership, and 1,601 ac (648 ha) is in other ownership. This unit is consistently occupied by western yellow-billed cuckoos during the breeding season. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit is considered to have been occupied at the time of listing. The site also provides a movement corridor between larger habitat patches. Tamarisk is a component of habitat in this unit and may provide understory or nesting habitat for the western yellow-billed cuckoo. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

Unit 25: AZ–23 Blue River, Greenlee County, Arizona

Revised proposed critical habitat unit AZ–23 is 1,025 ac (415 ha) in extent and is an 8-mi (13-km)-long continuous segment of the Blue River in Greenlee County, Arizona. The entire unit is in Federal ownership located on the Apache Sitgreaves National Forest managed by the USFS. This unit is consistently occupied by western yellow-billed cuckoos during the breeding season and also acts as a movement corridor. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit is considered to have been occupied at the time of listing. Tamarisk is a component of habitat in this unit and may provide understory or nesting habitat for the western yellow-billed cuckoo. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

Unit 26: AZ–24 Pinto Creek South, Gila and Pinal Counties, Arizona

Revised proposed critical habitat unit AZ–24 is 373 ac (151 ha) in extent and is a 4-mi (6-km)-long continuous segment of Pinto Creek in Gila and Pinal Counties, Arizona. Approximately 368 ac (149 ha) is in Federal ownership, and 5 ac (2 ha) is in other ownership. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit is considered to have been occupied at the time of listing. Tamarisk is a component of habitat in this unit and may provide understory or nesting habitat for the western yellow-billed cuckoo. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

Unit 27: AZ–25 Aravaipa Creek; Pinal and Graham Counties, Arizona

Revised proposed critical habitat Unit AZ–25 is 3,329 ac (1,347 ha) in extent and is a 25-mi (40-km)-long continuous segment of Aravaipa Creek in Pinal and Graham Counties, Arizona. Approximately 622 ac (252 ha) is in Federal ownership; 116 ac (47 ha) is in State ownership; 392 ac (159 ha) is in Tribal ownership; and 2,199 ac (890 ha) is in other ownership. Western yellow-billed cuckoos have been detected during the breeding season within this unit. This unit is considered to have been occupied at the time of listing (Corman and Magill 2000, p. 41; Cornell Lab of Ornithology 2016 (eBird data)). The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos.

Patches and stringers of cottonwood-willow riparian forest and adjacent mesquite bosque exist throughout Aravaipa Canyon. This drainage experiences scouring flood flows that can result in shifting suitable habitat within the floodplain. Including the entire Aravaipa Canyon ensures that if suitable habitat shifts, it will remain within critical habitat. Connecting this unit to the San Pedro River units (AZ–14 and AZ–15) by including the confluence with the San Pedro River strengthens the conservation value of both units by linking breeding, migration, and dispersal corridors. Included in this unit is 25.4 ac (10.3 ha) of dense mesquite bosque habitat that occurs just upstream from but does not contain the Highway 77 bridge across Aravaipa Creek near the San Pedro River. This bosque area is located just across the highway from the main critical habitat block along the San Pedro River and averages more than 325 ft wide. Altered hydrology has contributed to the establishment of tamarisk. Tamarisk may provide habitat for the western yellow-billed cuckoo in this unit. Although tamarisk is not as desirable as native habitat, it contributes toward habitat suitability in areas where the native tree density can no longer be sustained.

Unit 28: AZ–26, Gila River 2; Graham and Greenlee Counties, Arizona

Revised proposed critical habitat Unit AZ–26 is 8,588 ac (3,475 ha) in extent and is a 4.5-mi (7.4-km)-long continuous segment of the Gila River in Graham and Greenlee Counties, Arizona. Approximately 1,953 ac (791 ha) is in Federal ownership; 206 ac (83 ha) is in State ownership; 1,436 ac (581 ha) is in Tribal ownership; and 4,994 ac (2,021 ha) is in other ownership. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit is considered to have been occupied at the time of listing and is used by the western yellow-billed cuckoo during the breeding season. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

This unit was previously proposed but has been extended. Although narrow and patchy in some reaches, suitable habitat exists within this extension from the eastern end of the unit to the western end of Unit 38, NM–7, Upper Gila River in New Mexico

(Johnson 2016, entire). No protocol surveys have been conducted in this extended reach, but western yellow-billed cuckoos have been detected incidentally as a result of survey efforts for other species (Johnson 2016, entire). Habitat is primarily cottonwood and willow, with less tamarisk than farther downstream (Johnson 2016, entire).

Unit 29: AZ–27 Pinto Creek North; Gila County, Arizona

Revised proposed critical habitat unit AZ–27 is 427 ac (173 ha) in extent and is a 6-mi (10-km)-long continuous segment of Pinto Creek in Gila County, Arizona. Approximately 415 ac (168 ha) is in Federal ownership, and 12 ac (5 ha) is in other ownership. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit is considered to have been occupied at the time of listing and is used by the western yellow-billed cuckoo during the breeding season. This unit has been consistently occupied by western yellow-billed cuckoos during the breeding season. The site also provides migration stopover habitat. Tamarisk is a component of habitat in this unit and may provide understory or nesting habitat for the western yellow-billed cuckoo. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

Unit 30: AZ–28 Mineral Creek; Pinal and Gila Counties, Arizona

Revised proposed critical habitat Unit AZ–28 is 380 ac (154 ha) in extent and is a 7-mi (11-km)-long continuous segment of Mineral Creek in Pinal and Gila Counties, Arizona. Approximately 1 ac (less than 1 ha) is in Federal ownership; 198 ac (80 ha) is in State ownership; and 180 ac (73 ha) is in other ownership. This unit is considered to have been occupied at the time of listing and is used by the western yellow-billed cuckoo during the breeding season. Data suggest that there were as many as six breeding pairs along this segment of Mineral Creek (WestLand Resources, Inc. 2011, pp. ES–1, 4, 5, Figs. 1–5). The southern end of Mineral Creek, which is not included in the proposal, empties into a reservoir owned by American Smelting And Refining Company (ASARCO).

This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. This unit was occupied by the species at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. Mineral Creek provides suitable habitat for western yellow-billed cuckoos along most of the surveyed reach, consisting mostly of ash, with willow, cottonwood, and sycamore (Westland Resources, Inc. 2015d, entire).

Unit 31: AZ–29 Big Sandy River; Mohave County, Arizona

Revised proposed critical habitat Unit AZ–29 is 20,179 ac (8,166 ha) in extent and approximately 58-mi (93-km) in length. Approximately 5,269 ac (2,132 ha) is in Federal ownership; 1,453 ac (588 ha) is in State ownership; 236 ac (96 ha) is in Tribal ownership; and 13,221 ac (5,351 ha) is in other ownership.

This unit is considered to have been occupied at the time of listing and is used by the western yellow-billed cuckoo during the breeding season. Western yellow-billed cuckoos, including pairs, have been documented within this unit (Dockens *et al.* 2006, p. 7; Magill *et al.* 2005, p. 8; O'Donnell *et al.* 2016, pp. 1, 6, 21). The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. This unit was occupied by the species at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

The Big Sandy River has flows that are spatially and temporally intermittent. However, in the vicinity of US 93, the river is perennial and supports a dense riparian woodland of tamarisk, cottonwood, and Goodding's willow, bordered and interspersed with mesquite (Magill *et al.* 2005, pp. 1, 5). Within the floodplain, seep willow, arrowweed (*Pluchea sericea*), and screw-bean mesquite (*Prosopis pubescens*) are also common. Adjacent upland habitat in the area is Arizona Upland Subdivision of Sonoran Desertscrub dominated by foothills paloverde (*Circidium floridium*), mixed cacti, and creosote bush (*Larrea tridentata*) (Magill *et al.* 2005, p. 5). Western yellow-billed cuckoos were found in cottonwood, willow, or the adjacent mesquite (Magill *et al.* 2005, p. 8; Dockens *et al.* 2006, p. 7).

Unit 32: NM–1 San Francisco River; Catron County, New Mexico

Revised proposed critical habitat unit NM–1 is 2,039 ac (825 ha) in extent and is a 10-mi (16-km)-long continuous segment of the San Francisco River near the Town of Glenwood in Catron County, New Mexico. This segment includes 1.2 mi (2 km) up Whitewater Creek from the confluence of the San Francisco River near the Town of Glenwood. Approximately 738 ac (299 ha) is in Federal ownership; 10 ac (4 ha) is in State ownership; and 1,291 ac (522 ha) is in other ownership. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit is considered to have been occupied at the time of listing and is used by the western yellow-billed cuckoo during the breeding season. The site also provides migratory stopover habitat for western yellow-billed cuckoos moving farther north. Tamarisk is a component of habitat in this unit and may provide understory or nesting habitat for the western yellow-billed cuckoo. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

Unit 33: NM–2 Gila River; Grant County, New Mexico

Revised proposed critical habitat unit NM–2 is 4,177 ac (1,690 ha) in extent and is a 24-mi (37-km)-long continuous

segment of the Gila River from 10 mi (16 km) downstream from the town of Cliff to 10 mi (16 km) upstream of the town of Gila in Grant County, New Mexico. Approximately 974 ac (394 ha) is in Federal ownership; 201 ac (81 ha) is in State ownership; and 3,002 ac (1,215 ha) is in other ownership. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit is considered to have been occupied at the time of listing and is used by the western yellow-billed cuckoo during the breeding season. This unit is consistently occupied by a large number of western yellow-billed cuckoos during the breeding season and is an important breeding location for the species. The site also provides migratory stopover habitat for western yellow-billed cuckoos moving farther north. Tamarisk is a component of habitat in this unit and may provide understory or nesting habitat for the western yellow-billed cuckoo. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

Unit 34: NM–3A and NM–3B Mimbres River; Grant County, New Mexico

Revised proposed critical habitat Unit NM–3 is 544 ac (220 ha) in extent (NM–3A = 260 ac (105 ha); NM–3B = 284 ac (115 ha)). The unit is made up of two segments totaling approximately 7.4 mi (11.9 km) of the Mimbres River north of the town of Mimbres in Grant County, New Mexico. The entire proposed Unit NM–3 is privately owned. This unit is considered to have been occupied at the time of listing because it has been occupied by western yellow-billed cuckoos during the breeding season in recent years. The two areas provide the habitat components in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. Tamarisk is a component of habitat in this unit and may provide understory or nesting habitat for the western yellow-billed cuckoo. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

Unit 35: NM–4 Upper Rio Grande 1; Rio Arriba County, New Mexico

Revised proposed critical habitat unit NM–4 is 1,830 ac (741 ha) in extent and is a 10-mi (16-km)-long continuous segment of the upper Rio Grande from Ohkay Owingeh to near Alcalde in Rio Arriba County, New Mexico. Approximately 1,313 ac (531 ha) is in Tribal ownership, and 517 ac (209 ha) is in other ownership. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit is considered to have been occupied at the time of listing and is used by the western yellow-billed cuckoo during the breeding season. The site also provides a movement corridor for western yellow-billed cuckoos moving farther north. Tamarisk is a component of habitat in this unit and may provide understory or nesting habitat for the western yellow-billed cuckoo. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

Unit 36: NM–5 Upper Rio Grande 2; Santa Fe and Rio Arriba Counties, New Mexico

Revised proposed critical habitat unit NM–5 is 1,173 ac (475 ha) in extent and is a 6-mi (10-km)-long continuous segment of the Upper Rio Grande starting from the Highway 502 Bridge at the south end of the San Ildefonso Pueblo upstream to a point on the river in Rio Arriba County, New Mexico. The entire proposed unit NM–5 is Tribal land located on the San Ildefonso Pueblo and Santa Clara Pueblo. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit is considered to have been occupied at the time of listing and is used by the western yellow-billed cuckoo during the breeding season. This unit has been consistently occupied by western yellow-billed cuckoos during the breeding season. The site also provides a movement corridor for western yellow-billed cuckoos moving farther north. Tamarisk is a component of habitat in this unit and may provide understory or nesting habitat for the western yellow-billed cuckoo. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

Unit 37: NM–6A and NM–6B Middle Rio Grande; Sierra, Socorro, Valencia, Bernalillo, and Sandoval Counties, New Mexico

Revised proposed critical habitat Unit NM–6 is made up of two areas (NM–6A = 7,238 ac (2,929 ha) and NM–6B = 61,343 ac (24,825 ha)) along the Rio Grande from Elephant Butte Reservoir in Sierra County upstream through Socorro, Valencia, and Bernalillo Counties to below Cochiti Dam in Cochiti Pueblo in Sandoval County, New Mexico. Approximately 11,802 ac (4,776 ha) is in Federal ownership; 21,914 ac (8,868 ha) is in State ownership; 2,257 ac (913 ha) is in Tribal ownership; and 25,376 ac (10,270 ha) is in other ownership. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

This unit is consistently occupied by a large number of breeding western yellow-billed cuckoos and currently is the largest breeding group of the western yellow-billed cuckoo north of Mexico. This unit is considered to have been occupied at the time of listing and is used by the western yellow-billed cuckoo during the breeding season. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. The site also provides a movement corridor for western yellow-billed cuckoos. Altered hydrology has resulted in the establishment of tamarisk. Tamarisk is being used by western yellow-billed cuckoos during the breeding season in this unit and may provide important understory habitat (Sechrist *et al.* 2009, p. 55). The occupied habitat within Elephant Butte Reservoir from RM 54 to RM 38 was added to this unit, as well as occupied

areas within Bosque del Apache National Wildlife Refuge extending west of the active floodplain. These additions are included based on consistent occupancy of breeding western yellow-billed cuckoos in these areas. For Elephant Butte Reservoir specifically and in addition to the consistent occupancy of breeding western yellow-billed cuckoos, multiple comments were received from the previous critical habitat proposal further citing why this extended portion from RM 54 to RM 38 is essential to the conservation of the species.

Unit 38: NM–7, Upper Gila River; Hidalgo and Grant Counties, New Mexico

Revised proposed critical habitat Unit NM–7 is 4,727 ac (1,913 ha) in size and extends in a 30-mi (48-km)-long continuous segment of the Gila River from the Arizona-New Mexico border 5 mi (8 km) downstream from Virden in Hidalgo County upstream to 8 mi (13 km) upstream from Red Rock in Grant County, New Mexico. Approximately 980 ac (396 ha) is in Federal ownership; 294 ac (119 ha) is in State ownership; and 3,453 ac (1,397 ha) is in other ownership. This site is consistently occupied by numerous pairs of western yellow-billed cuckoos during the breeding season. Tamarisk is a component of habitat in this unit and may provide understory or nesting habitat for the western yellow-billed cuckoo. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. The unit also provides connecting habitat between the Upper and Lower Gila River and a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos.

Unit 39: NM–8A Caballo Delta North and NM–8B Caballo Delta South; Sierra County, New Mexico

Revised proposed critical habitat unit NM–8 is made up of two areas (NM–8A = 190 ac (77 ha) and NM–8B = 155 ac (63 ha)) within the delta area of Caballo Reservoir east of the town of Caballo, within Sierra County, New Mexico. The entire unit is owned by Reclamation and managed by Reclamation, NM State Parks, and BLM. This unit was formally surveyed in 2014 and 2015 with an estimated occupancy of 14 breeding pairs. We used the 1998–2014 timeframe to determine occupancy at the time of listing. We included 2015 results because it is the best available information. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. The unit includes areas of riparian vegetation composed of mainly Goodding's and coyote willow as well as tamarisk. The areas also provide a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. Despite the minimal acreage and narrow size of the habitat patches within the unit, we still consider this unit essential to the conservation of the species due to the information stated above and because of the lack of habitat in the surrounding area. This type of habitat is representative of the southwestern breeding habitat type.

Unit 40: NM–9 Animas; Sierra County, New Mexico

Revised proposed critical habitat unit NM–9 is 608 ac (246 ha) in extent and is located on a 6-mi (10-km)-long continuous segment of Las Animas Creek west of the town of Caballo, within Sierra County, New Mexico. The entire unit is privately owned and managed. This site has been known to be historically occupied based on incidental detections prior to 2016.

The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. The unit includes areas of riparian vegetation that are suitable as western yellow-billed cuckoo breeding habitat and connected areas of riparian vegetation that are suitable as foraging habitat. Habitat at the site consists of mainly sycamore riparian woodland. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. The addition of this unit is based on new records of western yellow-billed cuckoos that were not available when the proposed critical habitat rule was published (Stinnett 2018, entire). This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

Unit 41: NM–10 Selden Canyon and Radium Springs; Doña Ana County, New Mexico

Revised proposed critical habitat unit NM–10 is 237 ac (96 ha) in extent and is a 12.5-mi (20-km)-long continuous segment of river in Doña Ana County, New Mexico. It is located on a continuous segment of habitat northwest of the town of Radium Springs, within Doña Ana County, New Mexico. Approximately 20 ac (8 ha) is in Federal ownership, and 218 ac (88 ha) is in other ownership. This unit was formally surveyed in 2014 and 2015 with an estimated occupancy of four breeding pairs. We used the 1998–2014 timeframe to determine occupancy at the time of listing. We included 2015 results because it is the best available information. This unit is part of the core area as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. The unit includes areas of riparian vegetation composed of mainly tamarisk and coyote willow, which provide the structure and density to accommodate four estimated territories. The addition of the unit is based on new records of western yellow-billed cuckoos that were not available when the proposed critical habitat rule was published (White *et al.* 2018, entire).

Unit 42: AZ–30 Arivaca Wash and San Luis Wash; Pima County, Arizona

Revised proposed critical habitat unit AZ–30 is 5,765 ac (2,333 ha) in extent and is made up of two washes that join to form a 17-mi (27-km)-long continuous segment that comprises 9 mi (15 km) of Arivaca Wash and 8 mi (13 km) of San Luis Wash. The unit is located about 10 mi (16 km) north of the border of Mexico near the Town of Arivaca in Pima County, Arizona. Approximately 4,662 ac (1,887 ha) is in Federal ownership; 89 ac (36 ha) is in State ownership; and 1,014 ac (410 ha) is in other ownership. The unit is considered to have been occupied at the time of listing. This unit is consistently occupied by western yellow-billed cuckoos during the breeding season. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit (monsoonal events). This unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The site also provides a movement corridor between larger habitat patches. Tamarisk is a component of habitat in this unit and may provide understory or nesting habitat for the western yellow-billed cuckoo.

Unit 43: AZ–31 Florida Wash; Pima and Santa Cruz Counties, Arizona

Revised proposed critical habitat Unit AZ–31 is 747 ac (302 ha) in extent and is a 6-mi (10-km)-long continuous segment of Florida Wash and tributaries in Pima and Santa Cruz Counties, Arizona. Approximately 449 ac (182 ha) is in Federal ownership; 255 ac (103 ha) is in State ownership; and 43 ac (18 ha) is in other ownership. This unit has been expanded from the 2014 proposed designation because new information shows that western yellow-billed cuckoos occupy habitat during the breeding season within the expanded area of suitable habitat (Arizona Game and Fish Department 2016, entire; MacFarland and Horst 2015, pp. 101–102, 185–186; Cornell Lab of Ornithology 2016 (eBird data)). The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit (monsoonal events). This unit is considered to have been occupied at the time of listing. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. This unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo.

This unit is within the Santa Rita Mountains IBA (National Audubon Society 2016f, entire), one of the sky islands of southeastern Arizona with transitional elevational gradients of forest, oak woodland, grassland, and riparian habitat. Vegetation in occupied habitat is primarily oak, hackberry, and mesquite, with some sycamore, ocotillo (*Fouquieria splendens*), and juniper along with various other midstory and understory plant species (MacFarland and Horst 2015, pp. 124, 129, 134).

Unit 44: AZ–32 California Gulch; Santa Cruz County, Arizona

Revised proposed critical habitat Unit AZ–32 is 558 ac (226 ha) in extent and is a 7-mi (11-km)-long continuous segment along California Gulch in Santa Cruz County, Arizona. Approximately 376 ac (152 ha) is in Federal ownership, and 182 ac (73 ha) is in other ownership. Following the publication of the 2014 critical habitat proposed rule, we received additional information on western yellow-billed cuckoo occupancy in Madrean evergreen woodland drainages that supports inclusion of this area as critical habitat (MacFarland and Horst 2015, entire). There have been multiple reports of western yellow-billed cuckoos using this drainage during the breeding period between July–September 2001–2015 (Cornell Lab of Ornithology 2016 (eBird data)). Therefore we consider this a breeding area for the species. This new unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos.

The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit (monsoonal events). The unit includes areas of riparian and Madrean evergreen woodland vegetation that are suitable as western yellow-billed cuckoo breeding habitat and connected areas of riparian and Madrean evergreen woodland vegetation that are suitable as foraging habitat. California Gulch is an Arizona IBA in one of the sky islands, with western yellow-billed cuckoos identified as one of the breeding birds (National Audubon Society 2016g; entire). The canyon is unique with its dense shrub layer on its steep sides, and a perennial spring-fed stream draining into Mexico (National Audubon Society 2016g, entire). The habitat is Sonoran desert scrub, Madrean evergreen woodland, semi-desert grassland, and low-elevation riparian.

Unit 45: AZ–33 Sycamore Canyon; Santa Cruz County, Arizona

Revised proposed critical habitat Unit AZ–33 is 601 ac (243 ha) in extent and is an 8-mi (11-km)-long continuous segment along Sycamore Canyon in Santa Cruz County, Arizona. Nearly the entire unit is in Federal ownership with less than 1 ac (< 1 ha) being privately owned. Following the publication of the 2014 proposed rule, we received additional information on western yellow-billed cuckoo occupancy in Madrean evergreen woodland drainages that supports inclusion as critical habitat (MacFarland and Horst 2015, entire). This new unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. There have been multiple sightings of western yellow-billed cuckoo using this drainage in the months of July–September in almost every year during the period 2000–2015 (Cornell Lab of Ornithology 2016 (eBird data)). Up to six territories or potential pairs were found during western

yellow-billed cuckoo surveys in 1999 (Corman and Magill 2000, p. 51). During 2015 surveys, three territories were detected, including one territory with a pair and another territory with a western yellow-billed cuckoo carrying food (MacFarland and Horst 2015, pp. 25–26). The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos.

The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit (monsoonal events). The unit includes areas of riparian and Madrean evergreen woodland vegetation that are suitable as western yellow-billed cuckoo breeding habitat and connected areas of riparian and Madrean evergreen woodland vegetation that are suitable as foraging habitat. This unit is contained within the Sycamore Canyon/Pajarito Mountains IBA, with western yellow-billed cuckoos identified as one of the breeding birds (National Audubon Society 2016h, entire).

Unit 46: AZ–34 Madera Canyon; Pima and Santa Cruz Counties, Arizona

Revised proposed critical habitat Unit AZ–34 is 1,732 ac (701 ha) in extent and is a 7-mi (11-km)-long continuous segment of Madera Canyon in Pima and Santa Cruz Counties, Arizona. Approximately 1,419 ac (574 ha) is in Federal ownership, and 313 ac (127 ha) is in other ownership. Following the publication of the 2014 critical habitat proposed rule, we received additional information on western yellow-billed cuckoo occupancy in Madrean evergreen woodland drainages that supports inclusion as critical habitat (MacFarland and Horst 2015, entire). This unit in Madera Canyon includes many western yellow-billed cuckoo detections by birders throughout this reach between 1998 and 2014 (Cornell Lab of Ornithology 2016 (eBird data)). The mouth of lower Madera Canyon is an area with numerous western yellow-billed cuckoo detections in multiple years (Cornell Lab of Ornithology 2016 (eBird data)). Tucson Audubon documented one occupied territory found consistently in lower Madera Canyon during protocol surveys during the breeding season in 2015 (MacFarland and Horst 2015, pp. 105–106). This new unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos.

The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit (monsoonal events). The unit includes areas of riparian and Madrean evergreen woodland vegetation that are suitable as western yellow-billed cuckoo breeding habitat and connected areas of riparian and Madrean evergreen woodland vegetation that are suitable as foraging habitat. This unit is within the Santa Rita Mountains IBA (National Audubon Society 2016f, entire), one of the sky islands in southeastern Arizona.

Unit 47: AZ–35 Montosa Canyon; Santa Cruz County, Arizona

Revised proposed critical habitat Unit AZ–35 is 499 ac (202 ha) in extent and is a 4-mi (6-km)-long continuous segment of Montosa Canyon in Santa Cruz County, Arizona. Approximately 496 ac (201 ha) is in Federal ownership, and 3 ac (1 ha) is in other ownership. Following the publication of the 2014 critical habitat proposed rule, we received additional information on western yellow-billed cuckoo occupancy in Madrean evergreen woodland drainages that supports inclusion as critical habitat. Five territories, including four pairs, were found during surveys in 2015 (MacFarland and Horst 2015, pp. 103–104; Sferra 2015, entire). Many western yellow-billed cuckoos have been detected by birders for at least the last 4 years (Cornell Lab of Ornithology 2016 (eBird data)). This new unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos.

The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit (monsoonal events). This unit includes areas of riparian and Madrean evergreen woodland vegetation that are suitable as western yellow-billed cuckoo breeding habitat and connected areas of riparian and Madrean evergreen woodland vegetation that are suitable as foraging habitat. This canyon contains dense vegetation along the creek that flows through the bottom of the canyon, and the sloping vegetated canyon walls provide additional foraging opportunities (MacFarland and Horst 2015, p. 103). This unit is within the Santa Rita Mountains IBA (National Audubon Society 2016f, entire), one of the sky islands in southeastern Arizona.

Unit 48: AZ–36 Patagonia Mountains, Santa Cruz County, Arizona

Revised proposed critical habitat Unit AZ–36 is 1,912 ac (774 ha) in extent and is an 11-mi (17-km)-long segment made up of several drainages in the Patagonia Mountains in Santa Cruz County, Arizona. Approximately 1,059 ac (429 ha) is in Federal ownership; 8 ac (3 ha) is in State ownership; and 845 ac (341 ha) is in other ownership. Following the publication of the 2014 critical habitat proposed rule, we received additional information on western yellow-billed cuckoo occupancy in Madrean evergreen woodland drainages that supports inclusion as critical habitat (MacFarland and Horst 2015, entire). A popular birding destination, there have been multiple postings in eBird of western yellow-billed cuckoos using this drainage in the months of July–September in the period 2000–2015 (Cornell Lab of Ornithology 2016 (eBird data)). Western yellow-billed cuckoos were detected in eight locations during 2012 surveys in riparian vegetation along 2.2 mi (3.5 km) of Harshaw Creek, along 2.1 mi (3.3 km) of Corral Canyon, and along 1.4 mi (2.2 km) of Hermosa Canyon (WestLand Resources, Inc. 2013a, pp. 2–3). Four locations were in Harshaw Creek, four were in Corral Canyon, and two were in Hermosa Canyon (WestLand Resources, Inc. 2013a, p. 4). Western yellow-billed cuckoos were in ephemeral drainages,

except for one Hermosa Canyon detection on a hilltop of sparse oak trees and manzanita (WestLand Resources, Inc. 2013a, p. 5). Western yellow-billed cuckoos were detected along 8 of the survey transects at a total of 46 separate locations in an expanded 2013 survey in Harshaw Creek and an unnamed tributary, Hermosa Creek, Goldbaum Creek, Corral Canyon and two unnamed tributaries, and Willow Springs Canyon (WestLand Resources, Inc. 2013b, pp. 4–5). Surveyors documented seven possible breeding occurrences and two probable breeding occurrences (WestLand Resources, Inc. 2013b, pp. 7–9). Probable breeding locations were defined by two western yellow-billed cuckoos exchanging calls at the same location, and possible breeding locations were defined as multiple detections in the same location across more than one survey period (WestLand Resources, Inc. 2013b, pp. 8–9). This new unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The site also provides a movement corridor migratory stop-over habitat for western yellow-billed cuckoos.

This unit was occupied by the species at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit (monsoonal events). Western yellow-billed cuckoos were largely associated with oak, juniper, and scattered sycamore vegetation along drainages, but they were also detected in upland areas dominated by nonriparian associated shrubs and oak trees (WestLand Resources, Inc. 2013, p. 3).

The Patagonia Mountains IBA is within one of southern Arizona's sky islands and is composed of Madrean evergreen woodland habitat dominated by oak-juniper, oak-pine, and pine oak communities surrounded by grasslands and desert (National Audubon Society 2016i, entire). The many canyons and drainages that cut through these mountains support riparian vegetation. The extent of the oak-juniper community type habitat, with sycamores in drainages, is continuous throughout this range.

Unit 49: AZ–37 Canelo Hills, Santa Cruz County

Revised proposed critical habitat Unit AZ–37 is 2,822 ac (1,142 ha) in extent and is an 11.5-mi (18.5-km)-long of a drainage within Santa Cruz County, Arizona. Approximately 1,381 ac (559 ha) is in Federal ownership; 1 ac (less than 1 ha) is in State ownership; and 1,440 ac (583 ha) is in other ownership. Following the publication of the 2014 proposed rule, we received survey information, as identified below, on western yellow-billed cuckoo occupancy and habitat use that confirms occupancy at the time of listing which supports the addition of this unit to the proposed designation of critical habitat.

Western yellow-billed cuckoos occupy the trees bordering creeks and cienega wetlands and have been detected during the breeding season in several years, including a pair each on August 27, 1998, at Canelo Hills Cienega and Turkey Creek (Corman and Magill 2000, p. 43; Cornell Lab of Ornithology 2016 (eBird data)). Western yellow-billed cuckoos have been detected incidentally in this unit for many years from 1967 through 1998 (Arizona Game and Fish Department 2016, entire) and more recently on June 19, 2001, September 28, 2011, August 13, 2013, and June 23, 2014 (Cornell Lab of Ornithology 2016 (eBird data)). The first year of protocol surveys were conducted in 2015, with western yellow-billed cuckoos detected on July 16, July 26 (two western yellow-billed cuckoos in different areas), July 31, August 5 (two western yellow-billed cuckoos in different areas), and August 29 (Audubon Arizona 2015, entire).

This new unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit (monsoonal events). This unit includes areas of riparian and Madrean evergreen woodland vegetation that are suitable as western yellow-billed cuckoo breeding habitat and connected areas of riparian and Madrean evergreen woodland vegetation that are suitable as foraging habitat.

Unit 50: AZ–38 Arivaca Lake, Pima and Santa Cruz Counties, Arizona

Revised proposed critical habitat Unit AZ–38 is 1,365 ac (553 ha) in extent and is a 9-mi (14-km)-long continuous segment of stream near Arivaca Lake in Pima and Santa Cruz Counties, Arizona. Approximately 567 ac (229 ha) is in Federal ownership; 417 ac (169 ha) is in State ownership; and 381 ac (154 ha) is in other ownership. Following the publication of the 2014 proposed rule, we received additional information on western yellow-billed cuckoo occupancy and habitat use from the time of listing and shortly thereafter (2015) that supports inclusion as critical habitat (MacFarland and Horst 2015, entire). Tucson Audubon detected seven occupied territories with repeated detections, including three pairs, where they surveyed at and near the lake in 2015 (MacFarland and Horst 2015, pp. 17–18). The seven territories documented is likely an underestimate, as only a small portion of suitable habitat was surveyed. Western yellow-billed cuckoos were detected at the lake on every visit during 2015, and habitat surrounding the lake and side canyons is considered highly suitable. Some parts of the lake were only surveyed once in 2015 due to safety concerns and the difficulty of walking in rough terrain and through dense vegetation (MacFarland and Horst 2015, pp. 17–18). Additional records exist from previous years (Cornell Lab of Ornithology 2016 (eBird data). Although some of the sightings are from after the time of listing, we believe the site was used by the western yellow-billed cuckoo based on past records and habitat conditions.

This unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes,

in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit (monsoonal events). This unit includes areas of riparian and Madrean evergreen woodland vegetation that are suitable as western yellow-billed cuckoo breeding habitat and connected areas of riparian and Madrean evergreen woodland vegetation that are suitable as foraging habitat.

Unit 51: AZ–39 Peppersauce Canyon, Pinal County, Arizona

Revised proposed critical habitat Unit AZ–39 is 349 ac (141 ha) in extent and is a 4-mi (6-km)-long continuous segment of stream within Peppersauce Canyon in Pinal County, Arizona. Approximately 317 ac (128 ha) is in Federal ownership, and 32 ac (13 ha) is in other ownership. Following the publication of the first western yellow-billed cuckoo critical habitat proposed rule, we received additional information on western yellow-billed cuckoo occupancy and habitat use in Madrean evergreen woodland drainages that supports inclusion as critical habitat. Tucson Audubon detected western yellow-billed cuckoos on two surveys in 2015, including a pair in August, the first year this area has been surveyed (MacFarland and Horst 2015, pp. 53–54). Although these sightings are from after the time of listing, we believe the site was used by the western yellow-billed cuckoo based on occupancy in nearby areas and habitat conditions.

This new unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos.

The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit (monsoonal events). This unit includes areas of riparian and Madrean evergreen woodland vegetation that are suitable as western yellow-billed cuckoo breeding habitat and connected areas of riparian and Madrean evergreen woodland vegetation that are suitable as foraging habitat. Dominant overstory vegetation in occupied habitat consists of oak, sycamore, cottonwood, mesquite, walnut, and ocotillo (MacFarland and Horst 2015, p. 122).

Unit 52: AZ–40 Pena Blanca Canyon, Santa Cruz County, Arizona

Revised proposed critical habitat Unit AZ–40 is 484 ac (196 ha) in extent and is a 7-mi (11-km)-long continuous segment of stream within Pena Blanca Canyon in Santa Cruz County, Arizona. Approximately 483 ac (196 ha) is in Federal ownership, and less than 1 ac (1 ha) is in other ownership. Following the publication of the first western yellow-billed cuckoo critical habitat proposed rule, we received additional information on western yellow-billed cuckoo occupancy and habitat use in Madrean evergreen woodland drainages that supports inclusion as critical habitat (MacFarland and Horst 2015, entire). Tucson Audubon detected three western yellow-billed cuckoo territories, including two pairs during surveys in 2015 (MacFarland and Horst 2015, pp. 21–22). Western yellow-billed cuckoos were detected on all four surveys in 2015, including a western yellow-billed cuckoo on a nest, and a western yellow-billed cuckoo carrying what appeared to be food at a different location. An adult was observed feeding a large caterpillar to a fledgling on September 19, 2014 at Pena Blanca Lake (Helentjaris 2014, entire). Western yellow-billed cuckoos have been documented in other years at this site as well, with data from birder listserves and eBird (Cornell Lab of Ornithology 2016 (eBird data)). Although these sightings are from after the time of listing, we believe the site was used by the western yellow-billed cuckoo based on occupancy in nearby areas and habitat conditions.

This new unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit (monsoonal events). This unit includes areas of riparian and Madrean evergreen woodland vegetation that are suitable as western yellow-billed cuckoo breeding habitat and connected areas of riparian and Madrean evergreen woodland vegetation that are suitable as foraging habitat. Overstory vegetation at occupied territories is primarily oak and willow, with small amounts of juniper and ash (MacFarland and Horst 2015, p. 121).

Unit 53: AZ–41 Box Canyon, Pima County, Arizona

Revised proposed critical habitat Unit AZ–41 is 536 ac (217 ha) in extent and is a 7-mi (11-km)-long continuous segment of stream within Box Canyon in Pima County, Arizona. Approximately 317 ac (128 ha) is in Federal ownership; 184 ac (74 ha) is in State ownership; and 34 ac (14 ha) is in other ownership. Following the publication of the first western yellow-billed cuckoo critical habitat proposed rule, we received additional information on western yellow-billed cuckoo occupancy and habitat use in Madrean evergreen woodland drainages that supports inclusion as critical habitat (MacFarland and Horst 2015, entire). Tucson Audubon detected two western yellow-billed cuckoo territories on three surveys in 2015, including the observation of a western yellow-billed cuckoo carrying food, an indication of a likely active nest (MacFarland and Horst 2015, pp. 97–98). A western yellow-billed cuckoo was also observed carrying food to a nest on August 28, 2013, at a different location (Sebesta 2014, entire). Other observations of western yellow-billed cuckoos in Box Canyon have been reported by birders during the breeding season in more than one year (Cornell Lab of Ornithology 2016 (eBird data)). Although some of these sightings are from after the time of listing, we believe the site was used by the western yellow-billed cuckoo based on records at the time of listing, occupancy in nearby areas, and habitat conditions. This unit is within the Santa Rita Mountains IBA (National Audubon Society 2016f, entire) (see description under Unit 43; AZ–31 Florida Wash).

This new unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed

cuckoos. The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit (monsoonal events). This unit includes areas of riparian and Madrean evergreen woodland vegetation that are suitable as western yellow-billed cuckoo breeding habitat and connected areas of riparian and Madrean evergreen woodland vegetation that are suitable as foraging habitat. Overstory vegetation in occupied habitat is primarily mesquite, ash, ocotillo, willow, oak, sycamore, hackberry, and juniper (MacFarland and Horst 2015, p. 124). Midstory vegetation in occupied habitat includes desert cotton, walnut, coursetia (*Coursetia* sp.), mesquite, *Cercocarpus* sp., and sotol (*Dasylirion wheeleri)* (MacFarland and Horst 2015, p. 129). Understory vegetation in occupied habitat includes sideoats gramma, brickellia (*Brickellia* sp.), nonnative Bermuda grass, Lehman's lovegrass, Johnson grass, and cocklebur (*Xanthium* sp.) (MacFarland and Horst 2015, p. 134).

Unit 54: AZ–42 Rock Corral Canyon, Santa Cruz County, Arizona

Revised proposed critical habitat Unit AZ–42 is 214 ac (87 ha) in extent and is a 3-mi (5-km)-long continuous segment of stream within Rock Corral Canyon in Santa Cruz County, Arizona. Approximately 190 ac (77 ha) is in Federal ownership, and 25 ac (10 ha) is in State ownership. Following the publication of the first western yellow-billed cuckoo critical habitat proposed rule, we received additional information on western yellow-billed cuckoo occupancy and habitat use in Madrean evergreen woodland drainages that supports inclusion as critical habitat (MacFarland and Horst 2015, entire). This canyon is part of the Tumacacori Mountains, with high bird and plant diversity (MacFarland and Horst 2015, p. 23). Two occupied territories, including one breeding pair, were detected during the 2015 surveys (MacFarland and Horst 2015, pp. 23–24). Detections during the breeding season have also been documented by other observers in 2015 and 2011, including a probable breeding pair in 2011 (Cornell Lab of Ornithology 2016 (eBird data)). Although some of these sightings are from after the time of listing, we believe the site was used by the western yellow-billed cuckoo based on records at the time of listing, occupancy in nearby areas, and habitat conditions.

This new unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos.

The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit (monsoonal events). This unit includes areas of riparian and Madrean evergreen woodland vegetation that are suitable as western yellow-billed cuckoo breeding habitat and connected areas of riparian and Madrean evergreen woodland vegetation that are suitable as foraging habitat. Overstory vegetation in occupied habitat is primarily mesquite, with some oak and cottonwood (MacFarland and Horst 2015, p. 121).

Unit 55: AZ–43 Lyle Canyon, Santa Cruz and Cochise Counties, Arizona

Revised proposed critical habitat Unit AZ–43 is 1,293 ac (523 ha) in extent and is a 7.5-mi (12-km)-long continuous segment of stream within Lyle Canyon in Santa Cruz and Cochise Counties, Arizona. Approximately 716 ac (290 ha) is in Federal ownership, and 577 ac (234 ha) is in other ownership. Following the publication of the first western yellow-billed cuckoo critical habitat proposed rule, we received additional information on western yellow-billed cuckoo occupancy and habitat use in Madrean evergreen woodland drainages that supports inclusion as critical habitat (MacFarland and Horst 2015, entire). Two western yellow-billed cuckoo territories, including a pair, were detected on three surveys in July and August 2015, in Korn Canyon, near the confluence with Lyle Canyon (MacFarland and Horst 2015, pp. 35–36). Two pairs of western yellow-billed cuckoos were detected on four surveys in July and August 2015, in Lyle Canyon (MacFarland and Horst 2015, pp. 33–34). Although these sightings are from after the time of listing, we believe the site was used by the western yellow-billed cuckoo based on occupancy in nearby areas and habitat conditions.

This new unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The site is considered occupied at the time of listing. The site also provides a movement corridor and migratory stop-over location and was considered occupied by the species at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit (monsoonal events). More specifically, this site includes areas of riparian and Madrean evergreen woodland vegetation that are suitable as western yellow-billed cuckoo breeding habitat and connected areas of riparian and Madrean evergreen woodland vegetation that are suitable as foraging habitat. Occupied overstory habitat in Korn Canyon is dominated by oak and juniper, with some sycamore and ash (MacFarland and Horst 2015, pp. 121–122). Occupied overstory habitat in Lyle Canyon is dominated by oak and juniper, with some sycamore, pinion pine, and walnut (MacFarland and Horst 2015, p. 122).

Unit 56: AZ–44 Parker Canyon Lake, Santa Cruz and Cochise Counties, Arizona

Revised proposed critical habitat Unit AZ–44 is 1,499 ac (607 ha) in extent and is a 10.5-mi (16-km)-long continuous segment of stream near Parker Canyon Lake in Santa Cruz and Cochise Counties, Arizona. Approximately 1,424 ac (576 ha) is in Federal ownership, and 75 ac (31 ha) is in other ownership. Following the publication of the first western yellow-billed cuckoo critical habitat proposed rule, we received additional information on western yellow-billed cuckoo occupancy and habitat use in Madrean evergreen woodland drainages that supports inclusion as critical habitat. Western yellow-billed cuckoos were detected on three western yellow-billed cuckoo surveys in July and August 2015, in Collins Canyon, including a pair (MacFarland and Horst 2015, pp. 29–

30). Western yellow-billed cuckoos were detected on four surveys in July and August 2015, in Merritt Canyon (MacFarland and Horst 2015, pp. 37–38). Western yellow-billed cuckoos were documented at Parker Canyon Lake in 2015 by birders in August (Cornell Lab of Ornithology 2016 (eBird data)). Although these sightings are from after the time of listing, we believe the site was used by the western yellow-billed cuckoo based on occupancy in nearby areas and habitat conditions.

This new unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit (monsoonal events). More specifically, this site contains areas of riparian and Madrean evergreen woodland vegetation that are suitable as western yellow-billed cuckoo breeding habitat and connected areas of riparian and Madrean evergreen woodland vegetation that are suitable as foraging habitat. Dominant overstory vegetation in occupied habitat in Collins and Merritt canyons consists of juniper and oak, with ash, pine, cottonwood, and walnut (MacFarland and Horst 2015, pp. 121–122). Merritt Canyon, north of Parker Canyon Lake, is a shallow and wide drainage with large trees and flowing water (MacFarland and Horst 2015, p. 37). Western yellow-billed cuckoo were observed in Merritt Canyon on Forest Service land as well as private inholding that contained large, ornamental trees and a large turf lawn.

Unit 57: AZ–45 Barrel Canyon, Pima County, Arizona

Revised proposed critical habitat Unit AZ–45 is 920 ac (372 ha) in extent and is a 5-mi (8-km)-long continuous segment of stream within Barrel Canyon in Pima County, Arizona. Approximately 755 ac (306 ha) is in Federal ownership; less than 1 ac (1 ha) is in State ownership; and 164 ac (66 ha) is in other ownership. Following the publication of the first western yellow-billed cuckoo critical habitat proposed rule, we received additional information on western yellow-billed cuckoo occupancy and habitat use in Madrean evergreen woodland drainages that supports inclusion as critical habitat. Western yellow-billed cuckoos were documented during protocol surveys in the summers of 2013, 2014, and 2015 in this unit (WestLand Resources, Inc. 2015a, pp. 2–4; Westland Resources 2015b, entire; Westland Resources 2015c, entire.

This new unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit (monsoonal events). This unit includes areas of riparian and Madrean evergreen woodland vegetation that are suitable as western yellow-billed cuckoo breeding habitat and connected areas of riparian and Madrean evergreen woodland vegetation that are suitable as foraging habitat. Vegetation associated with these detections was Emory oak (*Quercus emoryi*), Arizona white oak (*Q. arizonica*), velvet mesquite, and desert willow, with an occasional Arizona sycamore, Arizona walnut, and Goodding's willow and alligator juniper (along sandy bottom drainages lacking perennial surface water.

Unit 58: AZ–46 Gardner Canyon; Pima and Santa Cruz Counties, Arizona

Revised proposed critical habitat Unit AZ–46 is 5,081 ac (2,056 ha) in extent and is a 14-mi (23-km)-long continuous segment of stream within Gardner Canyon in Pima and Santa Cruz Counties, Arizona. Approximately 4,320 ac (1,748 ha) is in Federal ownership; 290 ac (117 ha) is in State ownership; and 471 ac (191 ha) is in other ownership. This unit includes suitable habitat within the Las Cienegas National Conservation Area (NCA) that connects Gardner Canyon with upper Cienega Creek.

Western yellow-billed cuckoos were detected within this drainage at the Las Cienegas NCA Cottonwood Tanks on August 19, 2012, and June 10 and July 9, 2014 (Cornell Lab of Ornithology 2016 (eBird data)). Western yellow-billed cuckoos were detected on June 23, 2001 (Cornell Lab of Ornithology 2016 (eBird data)), in 2002 (Arizona Game and Fish Department 2016, entire), and on July 25, 2015 (Cornell Lab of Ornithology 2016 (eBird data)) along Gardner Canyon or Gardner Canyon Road in Coronado National Forest. All detections were incidental; no western yellow-billed cuckoo protocol surveys have been conducted in Gardner Canyon.

This new unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit (monsoonal events). This unit includes areas of riparian and Madrean evergreen woodland vegetation that are suitable as western yellow-billed cuckoo breeding habitat and connected areas of riparian and Madrean evergreen woodland vegetation that are suitable as foraging habitat. Habitat in Gardner Canyon is Madrean evergreen woodland with oak, desert willow, mesquite, and juniper. The drainage is intermittent during the monsoonal rain season.

Unit 59: AZ–47 Brown Canyon; Pima County, Arizona

Revised proposed critical habitat Unit AZ–47 is 1,113 ac (451 ha) in extent and is an 8-mi (13-km)-long continuous segment of stream within Brown Canyon in Pima County, Arizona. Approximately 726 ac (294 ha) is in Federal ownership; 228 ac (92 ha) is in State ownership; and 159 ac (65 ha) is in other ownership. Western yellow-billed cuckoos were detected by birders during the breeding season on August

29–September 1, 2005, and June 25, 2015 (American Birding Association 2012, entire; Cornell Lab of Ornithology 2016 (Bird data)). Nesting has been confirmed in Brown Canyon (B. Powell, unpublished data as reported in Pima County 2016, p. A–78; Corson 2018, pp. 11–12). In addition, they have also been observed during the breeding season by Buenos Aires National Wildlife Refuge staff (Flatland 2011, entire).

This new unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit (monsoonal events). This unit includes areas of riparian and Madrean evergreen woodland vegetation that are suitable as western yellow-billed cuckoo breeding habitat and connected areas of riparian and Madrean evergreen woodland vegetation that are suitable as foraging habitat. Brown Canyon includes a broad mix of dominant plant species that change with elevation and topography. At lower elevations, vegetation is predominantly Sonoran Desert uplands; at higher elevations, vegetation is predominantly oak woodlands (Powell and Steidl 2015, p. 68). Vegetation includes a mix of mesquite, oaks, hackberry, sycamore, walnut, acacia, *Mimosa* sp., and juniper (Powell and Steidl 2015, pp. 67, 69).

Unit 60: AZ–48 Sycamore Canyon, Patagonia Mountains; Santa Cruz County, Arizona

Revised proposed critical habitat Unit AZ–48 is 604 ac (245 ha) in extent and is a 5-mi (8-km)-long continuous segment of stream within Sycamore Canyon in Santa Cruz County, Arizona. The unit is entirely within Federal lands within the Coronado National Forest. Sycamore Canyon is a well-vegetated riparian corridor in Madrean evergreen woodland in the Patagonia Mountains. This site was surveyed only twice, but western yellow-billed cuckoos were detected at two locations on August 4 and 18, 2015, during protocol surveys (MacFarland and Horst 2015, pp. 91, 92). Numerous western yellow-billed cuckoos have been incidentally detected within this mountain range in multiple years, especially along Harshaw Creek (Cornell Lab of Ornithology 2016 (eBird data)). This unit lies within the Patagonia Mountains IBA.

This new unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit (monsoonal events). This unit includes areas of riparian and Madrean evergreen woodland vegetation that are suitable as western yellow-billed cuckoo breeding habitat and connected areas of riparian and Madrean evergreen woodland vegetation that are suitable as foraging habitat. Dominant overstory vegetation where western yellow-billed cuckoos have been found during surveys was primarily oak, ash, cottonwood, and mesquite, and dominant midstory vegetation was mesquite, *Baccharis* sp., ash, *Mimosa* sp., grape, and skunkbush (*Rhus trilobata*) (MacFarland and Horst 2015, pp. 91, 124, 129).

Unit 61: AZ–49 Washington Gulch; Santa Cruz County, Arizona

Revised proposed critical habitat Unit AZ–49 is 587 ac (237 ha) in extent and is a 5-mi (8-km)-long continuous segment of stream within Washington Gulch in Santa Cruz County, Arizona. Approximately 361 ac (146 ha) is in Federal ownership, and 226 ac (91 ha) is in other ownership. Washington Gulch is a riparian corridor in Madrean evergreen woodland in the Patagonia Mountains in the Coronado National Forest. A September 2, 2014, entry in eBird noted that a western yellow-billed cuckoo was calling during the field season (Cornell Lab of Ornithology 2015 (eBird data)). A western yellow-billed cuckoo was detected in the same general area during protocol surveys on July 22 and August 19 in 2015 in Washington Gulch (MacFarland and Horst 2015, pp. 91–94). This unit lies within the Patagonia Mountains IBA.

This new unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit (monsoonal events). This unit includes areas of riparian and Madrean evergreen woodland vegetation that are suitable as western yellow-billed cuckoo breeding habitat and connected areas of riparian and Madrean evergreen woodland vegetation that are suitable as foraging habitat. This drainage contains an overstory of large oak trees with some juniper and a midstory of manzanita and juniper (MacFarland and Horst 2015; pp. 93, 124, 129).

Unit 62: AZ–50 Paymaster Spring and Mowrey Wash; Santa Cruz County, Arizona

Revised proposed critical habitat Unit AZ–50 is 903 ac (365 ha) in extent and is made up of segments of stream within Paymaster Spring and Mowrey Wash totaling 5.5 mi (8.8 km) in Santa Cruz County, Arizona. Approximately 390 ac (158 ha) is in Federal ownership, and 512 ac (207 ha) is in other ownership. Paymaster Creek is a riparian corridor in Madrean evergreen woodland in the Patagonia Mountains in the Coronado National Forest. A western yellow-billed cuckoo was detected incidentally on June 18, 2010, and during protocol surveys on July 7 and 22, 2015 (MacFarland and Horst 2015, p. 89). This unit lies within the Patagonia Mountains IBA.

This new unit is part of the area within the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo, which is outside mainstem rivers and their tributaries as identified in our conservation strategy for designating

critical habitat for the western yellow-billed cuckoo. The site also provides a movement corridor and migratory stop-over habitat for western yellow-billed cuckoos. The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit (monsoonal events). This unit includes areas of riparian and Madrean evergreen woodland vegetation that are suitable as western yellow-billed cuckoo breeding habitat and connected areas of riparian and Madrean evergreen woodland vegetation that are suitable as foraging habitat. Oak, juniper, and some pine were the most dominant tree species where western yellow-billed cuckoos were detected during surveys (MacFarland and Horst 2015, p. 123).

Unit 63: CA–1 Sacramento River; Colusa, Glenn, Butte, and Tehama Counties, California

Revised proposed critical habitat unit CA–1 is 35,406 ac (14,328 ha) in extent and is a 69-mi (111-km)-long continuous segment of the Sacramento River starting 5 mi (8 km) southeast of the city of Red Bluff in Tehama County, California, to the downstream boundary of the Colusa-Sacramento River State Recreation Area next to the town of Colusa in Colusa County, California. The middle segment of this river reach flows through Butte and Glenn Counties. Approximately 2,123 ac (859 ha) is in Federal ownership; 485 ac (197 ha) is in State ownership; and 32,800 ac (13,274 ha) is in other ownership. The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This site has been a significant nesting area (nearly 100 nesting pairs in early 1970s) for the western yellow-billed cuckoo in the past but has been in decline (Dettling and Howell 2011a, pp. 30–35; Dettling and Howell 2011b, entire; Dettling *et al.* 2015, p. 2). Survey efforts in the early 1970s detected approximately 3 western yellow-billed cuckoo detections per day (60–96 nesting pairs). In the late 1980s this number dropped to less than 1.5 per day (35 nesting pairs) and in 2012 the survey efforts identified 1 to less than 1 sighting per day (28 nesting pairs) (Dettling *et al.* 2015, pp. 11–13). This unit is part of the area outside the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo that is in a different ecological setting as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. It is an important area to maintain for occupancy to promote species recovery. Minor revisions to the unit from the 2014 proposed designation include removal of orchard areas, agricultural lands, and roadways.

Unit 64: CA–2 South Fork Kern River Valley; Kern County, California

Revised proposed critical habitat Unit CA–2 is 2,640 ac (1,068 ha) in extent and is a 13-mi (21-km)-long continuous segment of the South Fork Kern River from west of the settlement of Canebrake downstream to Lake Isabella and includes the upper 0.6 mi (1.0 km) of Lake Isabella in Kern County, California. Approximately 88 ac (35 ha) is in Federal ownership; 419 ac (170 ha) is in State ownership; and 2,133 ac (863 ha) is in other ownership. Much of the privately owned land is owned and managed by Audubon California as the Kern River Preserve. Numbers of breeding western yellow-billed cuckoos have been relatively consistent at this site. The enlargement of this site from the 2014 proposed designation is based on recent observations in 2000 and 2014 of western yellow-billed cuckoos on the Canebrake Ecological Reserve. Western yellow-billed cuckoos were found in the expanded area in the 1980s and early 1990s, but none were found in the late 1990s, so the area wasn't included in the original proposal. The habitat at this site is improving based on reduction of cattle grazing and habitat restoration activities. The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit is part of the area outside the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo that is in a different ecological setting as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The site provides a stop-over area or movement corridor between western yellow-billed cuckoos breeding on the Colorado River and the Sacramento River. We have identified approximately 1,370 ac (555 ha) for potential exclusion from this unit (see Consideration of Impacts Under Section 4(b)(2) of the Act).

Unit 65: ID–1 Snake River 1; Bannock and Bingham Counties, Idaho

Revised proposed critical habitat unit ID–1 is 9,655 ac (3,907 ha) in extent and is a 22-mi (35-km)-long continuous segment of the Snake River from the upstream end of the American Falls Reservoir in Bannock County upstream to a point on the Snake River approximately 2 mi (3 km) west of the Town of Blackfoot in Bingham County, Idaho. Approximately 3,694 ac (1,494 ha) is in Federal ownership; 1,763 ac (713 ha) is in State ownership; 2,527 ac (1,023 ha) is in Tribal ownership; and 1,672 ac (676 ha) is in other ownership. This unit is part of the area outside the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo that is in a different ecological setting as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit is consistently occupied by western yellow-billed cuckoos during the breeding season. The unit is at the northern limit of the species' current breeding range.

Unit 66: ID–2 Snake River 2; Bonneville, Madison, and Jefferson Counties, Idaho

Revised proposed critical habitat unit ID–2 is 11,442 ac (4,630 ha) in extent and is a 40-mi (64-km)-long continuous segment of the Snake River from the bridge crossing on the Snake River 2 mi (3 km) east of the Town of Roberts in Madison County through Jefferson County and upstream to the vicinity of the mouth of Table Rock Canyon in Bonneville County, Idaho.

Approximately 5,862 ac (2,372 ha) is in Federal ownership; 1,940 ac (785 ha) is in State ownership; and 3,641 ac (1,473 ha) is in other ownership. Portions of this unit are within lands designated as the Snake River ACEC by BLM, and the Land and Water Conservation Fund (LWCF) program has purchased 32 properties in fee title and set aside approximately 42 conservation easements (22,400 ac (9,065 ha)) within the ACEC. The western yellow-billed cuckoo has been identified as a species of concern in the ACEC. State and County road crossings account for less than 1 percent of total ownership of this proposed unit. The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit is part of the area outside the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo that is in a different ecological setting as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. This unit is consistently occupied by western yellow-billed cuckoos during the breeding season. The unit is at the northern limit of the species' current breeding range.

Unit 67: ID–3 Henry's Fork and Teton Rivers; Madison and Fremont Counties, Idaho

Revised proposed critical habitat Unit ID–3 is 4,641 ac (1,878 ha) in extent and is a 15-mi (24-km)-long continuous segment of the Henry's Fork of the Snake River in Madison County from approximately 16 km (10 mi) upstream of the confluence with the Snake River to a point on the river approximately 1.6 km (1 mi) downstream of the town of St. Anthony in Fremont County, Idaho. Approximately 756 ac (305 ha) is in Federal ownership; 511 ac (206 ha) is in State ownership; and 3,374 ac (1,366 ha) is in other ownership. This unit is occupied by western yellow-billed cuckoos during the breeding season and represents the northern limit of the species' currently known breeding range. This unit is part of the area outside the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo that is in a different ecological setting as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The unit contains all the physical or biological features essential to the conservation of the species and was occupied at the time of listing and is still considered occupied. Inclusion of this unit contributes to the proposed critical habitat designation representing the full breeding range of the DPS. New comments by the American Bird Conservancy during the previous comment period, along with survey and habitat information previously submitted by the BLM and Idaho Department of Fish and Game, show western yellow-billed cuckoos in the expanded area. In response to the comments and new information received, we are amending the previously proposed boundaries of this unit to incorporate additional habitat upstream to approximately 1.6 km (1 mi) downstream of the town of St. Anthony, Fremont County, Idaho. Portions of this unit were removed based on our reevaluation of the habitat.

Unit 68: CO–1 Colorado River; Mesa County, Colorado

Revised proposed critical habitat unit CO–1 is 4,002 ac (1,620 ha) in extent and is a 25-mi (40-km)-long continuous segment of the Colorado River in the vicinity of Grand Junction in Mesa County, Colorado. Approximately 32 ac (13 ha) is in Federal ownership; 417 ac (169 ha) is in State ownership; and 3,553 ac (1,438 ha) is in other ownership. The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. The Colorado River Wildlife Management Area managed by the U.S. Fish and Wildlife Service holds conservation easements on several private parcels in this unit. This unit is part of the area outside the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo that is in a different ecological setting as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. This unit has been occupied by western yellow-billed cuckoos. The site also provides a migration stopover habitat for western yellow-billed cuckoos moving farther north.

Unit 69: CO–2 North Fork Gunnison River; Delta County, Colorado

Revised proposed critical habitat unit CO–2 is 2,326 ac (941 ha) in extent and is a 16-mi (26-km)-long continuous segment of the North Fork of the Gunnison River between Hotchkiss and Paeonia in Delta County, Colorado. Approximately 115 ac (47 ha) is in Federal ownership, and 2,211 ac (895 ha) is in other ownership. This unit is considered to have been occupied at the time of listing and is used by the western yellow-billed cuckoo during the breeding season. This unit has been consistently occupied by western yellow-billed cuckoos during the breeding season. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit is part of the area outside the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo that is in a different ecological setting as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The site also provides migratory stopover habitat for western yellow-billed cuckoos moving farther north.

Unit 70: UT–1 Green River 1; Uintah and Duchesne Counties, Utah

Revised proposed critical habitat unit UT–1 is 28,381 ac (11,486 ha) in extent and is made up of segments totaling 52 mi (83 km) of the Green River and Duchesne Rivers in the vicinity of Ouray in Uintah County, Utah. Approximately 4,657 ac (1,885 ha) is in Federal ownership; 4,411 ac (1,785 ha) is in State ownership; 14,611 ac (5,913 ha) is in Tribal ownership; and 4,702 ac (1,903 ha) is in other ownership. This unit has consistently had western yellow-billed cuckoos during the breeding season. This unit is part of the area outside the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo that is in a different ecological setting as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The site also provides a movement corridor for western yellow-billed cuckoos moving farther north.

The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit includes areas of riparian vegetation that area suitable as western yellow-billed cuckoo breeding habitat and connected areas of riparian vegetation that are suitable as foraging habitat. Recent surveys in this area revealed multiple western yellow-billed cuckoo detections.

Unit 71: UT–2 Green River 2; Emery and Grand Counties, Utah

Revised proposed critical habitat Unit UT–2 is 1,135 ac (459 ha) in extent and is an 8-mi (13-km)-long continuous segment of the Green River north of the town of Green River in Emery and Grand Counties, Utah. Approximately 40 ac (17 ha) is in Federal ownership; 632 ac (256 ha) is in State ownership; and 462 ac (187 ha) is in other ownership. Recent surveys have shown that this unit has a number of western yellow-billed cuckoos during the breeding season (Utah Division of Wildlife Resources (UDWR) 2012, entire; UDWR 2013, entire; UDWR 2014, entire). This unit is part of the area outside the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo that is in a different ecological setting as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The site also provides migratory stop-over habitat for western yellow-billed cuckoos.

The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit includes areas of riparian vegetation that are suitable as western yellow-billed cuckoo breeding habitat and connected areas of riparian vegetation that are suitable as foraging habitat. The recent surveys identified above in this area revealed multiple western yellow-billed cuckoo detections.

Unit 72: TX–1 Terlingua Creek and Rio Grande; Brewster County, Texas

Revised proposed critical habitat unit TX–1 is 7,913 ac (3,202 ha) in extent and is a 45-mi (72-km)-long continuous segment from lower Terlingua Creek to the Rio Grande in Brewster County, Texas. Approximately 7,792 ac (3,153 ha) is in Federal ownership, and 121 ac (49 ha) is in other ownership. Because this unit is along the border between United States and Mexico, we delineated the southern edge of the unit using the State of Texas boundary. Per our implementing regulations at 50 CFR 424.12(g), the Secretary does not designate critical habitat within foreign countries or in other areas outside the jurisdiction of the United States; therefore, no Mexican lands are included in this unit. This unit has been consistently occupied by western yellow-billed cuckoos during the breeding season. This unit is part of the area outside the Southwest portion of the DPS that provides breeding habitat for the western yellow-billed cuckoo that is in a different ecological setting as identified in our conservation strategy for designating critical habitat for the western yellow-billed cuckoo. The site also provides a north-south movement corridor for western yellow-billed cuckoos breeding farther north. Although tamarisk, a nonnative species that may reduce the habitat's value, is a major component of this unit, the area still provides habitat for the species and considered essential.

The unit is considered to have been occupied at the time of listing. The unit provides the habitat component provided in physical or biological feature 1 (PBF 1) and the prey component in physical or biological feature 2 (PBF 2). Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat as identified in physical or biological feature 3 (PBF 3) occurs within this unit but depends on river flows and flood timing. This unit includes areas of riparian vegetation that are suitable as western yellow-billed cuckoo breeding habitat and connected areas of riparian vegetation that are suitable as foraging habitat.

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 proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

We published a final regulation with a new definition of destruction or adverse modification on August 27, 2019 (84 FR 44976). Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Endangered Species 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. Reinitiation does not apply to an existing programmatic land management plan prepared pursuant to the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. 1701 *et seq.,* or the National Forest Management Act (NFMA), 16 U.S.C. 1600 *et seq.,* when a new species is listed or new critical habitat is designated under certain conditions (see our August 27, 2019, **Federal Register** notice (84 FR.44976).

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 western yellow-bulled cuckoo. 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 western yellow-billed cuckoo. These activities include, but are not limited to:

(1) Actions that would remove, thin, or destroy riparian western yellow-billed cuckoo habitat, without implementation of an effective riparian restoration plan that would result in the development of riparian vegetation of equal or better quality in abundance and extent. Such activities could include, but are not limited to, removing, thinning, or destroying riparian vegetation by mechanical (including controlled fire), chemical, or biological (poorly managed biocontrol agents) means. These activities could reduce the amount or extent of riparian habitat needed by western yellow-billed cuckoos for sheltering, feeding, breeding, and dispersing.

(2) Actions that would appreciably diminish habitat value or quality through direct or indirect effects. These activities could permanently eliminate available riparian habitat and food availability or degrade the general suitability, quality, structure, abundance, longevity, and vigor of riparian vegetation. Such activities could include, but are not limited to: Spraying of pesticides that would reduce insect prey populations within or adjacent to riparian habitat; introduction of nonnative plants, animals, or insects; habitat degradation from recreational activities; and activities such as water diversions or impoundments that would result in diminished or altered riverflow regimes, groundwater extraction activities, dam construction and operation activities, or any other activity that negatively changes the frequency, magnitude, duration, timing, or abundance of surface flow. These activities have the potential to reduce or fragment the quality or amount or extent of riparian habitat needed by western yellow-billed cuckoos for sheltering, feeding, breeding, and dispersing. However, we also note that existing water management operations in place on riverine segments identified as critical habitat, unless modified subsequent to this revised proposed designation, are unlikely to have any discernible effect on the quantity, quality, or value of the PBFs of the area identified as critical habitat. That is, when evaluating the effects on critical habitat, FWS considers ongoing water management operations within the proposed units that are not within the agency's discretion to modify to be part of the baseline. All areas identified as critical habitat where ongoing water operations exist contain the PBFs necessary to provide for the essential habitat needs of the cuckoo; therefore, we do not anticipate that the continuation of existing water management operations would appreciably diminish the value or quality of the critical habitat where they occur.

(3) Actions that would permanently destroy or alter western yellow-billed cuckoo habitat. Such activities could include, but are not limited to, discharge of fill material, draining, ditching, tiling, pond construction, and stream channelization (due to roads, construction of bridges, impoundments, discharge pipes, stormwater detention basins, dikes, levees, and other things). These activities could permanently eliminate available riparian habitat and food availability or degrade the general suitability, quality, structure, abundance, longevity, and vigor of riparian vegetation and microhabitat components necessary for nesting, migrating, food, cover, and shelter.

(4) Actions that would result in alteration of western yellow-billed cuckoo habitat from management of livestock or ungulates (for example, horses, burros). Such activities could include, but are not limited to, unrestricted ungulate access and use of riparian vegetation; excessive ungulate use of riparian vegetation during the nongrowing season (for example, leaf drop to bud break); overuse of riparian habitat and upland vegetation due to insufficient herbaceous vegetation available to ungulates; and improper herding, water development, or other livestock management actions. These activities could reduce the volume and composition of riparian vegetation, prevent regeneration of riparian plant species, physically disturb nests, alter floodplain dynamics, alter watershed and soil characteristics, alter stream morphology, and facilitate the growth of flammable nonnative plant species.

(5) Actions in relation to the Federal highway system, which could include,

but are not limited to, new road construction and right-of-way designation. These activities could eliminate or reduce riparian habitat along river crossings necessary for reproduction, sheltering, or growth of the western yellow-billed cuckoo.

(6) Actions that would involve funding and/or implementation of activities associated with cleaning up Superfund sites, erosion control activities, flood control activities, and communication towers. These activities could eliminate or reduce habitat for the western yellow-billed cuckoo.

(7) Actions that would affect waters of the United States under section 404 of the CWA. Such activities could include, but are not limited to, placement of fill into wetlands. These activities could eliminate or reduce the habitat necessary for the reproduction, feeding, or growth of the western yellow-billed cuckoo.

Finally, we note that for any of the seven categories of actions outlined above, we and the relevant Federal agency may find that the agency's anticipated actions affecting critical habitat may be appropriate to consider programmatically in section 7 consultation. Programmatic consultations can be an efficient method for streamlining the consultation process, addressing an agency's multiple similar, frequently occurring, or routine actions expected to be implemented in a given geographic area. Programmatic section 7 consultation can also be conducted for an agency's proposed program, plan, policy, or regulation that provides a framework for future proposed actions. We are committed to responding to any agency's request for a programmatic consultation, when appropriate and subject to the approval of the Director, as a means to streamline the regulatory process and avoid time-consuming and inefficient multiple individual consultations.

Exemptions

Application of Section 4(a)(3) of the Act

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)) provides that: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan 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.'' No Department of Defense lands have been identified as potential critical habitat; therefore, section 4(a)(3)(B)(i) of the Act does not apply, and no areas are being exempted.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary may exclude any area from critical habitat if it is determined that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless it is determined, 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. Please see the Service's policy regarding implementation of section 4(b)(2) of the Act published in the **Federal Register** on February 11, 2016 (81 FR 7226).

In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise his discretion to exclude the area only if such exclusion will not result in the extinction of the species.

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 considering 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 western yellow-billed cuckoo, the benefits of designating critical habitat include public awareness of the western yellow-billed cuckoo presence and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for western yellow-billed cuckoo due to the protection from adverse modification or destruction of critical habitat. Increased habitat protection reduces the risk that human actions will directly or indirectly appreciably diminish habitat value or quality. 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. Data limitations prevent the quantification of benefits.

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.

Based on the information provided by entities seeking exclusion, as well as any additional public comments we receive, we will evaluate whether certain lands in the revised proposed critical habitat (table 3) are appropriate for exclusion from the final designation under section 4(b)(2) of the Act. If the analysis indicates that the benefits of excluding lands from the final designation outweigh the benefits of designating those lands as critical habitat, then the Secretary may exercise his discretion to exclude the lands from the final designation. Tribal lands have not been identified for potential exclusion at this time; however, we have and will continue to coordinate and work with all tribes potentially affected by the revised proposed

designation throughout this process and may exclude some or all of their lands from the final designation. Please see *Government-to-Government Relationship with Tribes,* below, for a complete list of tribal lands currently within the revised proposed designation.

Table 3 below provides approximate areas of lands that meet the definition of critical habitat and are under our consideration for possible exclusion under section 4(b)(2) of the Act from the final critical habitat rule.

TABLE 3—AREAS CONSIDERED FOR EXCLUSION BY CRITICAL HABITAT UNIT

	Unit	Specific area	Area meeting the definition of critical habitat, in acres (ha)	Area considered for possible exclusion in acres (ha)
1	CA/AZ–1	Colorado River 1	82,138 (33,240)	55,061 (22,292)
2	CA/AZ–2	Colorado River 2	23,589 (9,546)	20,025 (8,107)
3	AZ–1	Bill Williams River	3,389 (1,371)	2,640 (1,069)
4	AZ–2	Alamo Lake	2,794 (1,131)	1,840 (745)
7	AZ–5	Upper Verde River	6,047 (2,447)	491 (199)
9	AZ–7	Beaver Creek	2,082 (842)	1 (<1)
10	AZ–8	L. Verde R./West Clear Ck	2,178 (882)	42 (17)
11	AZ–9A	Horseshoe Dam	2,743 (1,110)	626 (253)
12	AZ–10	Tonto Creek	3,669 (1,485)	3,155 (1,277)
13	AZ–11	Pinal Creek	419 (169)	390 (158)
16	AZ–14	Upper San Pedro River	31,060 (12,569)	89 (36)
17	AZ–15	Lower San Pedro/Gila R	23,400 (9,470)	1,757 (711)
19	AZ–17	Upper Cienega Creek	5,204 (2,106)	264 (107)
22	AZ–20	Gila River 1	20,724 (8,387)	10,183 (4,123)
23	AZ–21	Salt River	2,590 (1,048)	2,469 (1,000)
24	AZ–22	Lower Cienega Creek	2,360 (955)	2,360 (955)
27	AZ–25	Aravaipa Creek	3,329 (1,347)	392 (159)
28	AZ–26	Gila River 2	8,588 (3,475)	1,434 (580)
31	AZ–29	Big Sandy	20,179 (8,166)	721 (292
33	NM–2	Gila River	4,177 (1,690)	3,002 (1,215)
35	NM–4	Upper Rio Grande 1	1,830 (741)	1,313 (531)
36	NM–5	Upper Rio Grande 2	1,173 (475)	1,173 (475)
37	NM–6AB	Middle Rio Grande	68,581 (27,754)	17,096 (6,922)
39	NM–8A	Caballo Delta North	190 (77)	190 (77)
39	NM–8B	Caballo Delta South	155 (63)	155 (63)
40	NM–9	Animas	608 (246)	608 (246)
41	NM–10	Selden Cyn./Radium Sprs	237 (96)	237 (96)
43	AZ–31	Florida Wash	747 (302)	279 (113)
46	AZ–34	Madera Canyon	1,732 (701)	416 (168)
50	AZ–38	Arivaca Lake	1,365 (553)	380 (154)
53	AZ–41	Box Canyon	536 (217)	221 (89)
57	AZ–45	Barrel Canyon	920 (372)	170 (69)
58	AZ–46	Gardner Canyon	5,081 (2,056)	438 (177)
59	AZ–47	Brown Canyon	1,113 (451)	259 (105)
64	CA–2	South Fork Kern R. Valley	2,640 (1,068)	167 (67)
65	ID–1	Snake River 1	9,655 (3,907)	3,219 (1,303)
68	CO–1	Colorado River	4,002 (1,620)	417 (169)
70	UT–1	Green River 1	28,381 (11,486)	6,848 (2,771)
Total	.....	.....	.....	145,710 (58,968)

We specifically solicit comments on the inclusion or exclusion of these areas. In the paragraphs below, we provide brief descriptions of the lands under consideration for exclusion under section 4(b)(2) of the Act. We have also added an addendum to our incremental effects memorandum that lays out in table form the Service's policy considerations under section 4(b)(2) of the Endangered Species Act: Land Ownership/Management and Potential Economic Impacts for Proposed Western Yellow-billed Cuckoo Critical Habitat. This addendum was developed following the finalization of the incremental effects memorandum, and the information in the incremental effects memorandum was used to inform the policy considerations. We also solicit comments on any potential economic exclusions (see Information Requested).

Consideration of Exclusion of State Lands and Lands With Conservation Easements

In response to specific comments we have already received from the States where we are proposing critical habitat, we are requesting further information on potential exclusions for State-managed or privately managed lands including, but not limited to, State Wildlife Areas, State Habitat Areas, State Parks, and State or other lands (of various ownership) with permanent conservation easements. Table 4 lists examples of certain areas that may be appropriate for exclusion from critical habitat designation. For these and other areas being considered for exclusion, and as further discussed above, we are soliciting further information on where these properties are located, and how the western yellow-billed cuckoo or the riparian habitats they use are managed and protected at these areas. Without this information, we cannot weigh the benefits of a potential exclusion in comparison to inclusion. Table 4 is not exhaustive, and other areas within the revised proposed critical habitat not identified may be considered for

exclusion and potentially excluded in the final designation. We invite public comments and request submission of supporting materials necessary to inform our evaluation of these potential exclusions.

TABLE 4—EXAMPLES OF AREAS WITH LAND USE DESIGNATIONS THAT MAY BE CONSIDERED FOR EXCLUSION FROM CRITICAL HABITAT DESIGNATION

Critical habitat unit	Name of unit	Site type	Potential exclusion area
4	AZ–2 Alamo Lake	State Wildlife Area (SWA)	Alamo Wildlife Area.
7	AZ–5 Upper Verde River	SWA	Upper Verde River SWA.
64	CA–2 South Fork Kern River	Cons. Easement (CE)	Hafenfeld Ranch.
64	CA–2 South Fork Kern River	CE	Sprague Ranch.
68	CO–1 Colorado River	SWA	Walker SWA.
68	CO–1 Colorado River	Wildlife Management Area (WMA)	Colorado River WMA.
68	CO–1 Colorado River	State Park (SP)	James M. Robb—Colorado River SP.
69	CO–2 North Fork of the Gunnison River.	CE	Town of Hotchkiss Riparian Park.

Impacts on National Security and Homeland Security

Section 4(a)(3)(B)(i) of the Act 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'' pursuant to that section of the law. Nevertheless, when designating critical habitat under section 4(b)(2), 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 4(b)(2) exclusion analysis, we will give great weight to national-security and homeland-security concerns in analyzing the benefits of exclusion.

Under section 4(b)(2) of the Act, we consider whether there are lands owned or managed by the DoD where a national-security impact might exist. We received comments from the Department of the Army and Department of the Air Force regarding excluding areas based on national security or other military operations. The comments were from the Yuma Proving Grounds (Department of the Army 2014, entire), Luke Air Force Base (Department of the Air Force 2014, entire) concerning restricted airspace above proposed critical habitat; however, the actions described by the two installations do not impact habitat for the western yellow-billed cuckoo and would not require consideration of adverse modification of the critical habitat. We do not believe that Army operations will be disrupted as a result of designation of critical habitat and have issued a biological opinion to that effect. We will have further discussions with the Army to evaluate whether these areas should be excluded from the final designation based on national security.

We also received comments from the U.S. Army installation at Fort Huachuca requesting that areas outside the installation in Unit 26 (AZ–18) that includes the San Pedro Riparian National Conservation Area (SPRNCA) be excluded from the final designation. Our evaluation of this request is outlined below.

Upper San Pedro River (Unit 26 AZ–18). The area within Unit 26 being requested for exclusion is part of the SPRNCA and is managed by the BLM and composed of Federal, State, and private lands and not owned by the DoD or part of the lands managed under the Army's INRMP. The Army's rationale for the exclusion was that any additional restrictions to ground water pumping and water usage could affect their ability to increase staffing when needed, or carry out missions critical to national security. The Army also stated that designation of lands within the SPRNCA would increase its regulatory burden and disrupt its operations related to national security. The Army pointed to its continued land stewardship actions and its commitment to protecting natural resources on the base.

As stated above, the lands within Unit 26 (AZ–18) are primarily owned and managed by BLM. An exemption under section 4(a)(3)(a) does not apply because area is not subject to their INRMP. In addition, in the Fort Huachuca November 2013 Revised Biological Assessment (BA) (U.S. Department of the Army 2013, pp. 189–190) on its operations, it states that ''Fort-attributable groundwater use is unlikely to affect the yellow-billed cuckoo or its habitat where the species is known to occur in the SPRNCA, Babocomari Cienega, or the lower San Pedro River . . . .'' The BA concludes there will be no effect on western yellow-billed cuckoo or its habitat from Fort Huachuca's operational actions or

ground water pumping. In the subsequent 2014 biological opinion under section 7 of the Act, we issued a not likely to adversely affect (NLAA) or adversely modify critical habitat determination for the Army's operational activities and ground water pumping as they related to the SPRNCA and the western yellow-billed cuckoo (Service 2014, pp. 300–306). Given that the Fort's ground water use has been determined to not adversely affect western yellow-billed cuckoos or their habitat, we are not considering the area for exclusion at this time. Should the Army present additional information as to why the area warrants exclusion, we may consider their request in our final designation.

Lastly, we received a request from the U.S. Customs and Border Protection (CBP) (Department of Homeland Security) that proposed critical habitat along the U.S./Mexico border along California, Arizona, and Texas be considered for exclusion under section 4(b)(2) of the Act for national security reasons. The CBP was particularly concerned with Unit 7 (CA/AZ–1), Unit 26 (AZ–18) (south of Arizona Highway 92), Unit 31 (AZ–23), Unit 32 (AZ–24), and Unit 35 (AZ–27). However with the revision to the original proposal, we assume the CBP would request all areas along the California, Arizona, New Mexico, and Texas border be evaluated for exclusion. Our evaluation of this request is outlined below.

United States/Mexico Border; Colorado River 1 (Unit 7 CA/AZ–1), Upper San Pedro River (Unit 26 AZ–18), Unit 31 (AZ–23) Arivaca Wash and San Luis Wash, Unit 32 (AZ–24) Sonoita Creek, Santa Cruz River (Unit 34 AZ–26), Black Draw (Unit 35 AZ–27), Arroyo Caballo, Rio Grande (Unit 79 TX–1), Terlingua Creek and Rio Grande (Unit 80 TX–2) California Gulch (Unit 91 AZ–40), Sycamore Canyon (Unit 92 AZ–41), Pena Blanca Canyon (Unit 100 AZ–49), Washington Gulch (Unit 120 AZ–68), San Rafael Valley (Unit 113, AZ–62), and Guadalupe Canyon (Unit 118 AZ–72). As stated above, we received a request from the CBP that proposed critical habitat along the border in California, Arizona, and Texas be considered for exclusion under section 4(b)(2) of the Act. CBP stated they have concerns that the designation could have significant impacts on their ability to carry out CBP's national- and border-security missions along the U.S./Mexico international border. In these areas, CBP conducts clearing and management of riparian vegetation to maintain unobstructed lines of sight in the border areas to facilitate identification and location of illegal cross-border activities and to maintain the safety of CBP officers and agents who could be targets of cross-border violators hidden in unmanaged vegetation. The exact extent of area that is being considered for exclusion has not yet been identified, since it would depend on where areas of interest to the CBP are located and if such areas are requested. However, in general, we would expect the areas to be no more than 0.25 mi (0.4 km) from the border. We will be meeting with CBP staff to discuss their activities and make a final determination on potential exclusion in our final designation of critical habitat.

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 habitat conservation plans (HCPs), safe harbor agreements, or candidate conservation agreements with assurances, or whether there are nonpermitted 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.

Based on the information provided by entities seeking exclusion, as well as any additional public comments received, we will evaluate whether certain lands in the proposed critical habitat presented in table 3 are appropriate for exclusion from the final designation under section 4(b)(2) of the Act. If the analysis indicates that the benefits of excluding lands from the final designation outweigh the benefits of designating those lands as critical habitat, then the Secretary may exercise his discretion to exclude the lands from the final designation.

We believe that the following HCPs and other plans, partnerships, and agreements may fulfill the above criteria, and will consider the exclusion of these Federal, Tribal, and non-Federal lands covered by these plans that provide for the conservation of the western yellow-billed cuckoo. We are requesting comments on the benefits to the western yellow-billed cuckoo from these HCPs, plans, partnerships, and agreements. However, at this time, we are not proposing the exclusion of any areas in this revised proposed critical habitat designation for the western yellow-billed cuckoo. We specifically solicit comments on the inclusion or exclusion of such areas and request any information on any other potential exclusions. We may consider other areas for exclusion based on public comment and information we receive and on our further review of the revised proposed designation and its potential impacts.

Some of the following information on HCPs, plans, partnerships, and agreements was obtained from the August 15, 2011, proposed designation of revised critical habitat for the southwestern willow flycatcher (76 FR 50542). The areas used by the southwestern willow flycatcher and western yellow-billed cuckoo overlap in several areas in the southwestern United States, and management actions for the southwestern willow flycatcher often benefit the western yellow-billed cuckoo. These various plans describe beneficial actions for the southwestern willow flycatcher within the same area that we are proposing to designate as western yellow-billed cuckoo critical habitat. We will consider whether these beneficial actions for the southwestern willow flycatcher are appropriate to include in any consideration of excluding a given proposed western yellow-billed cuckoo unit from final western yellow-billed cuckoo critical habitat designation under section 4(b)(2) of the Act.

Below we present details on the areas being considered for exclusion within each State. Please see the Service's policy regarding implementation of section 4(b)(2) of the Act (81 FR 7226; February 11, 2016) for a description of the categories under which the areas considered for exclusion are grouped below.

California

Federal Lands

South Fork Kern River Valley (Unit 64 CA–2) Sprague Ranch Conservation Easement. Sprague Ranch is an approximately 2,479-ac (1,003-ha) parcel, which includes approximately 395 ha (975 ac) of floodplain habitat located along the South Fork of the Kern River in Kern County, California. Sprague Ranch was purchased by the U.S. Army Corps of Engineers (USACE) as a result of biological opinions for the long-term operation of Lake Isabella Dam and Reservoir (Service 1996 File Nos. 1–1–96–F–27; 1–1–99–F–216; and 1–1–05–F–0067), specifically to provide habitat and conservation for the southwestern willow flycatcher. Many of the actions may also benefit the

western yellow-billed cuckoo. During the periods of time southwestern willow flycatcher habitat is not available at Lake Isabella Reservoir as a result of short-term inundation from Isabella Dam operations, Sprague Ranch is expected to provide habitat for the southwestern willow flycatcher. The USACE, National Audubon Society (Audubon), and California Department of Fish and Wildlife (CDFW) (formerly California Department of Fish and Game) have a joint management agreement for this property, which is important southwestern willow flycatcher habitat. Sprague Ranch is located immediately north and adjacent to the Kern River Preserve (KRP), which is owned and operated by Audubon, and shares a common border with the KRP of more than 3 mi (4.8 km). Sprague Ranch contains existing riparian forest that can support and maintain nesting territories and migrating and dispersing southwestern willow flycatchers. Other portions of the ranch are believed to require restoration and management in order to become nesting southwestern willow flycatcher habitat. Activities such as nonnative vegetation control and native tree plantings are other management activities expected to occur. Sprague Ranch is currently being managed in accordance with the terms and conditions of the biological opinions specifically for the southwestern willow flycatcher.

Based on the anticipated benefits to the western yellow-billed cuckoo that would derive from the actions to benefit the southwestern willow flycatcher, we will consider excluding approximately 40 ac (16 ha) in Unit 64 along the South Fork Kern River on Sprague Ranch from final western yellow-billed cuckoo critical habitat designation under section 4(b)(2) of the Act.

Private or Other Non-Federal Conservation Plans or Agreements and Partnerships, in General

South Fork Kern River Valley (Unit 64 CA–2) Hafenfeld Ranch Conservation Easement. The Hafenfeld Ranch owns and manages a segment (127 ac (51 ha)) of proposed western yellow-billed cuckoo critical habitat along the South Fork Kern River within the Kern River Management Unit in Kern County, California. The Hafenfeld Ranch has developed a conservation easement and plan with the Natural Resources Conservation Service that provides management and protections for southwestern willow flycatcher habitat. We are evaluating whether these actions also provide benefit for the western yellow-billed cuckoo. The Hafenfeld parcel completes a continuous corridor of willow-cottonwood riparian habitat along the South Fork Kern River that connects the east and west segments of the Audubon Society's Kern River Preserve. The conservation easement and plan establishes that these lands are managed for the benefit of the southwestern willow flycatcher by restoring, improving, and protecting its habitat. Management activities include: (1) Limiting public access to the site, (2) winter-only grazing practices (outside of the southwestern willow flycatcher nesting season), (3) protection of the site from development or encroachment, (4) maintenance of the site as permanent open space that has been left predominantly in its natural vegetative state, and (5) spreading of flood waters to promote the moisture regime and wetland and riparian vegetation for the conservation of the southwestern willow flycatcher. Prohibitions of the easement that would benefit the conservation of the southwestern willow flycatcher include: (1) Haying, mowing, or seed harvesting; (2) altering the grassland, woodland, wildlife habitat, or other natural features; (3) dumping refuse, wastes, sewage, or other debris; (4) harvesting wood products; (5) draining, dredging, channeling, filling, leveling, pumping, diking, or impounding water features or altering the existing surface water drainage or flows naturally occurring within the easement area; and (6) building or placing structures on the easement.

Based on the actions to benefit the southwestern willow flycatcher, we will consider excluding the Hafenfeld Ranch lands within Unit 64 (127 ac (51 ha)) from final western yellow-billed cuckoo critical habitat designation under section 4(b)(2) of the Act.

Arizona

Tribal Lands Along the Colorado River

On the Colorado River along the California/Arizona border several Native American Tribes own lands within Units 1 (CA/AZ–1) and 2 (CA/AZ–2). We are considering excluding all Tribal lands from these two units. The total amount of area considered in the exclusion totals approximately 55,061 ac (22,292 ha) from Unit 1 and 20,025 ac (8.107 ha) from Unit 2. Information regarding Tribal management of these areas is described below.

Colorado River Indian Reservation (Unit 1, CA/AZ–1). The Colorado River Indian Tribal lands contain a proposed Colorado River segment of western yellow-billed cuckoo critical habitat in La Paz County, Arizona. The Colorado River Indian Tribes (CRIT) have finalized a southwestern willow flycatcher management plan (SWFMP) compatible with western yellow-billed cuckoo management (CRIT 2005, pp. 1–48). The CRIT's SWFMP describes a commitment to conduct a variety of habitat management actions. The SWFMP also identifies the assessment, identification, and protection of southwestern willow flycatcher migration habitat (CRIT 2005, pp. 1–48). The SWFMP identifies protecting breeding habitat with the Ahakhav Tribal Preserve and in any areas established for southwestern willow flycatchers with the Lower Colorado River Multi-Species Conservation Program (LCR MSCP). Seasonal closures of occupied southwestern willow flycatcher habitat during the breeding season may be necessary and established by the Colorado River Indian Tribes. Protection of habitat from fire is established in the SWFMP, as well as protections from other possible stressors such as overgrazing, recreation, and development (CRIT 2005, pp. 1–48). The Colorado River Indian Tribes may also work in conjunction with the LCR MSCP on additional riparian management. We received comments from the CRIT following our proposed rule, and those comments will be fully considered in the final designation. We will consider excluding the Colorado River Indian Tribal land from the final designation of western yellow-billed cuckoo critical habitat under section 4(b)(2) of the Act.

Fort Yuma Indian Reservation (Unit 1, CA/AZ–1). The Quechan Tribal lands contain a proposed Colorado River segment of western yellow-billed cuckoo critical habitat near the City of Yuma in Yuma County, Arizona. The Quechan Tribe has completed an SWFMP that is compatible with western yellow-billed cuckoo management (Quechan Indian Tribe 2005, pp. 1–30). The Quechan Tribe's SWFMP describes a commitment to conduct a variety of habitat management actions. The Tribe will manage riparian tamarisk that is intermixed with cottonwood, willow, mesquite, and arrow weed to maximize potential value for nesting southwestern willow flycatchers (Quechan Indian Tribe 2005, pp. 1–30). Any permanent land use changes for recreation or other reasons will consider and support southwestern willow flycatcher needs, as long as those needs are consistent with Tribal cultural and economic needs. The Tribe will consult with the Service to develop and design plans that minimize impacts to southwestern willow flycatcher habitat. The Tribe will

establish collaborative relationships with the Service to benefit the southwestern willow flycatcher, including monitoring for southwestern willow flycatcher presence and habitat condition, within the constraints of funds available to the Tribe. This action is anticipated to provide benefits to the western yellow-billed cuckoo. The Quechan Tribe may also work in conjunction with the LCR MSCP on additional riparian management. We will consider excluding the Quechan Tribal land from the final designation of western yellow-billed cuckoo critical habitat under section 4(b)(2) of the Act.

Cocopah Tribe of Arizona (Unit 1, CA/AZ–1). The Cocopah Tribal lands, located 13 mi (21 km) south of Yuma, in Yuma County, Arizona, contain proposed western yellow-billed cuckoo critical habitat along the lower Colorado River. We provided comments on a draft management plan provided by the Cocopah Tribe following our proposed critical habitat rule, and we will continue to work with the Cocopah Tribe on revisions compatible with western yellow-billed cuckoo management. The Cocopah Tribe may also work in conjunction with the LCR MSCP on additional riparian management. We will consider excluding the Cocopah Tribe of Arizona land from the final designation of western yellow-billed cuckoo critical habitat under section 4(b)(2) of the Act. Based on these conservation plans, we will consider excluding the Cocopah Tribal lands in Units 1 and 2.

Fort Mojave Indian Tribe (Unit 2, CA/AZ–2). Fort Mojave Indian Tribal lands contain a proposed segment of western yellow-billed cuckoo critical habitat at Lake Havasu in Mohave County, Arizona. The Fort Mojave Tribe has finalized an SWFMP, compatible with western yellow-billed cuckoo management (Fort Mojave Indian Tribe 2005, pp. 1–24). The Fort Mojave Tribe's SWFMP describes that, within the Tribe's budgetary constraints, they commit to management that will sustain the current value of tamarisk, willow, and cottonwood vegetation that meets moist soil conditions necessary to maintain southwestern willow flycatcher habitat; monitoring to determine southwestern willow flycatcher presence and vegetation status in cooperation with the Service; and wildfire response and law enforcement to protect suitable habitats. The Fort Mojave Indian Tribe may also work in conjunction with the LCR MSCP on additional riparian management (Fort Mojave Indian Tribe 2005, pp. 1–24). We will consider excluding the Fort Mojave Indian Tribal lands on the Colorado River from the final designation of western yellow-billed cuckoo critical habitat under section 4(b)(2) of the Act.

Other Tribal Lands in Arizona

Yavapai-Apache Nation (Unit 7: AZ–5, Upper Verde River; Unit 9: AZ–7, Beaver Creek; and Unit 10: AZ–8, Lower Verde River and West Clear Creek). The Yavapai-Apache Nation contains Verde River segments of proposed western yellow-billed cuckoo critical habitat in Yavapai County, Arizona. The small parcels are located near Clarkdale, Camp Verde, Middle Verde, Rimrock, and the I–17 interchange for Montezuma Castle National Monument (Yavapai-Apache Nation 2005, p. 6). The Yavapai-Apache Nation has completed an SWFMP that is compatible with western yellow-billed cuckoo management (Yavapai-Apache Nation 2005, pp. 1–15). The Yavapai-Apache Nation's SWFMP addresses and presents assurances for southwestern willow flycatcher habitat conservation. The Yavapai-Apache Nation will, through zoning, Tribal ordinances and code requirements, and measures identified in the southwestern willow flycatcher recovery plan, take all practicable steps to protect known southwestern willow flycatcher habitat located along the Verde River (Yavapai-Apache Nation 2005, p. 14). The Yavapai-Apache Nation will take all reasonable measures to assure that no net habitat loss or permanent modification of southwestern willow flycatcher habitat will result from recreational and road construction activities, or habitat restoration activities, and will take all reasonable steps to coordinate with the Service so that southwestern willow flycatcher habitat is protected. Within funding limitations and under confidentiality guidelines established by the Yavapai-Apache Nation, they will cooperate with the Service to monitor and survey habitat for breeding and migrating southwestern willow flycatchers, conduct research, and perform habitat restoration, or other beneficial southwestern willow flycatcher management activities. Because southwestern willow flycatchers and western yellow-billed cuckoos rely on similar riparian habitat, most of the mitigation measures serve both species. We received comments from the Yavapai-Apache Nation following our proposed critical habitat rule and have incorporated those comments in this revision. We will consider excluding the Verde River segments totaling 534 ac (216 ha) within the Yavapai-Apache Nation from the final designation of western yellow-billed cuckoo critical habitat under section 4(b)(2) of the Act.

San Carlos Reservation (Unit 17: AZ–15, Lower San Pedro River and Gila River; Unit 22: AZ–20, Gila River 1; Unit 27: AZ–25, Aravaipa Creek; and Unit 28: AZ–26, Gila River 2). The San Carlos Apache Tribal lands contain proposed western yellow-billed cuckoo critical habitat within the conservation space of San Carlos Lake and the Gila River upstream from San Carlos Lake, in Gila County, Arizona. The San Carlos Apache Tribe has finalized an SWFMP that is compatible with western yellow-billed cuckoo management (San Carlos Apache Tribe 2005, pp. 1–65). Implementation of the San Carlos Apache Tribe's SWFMP will protect all known southwestern willow flycatcher habitat on San Carlos Tribal Land and assure no net habitat loss or permanent modification will result (San Carlos Apache Tribe 2005, p. 36). All habitat restoration activities (whether to rehabilitate or restore native plants) will be conducted under reasonable coordination with the Service. All reasonable measures will be taken to ensure that recreational activities do not result in a net habitat loss or permanent modification. All reasonable measures will be taken to conduct livestock grazing activities under the guidelines established in the recovery plan for the southwestern willow flycatcher. Within funding limitations and under confidentiality guidelines established by the Tribe, the Tribe will cooperate with the Service to monitor and survey habitat for breeding and migrating southwestern willow flycatchers, conduct research, and perform habitat restoration, or other beneficial southwestern willow flycatcher management activities (San Carlos Apache Tribe 2005, pp. 35–36, 45–46). Because southwestern willow flycatchers and western yellow-billed cuckoos rely on similar riparian habitat, most of the mitigation measures serve both species. We received comments from the San Carlos Apache Tribe following our 2014 proposed critical habitat rule, and those comments and new comments will be fully considered in the final designation. We will consider excluding 13,766 ac (5,571 ha) of San Carlos Apache Tribal land from the final designation of western yellow-billed cuckoo critical habitat under section 4(b)(2) of the Act.

Hualapai Indian Tribe (Unit 31: AZ–29, Big Sandy River). The Hualapai Indian Tribe owns land within the proposed western yellow-billed cuckoo critical habitat along the Big Sandy River, in Mohave County, Arizona. The Hualapai Tribe has finalized a

management plan for the southwestern willow flycatcher that was adopted by the Hualapai Tribal Council (Hualapai Tribe 2004, entire).

The objectives of the Hualapai Tribe's management plan are to manage riparian vegetation to: (1) Maximize continued presence of native plant species suitable for use by flycatchers; (2) ensure that existing land uses (which presently include recreational activities) will not result in net loss or reduction in quality of habitat; and (3) continue their Department of Natural Resources partnership in the management of the lower Colorado River region, including those associated with the LCR MSCP (Hualapai Tribe 2004, pp. 17–18). Because southwestern willow flycatchers and western yellow-billed cuckoos rely on similar riparian habitat, most of the conservation measures identified in the plan serve both species. We will consider excluding the Hualapai Tribal lands within Unit 31: AZ–29, Big Sandy River, totaling approximately 242 ac (98 ha) from the final designation of critical habitat for the western yellow-billed cuckoo under section 4(b)(2) of the Act.

Private or Other Non-Federal Conservation Plans Related to Permits Under Section 10 of the Act

Colorado River; Bill Williams River (Unit 1: CA/AZ–1; Unit 2: CA/AZ–2; and Unit 3: AZ–1). Lower Colorado River Multi-Species Conservation Plan (LCR MSCP). The Lower Colorado River Multi-Species Conservation Program (2004, pp. 1–506) was developed for areas along the lower Colorado River along the borders of Arizona, California, and Nevada from the conservation space of Lake Mead to Mexico, in the Counties of La Paz, Mohave, and Yuma in Arizona; Imperial, Riverside, and San Bernardino Counties in California; and Clark County in Nevada. The LCR MSCP primarily covers activities associated with water storage, delivery, diversion, and hydroelectric production. The record of decision was signed by the Secretary of the Interior on April 2, 2005. Discussions began on the development of this HCP in 1994, but an important catalyst was a 1997 jeopardy biological opinion for the southwestern willow flycatcher issued to the Bureau of Reclamation for lower Colorado River operations. The Federal agencies involved in the LCR MSCP include Reclamation, Bureau of Indian Affairs (BIA), NPS, BLM, Western Area Power Administration, and the U.S. Fish and Wildlife Service.

The LCR MSCP planning area primarily surrounds proposed western yellow-billed cuckoo critical habitat along the lower Colorado River from Lake Mead to the southerly international border. Portions of the Colorado River, Lake Mead, Virgin River, and Muddy River in Arizona, Utah, and Nevada are included where they surround Lake Mead (including the conservation space of Lake Mead, which extends up the Colorado River to Separation Canyon). Also, a portion of the Bill Williams River at the Colorado River confluence at Lake Havasu occurs within the LCR MSCP planning area. The LCR MSCP permittees will create and maintain 4,050 ac (1,639 ha) of western yellow-billed cuckoo habitat, reduce the risk of loss of created habitat to wildfire, replace created habitat affected by wildfire, and avoid and minimize operational and management impacts to western yellow-billed cuckoos over the 50-year life of the permit (2005 to 2055) (Lower Colorado River Multi-Species Conservation Program 2004, pp. 5–30–5–36, Table 5–10, 5–58–5–60). Additional research, management, monitoring, and protection of western yellow-billed cuckoos will occur. In addition to western yellow-billed cuckoo habitat creation and subsequent management, the LCR MSCP will provide funds to ensure existing western yellow-billed cuckoo habitat is maintained. Western yellow-billed cuckoo management associated with the LCR MSCP is conducted in conjunction with management occurring on the National Wildlife Refuges (Bill Williams, Havasu, Cibola, and Imperial) and Tribal lands (Hualapai, Fort Mohave, Chemehuevi, Colorado River, and Quechan Tribes) along the LCR. Additional rationale for considering an exclusion within the geographic area covered by the LCR MSCP can be found in the final rule designating critical habitat for the southwestern willow flycatcher, published in the **Federal Register** on January 3, 2013 (78 FR 410–418). We will consider excluding all Federal and non-Federal land that may occur within the LCR MSCP planning area from the final designation of western yellow-billed cuckoo critical habitat under section 4(b)(2) of the Act.

Horseshoe Dam (Unit 11: AZ–9A), Horseshoe and Bartlett Dam Habitat Conservation Plan (HCP). In June 2008, the Service issued an incidental take permit to the Salt River Project (SRP) for 16 species that inhabit Horseshoe and Bartlett Reservoirs and the Verde River above and below the two dams in Gila and Maricopa Counties (SRP 2008, p. 6). The western yellow-billed cuckoo and southwestern willow flycatcher are two of the covered species in the permit. Critical habitat on the Verde River is proposed within the water storage space and upstream of Horseshoe Reservoir and downstream of Bartlett Lake. The area covered by the permit for the western yellow-billed cuckoo and southwestern willow flycatcher includes Horseshoe Reservoir up to an elevation of 2,026 ft (618 m) and Bartlett up to an elevation of 1,748 ft (533 m) (SRP 2008, p. ES–1). The water storage space within Horseshoe Reservoir is the primary area where impacts to the western yellow-billed cuckoos and southwestern willow flycatchers are anticipated to occur through periodic inundation and drying of habitat (SRP 2008, p. 3).

Water storage and periodic inundation of western yellow-billed cuckoo and southwestern willow flycatcher habitat would likely result in delayed or lost breeding attempts, decreased productivity and survivorship of dispersing adults in search of suitable breeding habitat, and decreased productivity of adults that attempt to breed at Horseshoe Reservoir. The 50-year Horseshoe and Bartlett Dam HCP provides measures to minimize and mitigate incidental take while allowing the continued operation of the two reservoirs (SRP 2011a, p. 5). These goals will be achieved with the following measures: (1) Managing water levels in Horseshoe Reservoir to the extent practicable to benefit or reduce impacts to the covered species; and (2) acquiring and managing southwestern willow flycatcher and western yellow-billed cuckoo habitat along rivers in central Arizona to provide a diversity of geographic locations with habitat like Horseshoe Reservoir (SRP 2008, p. ES–4). Mitigation efforts include operation of Horseshoe Reservoir to support tall, dense vegetation at the upper end of the reservoir and to make riparian habitat available earlier in the nesting season (SRP 2011a, p. 5). In addition, after two successive years without storage above an elevation of 1,990 ft (607 m), Horseshoe Reservoir would be filled in order to saturate the soil and relieve the drought stress on stands of willow trees (SRP 2008, pp. 30–31). Filling Horseshoe after two dry years would depend on whether adequate water supply is available, consistency with the other reservoir operation objectives, and maintenance of a minimum pool of 50,000 acre-feet in Bartlett to minimize impacts on recreation at that reservoir (SRP 2008, p. 31). The need to manage Horseshoe levels to support stands of tall dense vegetation would occur about once every 13 years on average based on historical runoff patterns.

While Horseshoe Dam operations may cause fluctuations in habitat abundance and quality, reservoir operations also create a dynamic environment that fosters the long-term persistence of habitat. Combined with the normal cycle of reservoir levels, which serve to establish and maintain riparian habitat in and adjacent to the reservoir, the modified reservoir operations minimize impacts on southwestern flycatchers and western yellow-billed cuckoos (SRP 2008, pp. 169–170). The HCP obligates the SRP to monitor western yellow-billed cuckoos, southwestern willow flycatchers, and habitat at Horseshoe Reservoir (SRP 2011a, p. 8) and mitigation properties. The SRP must acquire and manage in perpetuity 200 ac (81 ha) of riparian habitat by fee title or conservation easements (SRP 2011a, p. 5). The SRP has acquired a conservation easement for 150 ac (60 ha) and has acquired an additional 55 ac (22 ha) of riparian woodland on the Gila River near Fort Thomas (Unit 22, AZ–20, Gila River 1) (SRP 2011a, p. 5, SRP 2014, entire). These lands are part of a 1,250-ac (506-ha) continuous stand of riparian woodlands owned by SRP and Reclamation under a southwestern willow flycatcher and western yellow-billed cuckoo SRP conservation management plan (SRP 2014, entire).

The SRP provides water from Horseshoe and Bartlett Reservoirs directly to various beneficiaries of these storage facilities for irrigation and other uses (SRP 2008, pp. 11–22). Water from Horseshoe, Bartlett, and the SRP's other reservoirs is provided directly by the SRP to shareholder lands for irrigation and other uses, and is delivered to the cities of Avondale, Chandler, Gilbert, Glendale, Mesa, Peoria, Phoenix, Scottsdale, Tempe, and Tolleson for municipal use on shareholder lands. Water deliveries are also made under specific water rights in Horseshoe and Bartlett Reservoirs held by the City of Phoenix, Salt River Pima Maricopa Indian Community, and Fort McDowell Yavapai Nation. In addition, water is delivered from the SRP reservoir system to the cities, Gila River Indian Community, Buckeye Irrigation Company, Roosevelt Water Conservation District, and others in satisfaction of their independent water rights. Finally, exchange agreements between a number of entities and the SRP pursuant to State and Federal law are facilitated by stored water from Horseshoe and Bartlett Reservoirs. We will consider excluding 626 ac (253 ha) in and adjacent to the water storage area of Horseshoe Reservoir from the final designation of western yellow-billed cuckoo critical habitat under section 4(b)(2) of the Act. However, SRP supports the inclusion of the Gila River mitigation properties near Fort Thomas in Unit 22, AZ–20, Gila River 1, as critical habitat, and these properties are not being considered for exclusion (SRP 2014, entire).

Roosevelt Lake (Unit 12: AZ–10, Tonto Creek, and Unit 23: AZ–21, Salt River). In February 2003, the Service issued an incidental take permit to the SRP for four riparian bird species, including the western yellow-billed cuckoo and southwestern willow flycatcher for 50 years (SRP 2011b, p. 1). The Tonto Creek and the Salt River confluences with Roosevelt Lake are proposed as western yellow-billed cuckoo critical habitat. The activity covered by the permit is the continued operation by the SRP of Roosevelt Dam and Lake in Gila and Maricopa Counties, Arizona, up to an elevation of 2,151 ft (656 m) (SRP 2002, ES–1). The HCP specifies the following measures to minimize and mitigate incidental take of the four species: Creating and managing riparian habitat at Roosevelt Lake; and acquiring and managing riparian habitat in river basins in central Arizona that the four target bird species are expected to occupy (SRP 2002, p. ES–4). The HCP commits the SRP to acquire 2,250 ac (911 ha), including acquisition and management of at least 1,500 ac (607 ha) of riparian habitat by fee title or conservation easement offsite on the San Pedro, Verde, and Gila Rivers and protection of up to an additional 750 ac (304 ha). The SRP has exceeded this obligation, accruing 2,591 ac (1,049 ha) (SRP 2011b, p. 17) in Unit 7 (AZ–5, Upper Verde River), Unit 17 (AZ–15, Lower San Pedro River and Gila Rivers), and Unit 22 (AZ–20, Gila River 1). The SRP monitors vegetation at Roosevelt Lake to ensure that adaptive management thresholds or permit limits are not exceeded (SRP 2011b, p. 6). Because southwestern willow flycatchers and western yellow-billed cuckoos rely on similar riparian habitat, most of the mitigation measures serve both species.

Western yellow-billed cuckoo and southwestern willow flycatcher habitat at Roosevelt Lake varies depending on how and when the lake recedes as a result of water in-flow and subsequent storage capacity and delivery needs. Even in the expected high-water years, some southwestern willow flycatcher and western yellow-billed cuckoo habitat would persist at Roosevelt Lake. Measures in the HCP to protect habitat at Roosevelt Lake include funding a USFS employee to patrol and improve protection of southwestern willow flycatcher habitat in the Roosevelt lakebed from adverse activities such as fire ignition from human neglect, improper vehicle use, etc. (SRP 2011b, p. 13). The SRP also developed 20 ac (8 ha) of habitat near Roosevelt Lake at offsite Rockhouse Demonstration Site to serve as a potential refugium when Roosevelt Lake is near capacity (SRP 2011, p. 15). This site is an average of 25 ft (8 m) above ground water and relies on artificial irrigation. If SRP's ability to artificially irrigate the site is damaged or is discontinued and habitat is no longer suitable, the HCP provides an adaptive management alternative (SRP 2014, entire). The SRP monitors habitat conditions, southwestern willow flycatchers, and western yellow-billed cuckoos at Roosevelt Lake and at offsite mitigation properties (SRP 2011, pp. 19–20). We will consider excluding the water storage area of Roosevelt Lake, which is the area within the conservation pool up to the 2,151-ft (656-m) elevation, including 3,155 ac (1,277 ha) of Unit AZ–10 and 2,469 ac (1,000 ha) of Unit AZ–21, from the final designation of western yellow-billed cuckoo critical habitat under section 4(b)(2) of the Act. We will also consider exclusion of the 20-ac (8-ha) Rock Rockhouse Demonstration Site from the final designation of western yellow-billed cuckoo critical habitat under section 4(b)(2) of the Act. However, SRP supports the inclusion of their Unit 7 (AZ–5, Upper Verde River), Unit 17 (AZ–15, Lower San Pedro River and Gila Rivers), and Unit 22 (AZ–20, Gila River 1) mitigation properties as critical habitat, and they are not being considered for inclusion (SRP 2014, entire).

Pima County Multi-Species Conservation Plan (MSCP) (Unit 16: AZ–14, Upper San Pedro River; Unit 17: AZ–15, Lower San Pedro River and Gila River; Unit 19: AZ–17, Upper Cienega Creek; Unit 24: AZ–22, Lower Cienega Creek; Unit 43: AZ–31, Florida Wash; Unit 46: AZ–34, Madera Canyon; Unit 50: AZ–38 Arivaca Lake; Unit 53: AZ–41, Box Canyon; Unit 57: AZ–45 Barrel Canyon; Unit 58: AZ–46, Gardner Canyon; Unit 59: AZ–47, Brown Canyon. Under the Multi-Species Conservation Plan, Pima County will avoid, minimize, and mitigate impacts to 44 species and their habitat within the Permit Area (a portion of Pima County) during the 30-year section 10(a)(1)(B) permit period (Pima County 2016a, p. v). The primary covered activities are maintenance and construction activities and certain development activities of the private sector.

Based on the suite of covered activities and a modeling of urban

growth projections, Pima County anticipates that there will be approximately 36,000 ac (14,569 ha) of disturbance resulting from the covered activities within the permit area during the 30-year permit period. For this amount of disturbance, Pima County would provide approximately 116,000 ac (46,944 ha) of mitigation. Despite not yet having a section 10(a)(1)(B) permit, Pima County has acquired more than 74,000 ac (29,247 ha) of fee-owned lands and more than 124,000 ac (50,181 ha) of lease lands that provide the portfolio of lands Pima County would use to fulfill the section 10(a)(1)(B) permit mitigation obligations. Partial mitigation credit will be granted for lease lands and for improving natural resource conditions on those lease lands.

Other important avoidance, minimization, and mitigation measures related to this MSCP rely upon Pima County's continued application of various County Code requirements and departmental procedures that mandate the avoidance and mitigation of impacts to onsite sensitive resources. Pima County anticipates providing approximately 112,000 ac (45,325 ha) of mitigation for approximately 36,000 ac (14,568 ha) of disturbance resulting from covered activities (Pima County 2016a, p. v). Pima County has spent approximately $150 million on land acquisitions since 2004 in preparation for the section 10(a)(1)(B) permit mitigation needs. These dollars came primarily from bond funds approved by voters in 2004. Most of the management and enforcement functions associated with this MSCP are already taking place as Pima County implements the natural resource and open-space elements of its Sonoran Desert Conservation Plan. Implementation of the more comprehensive ecological monitoring program, which is required subsequent to the issuance of the section 10(a)(1)(B) permit, will result in new programmatic costs for Pima County (Pima County 2016a, p. vi). The plan will conserve and manage western yellow-billed cuckoos by: (1) Implementing the Pima County Riparian Protection Ordinance to minimize habitat loss; (2) protecting water rights at Cienega Creek Natural Preserve and Buehman Canyon to maintain and restore habitat; (3) seeking to protect additional water rights at Cienega Creek Natural Preserve and Buehman Canyon to maintain and restore habitat; and (4) conducting protocol surveys every 3 years at all sites; and (5) enacting a 400-m ''restricted activity zone'' buffer around known nests during the nesting period (Pima County 2016b, pp. A–80–81, A–273).

Revised proposed critical habitat within the jurisdiction of Pima County includes parts of the above-named units in the MSCP (Pima County 2016a, p. 14). We are considering excluding 9,191 ac (3,719 ha) of land in these units. Impacts within western yellow-billed cuckoo habitat resulting from the covered activities may emerge over the 30-year permit period and will be mitigated accordingly through the MSCP. Pima County submitted comments requesting that critical habitat be maintained on county- and district- owned and leased properties and on the Federal lands within Las Cienegas National Conservation Area and that these areas not be excluded from the final designation (Huckelberry 2014, entire). Pima County reasons that critical habitat designation will require the Federal agencies to use an additional standard of review when conducting section 7 consultations with the Service for federally permitted activities that are not controlled by Pima County, such as mines and transmission lines. Pima County's commitment to the protection of species and habitat is a core value of its citizens and government, as demonstrated by its continued implementation of the MSCP (Huckelberry 2014, entire). We will review Pima County's request not to exclude certain lands from the final designation of western yellow-billed cuckoo critical habitat under section 4(b)(2) of the Act.

Private or Other Non-Federal Conservation Plans or Agreements and Partnerships, in General

Alamo Lake State Wildlife Area (AWA); Alamo Lake (Unit 4, AZ–2). The Alamo Lake State Wildlife Area (AWA) in La Paz and Mohave Counties, Arizona, was created under provisions of the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), Public Land Order 492 (PLO 492), and the General Plan agreement between the Secretary of the Army, Secretary of the Interior, and Director of Arizona Game and Fish, signed January 19, 1968 (Arizona Game and Fish Department—Arizona State Parks (AGFD–ASP) 1997). The area is owned by the USACE and the State. A lease agreement between the Arizona Game and Fish Department Commission and the USACE was signed in 1970, establishing the AWA for fish and wildlife conservation and management purposes (AGFD–ASP 1997). The present lease area encompasses approximately 22,586 ac (9,140 ha).

Public input was solicited and addressed in development of the AWA Management Plan and the NEPA review process (AGFD–ASP 1997). The corresponding Alamo Wildlife Area Property Operational Management Plan addressing the operations of the property, together with the budget, is updated as needed to reflect the changes in operational management (AGFD 2012).

Proposed western yellow-billed cuckoo critical habitat occurs along the Big Sandy, Santa Maria, and Bill Williams Rivers, which make up the upper portion of Alamo Lake. The AWA Management Plan describes the unique riparian, wetland, and aquatic aspects of the area for a variety of species, specifically targeting the southwestern willow flycatcher for management and including the western yellow-billed cuckoo as a species of wildlife concern. Two of the specific resources are directed toward the habitat needs of the southwestern willow flycatcher and the western yellow-billed cuckoo: (1) Maintain and enhance aquatic and riparian habitats to benefit wildlife; and (2) restore, manage, and enhance habitats for wildlife of special concern. Large Fremont cottonwood and Goodding's willow forests, mesquite bosque, and small areas of wetland currently exist along the Big Sandy, Santa Maria, and upper Bill Williams Rivers. Increasing and improving these habitats will benefit riparian- and wetland-dependent species (AGFD 2012, p. 4–6). The objective for maintaining and enhancing riparian habitat includes (a) Maintaining a reservoir level sufficient to ensure suitable soil moisture conditions in the mixed riparian forest, and (b) managing burros and eliminating trespass cattle to ensure that browsing does not harm existing habitat or impair recruitment of replacement vegetation. Livestock grazing is excluded from the riparian areas on the upper end of Alamo Lake and the lower portions of the Santa Maria and Big Sandy Rivers. Burro management objectives are to monitor and limit use of riparian vegetation such that annual bark stripping of live trees does not exceed 3 percent in any of the key monitoring areas (AGFD 2012, p. 10). Fencing may be needed to exclude unauthorized livestock and feral burros, exclude elk, control off-highway-vehicle access, and better manage authorized livestock (AGFD 2012, pp. 10–12). We are considering to exclude the entire Alamo Lake area (Alamo Lake (Unit 4, AZ–2: 2,793 ac (1,130 ha)) and portions of the Big Sandy River (Unit 31, AZ–29: 500 ac (202 ha) within the Alamo Lake State Wildlife Area from the final designation of western yellow-billed

cuckoo critical habitat under section 4(b)(2) of the Act.

Pinal Creek (Unit 13 AZ–11). Freeport-McMoRan Incorporated (FMC), a private mining company, has ownership and management responsibility for a portion of Pinal Creek proposed as revised western yellow-billed critical habitat in Gila County, Arizona. Along this Pinal Creek segment, since 1998, FMC has been actively implementing conservation measures for improving the riparian habitat for the southwestern willow flycatcher. Conservation actions being implemented on FMC lands include control of exotic riparian plant species, improved cattle management, fencing, monitoring, and limiting access to the site in order to foster the development of native riparian habitat. From 1999 to 2007, the water and land management actions implemented resulted in an 88 percent increase in total riparian vegetation volume within the area (FMC 2012, p. 11). In 2012, FMC submitted a flycatcher management plan for the proposed segment of Pinal Creek (FMC 2012, entire), committing to continue implementing the land management actions initiated through a USACE permit that have resulted in the improved abundance, distribution, and quality of riparian habitat for nesting southwestern willow flycatchers. We expect such measures will also benefit the western yellow-billed cuckoo. As a result we are considering to exclude approximately 390 ac (158 ha) of Unit 13 from final designation under section 4(b)(2) of the Act.

Upper Verde River Wildlife Area (Unit 7: AZ–5, Upper Verde River). The Upper Verde Wildlife Area, owned by the Arizona Game and Fish Department, is located approximately 8 mi (12 km) north of Chino Valley in Yavapai County, Arizona (AGFD 2017, entire). The property consists of four parcels totaling approximately 796 ac (322 ha) located along the upper Verde River and lower Granite Creek. The AGFD also manages 240 ac (97 ha) of State Trust lands located adjacent to two of the deeded parcels. The primary management emphasis for the Upper Verde River property is to manage, maintain, and enhance riparian habitat and maintain native fish diversity (AGFD 2012, entire). A monitoring program is ongoing. The Upper Verde River property has four noncontiguous parcels of private land, which collectively include approximately 3 mi (5 km) of the upper Verde River, draining easterly from the confluence with Granite Creek to the Prescott National Forest boundary 3.5 mi (5.6 km) downstream. Riparian vegetation is dominated by Arizona ash, boxelder, Arizona walnut, and netleaf hackberry (AGFD 2017, entire). Some tamarisk is interspersed with native tree species. Lower Granite Creek supports a well-developed narrowleaf cottonwood (*Populus acuminata*) riparian forest. We received comments from the AGFD requesting an exclusion for this property, and those comments will be fully considered in the final designation. We will consider excluding 464 ac (188 ha) of AGFD land and 18 ac (7 ha) of State Trust lands from the final designation of western yellow-billed cuckoo critical habitat under section 4(b)(2) of the Act.

New Mexico

Tribal Lands

Tribal Management Plans and Partnerships—Santa Clara, Ohkay Owingeh, and the San Ildefonso Pueblos; Upper Rio Grande 1 (Unit 35: NM–4) and Upper Rio Grande 2 (Unit 36: NM–5). The Santa Clara Pueblo and Ohkay Owingeh contain proposed western yellow-billed cuckoo critical habitat along the Rio Grande within the Upper Rio Grande Management Unit in Rio Arriba County, New Mexico. The San Ildefonso Pueblo contains proposed western yellow-billed cuckoo critical habitat along the Rio Grande within the Upper Rio Grande Management Unit in Santa Fe County, New Mexico.

The Santa Clara Pueblo, Ohkay Owingeh, and the San Ildefonso Pueblo have conducted a variety of voluntary measures, restoration projects, and management actions to conserve the western yellow-billed cuckoo and its habitat on their lands. These Pueblos have made a commitment to the Service to develop an integrated resources management plan to address multiuse, enhancement, and management of their natural resources. The pueblos have implemented fuel reduction of flammable exotic riparian vegetation and native tree restoration projects in the riparian area since 2001, carefully progressing in incremental stages to reduce the overall effects to wildlife. Ohkay Owingeh has a management plan for the southwestern willow flycatcher that provides conservation and restoration for the riparian habitat needed for the western yellow-billed cuckoo and has expressed interest in incorporating western yellow-billed cuckoo conservation measures into that plan. We received comments from the Santa Clara Pueblo following our initial proposal and will fully consider those comments in the final designation. We will consider excluding the Santa Clara Pueblo, Ohkay Owingeh, and the San Ildefonso Pueblo lands totaling 1,173 ac (475 ha) from the final designation of western yellow-billed cuckoo critical habitat under section 4(b)(2) of the Act.

Tribal Management Plans and Partnerships—Cochiti, Santo Domingo, San Felipe, Sandia, Santa Ana, and Isleta Pueblos; Middle Rio Grande (Unit 37: NM–6A and 6B). The Cochiti Pueblo, Santo Domingo Pueblo, San Felipe Pueblo, Sandia Pueblo, and Santa Ana Pueblo contain proposed western yellow-billed cuckoo critical habitat along the Rio Grande within the Middle Rio Grande Management Unit in Sandoval County, New Mexico. The Isleta Pueblo contains proposed western yellow-billed cuckoo critical habitat along the Rio Grande within the Middle Rio Grande Management Unit in Bernalillo County, New Mexico.

The Cochiti Pueblo, Santo Domingo Pueblo, San Felipe Pueblo, Sandia Pueblo, Santa Ana Pueblo, and Isleta Pueblo have conducted a variety of voluntary measures, restoration projects, and management actions to conserve the western yellow-billed cuckoo and its habitat on their lands. Cochiti Pueblo, Santo Domingo Pueblo, San Felipe Pueblo, Sandia Pueblo, Santa Ana Pueblo, and Isleta Pueblo made commitments to the Service to develop integrated resources management plans to address multiuse, enhancement, and management of their natural resources. The pueblos have implemented fuel reduction of flammable exotic riparian vegetation and native tree restoration projects in the riparian area since 2001, carefully progressing in incremental stages to reduce the overall effects to wildlife. The San Felipe Pueblo developed a Wildlife Management Plan for the western yellow-billed cuckoo that includes restrictions on development in western yellow-billed cuckoo habitat as well as adaptive management and monitoring. The Isleta Pueblo submitted a Riverine Management Plan with management goals, objectives, and strategies specific to the western yellow-billed cuckoo. Regarding this proposed critical habitat unit, we received comments following our initial proposal from the Santa Ana Pueblo, San Felipe Pueblo, Isleta Pueblo, and Sandia Pueblo and those comments will be fully considered for the final designation. We will consider excluding the Cochiti Pueblo, Santo Domingo Pueblo, San Felipe Pueblo, Sandia Pueblo, Santa Ana Pueblo, and Isleta Pueblo lands totaling 9,509 ac (3,850 ha) from the final designation of western yellow-billed cuckoo critical habitat under section 4(b)(2) of the Act.

Federal Lands

Middle Rio Grande 1 (Unit 37: NM–6B). In January 2016, the Service issued a Biological Opinion for the Rio Grande Project Operating Agreement and storage of San-Juan Chama Project Water in Elephant Butte Reservoir for two riparian bird species, including the western yellow-billed cuckoo and southwestern willow flycatcher for 35 years (Service 2016a, entire). The area from RM 62 to RM 38 is currently proposed as western yellow-billed cuckoo critical habitat within Elephant Butte Reservoir, owned by Reclamation. The Biological Opinion addresses the following actions: (1) Pre-release of storage water from Elephant Butte Reservoir for flood control purposes; (2) the carryover accounting for the unused balance of annual diversion allocation to downstream irrigation districts; (3) diversion ratio adjustments that take into consideration changes in water availability; and (4) storage of San-Juan Chama Project water (Service 2016a, p. 6).

Conservation measures proposed by Reclamation and measures to minimize and mitigate incidental take of western yellow-billed cuckoos include: (1) Monitoring of federally listed species following established protocols; (2) adding the western yellow-billed cuckoo to the Reclamation (2012) Southwestern Willow Flycatcher Management Plan for the Rio Grande Project (Management Plan); (3) minimizing take during high water surface elevation periods at Elephant Butte Reservoir; (4) minimizing the effects of suitable habitat loss due to the proposed action; and (5) developing a model to estimate quantities of suitable habitat gained and lost as a result of fluctuating water surface elevations (Service 2016a, pp. 7, 40–44). The Management Plan was initiated in 2012 and includes restoration projects and monitoring efforts that also benefit the western yellow-billed cuckoo (Reclamation 2012, p. 37). The Management Plan commits Reclamation to ensuring at least 801 ac (324 ha) of suitable habitat from the San Marcial, New Mexico, to Fort Quitman, Texas, is maintained and available for the southwestern willow flycatcher, an extensive monitoring and habitat mapping program, and restoration activities that include partners such as the International Boundary and Water Commission (IBWC), New Mexico State Parks, the Service, Audubon and others (Reclamation 2012, pp. 22, 28, 35). Because southwestern willow flycatchers and western yellow-billed cuckoos rely on similar riparian habitat, some of the mitigation and monitoring measures serve both species in the interim until the Management Plan is revised to include the western yellow-billed cuckoo specifically. We are considering the development and implementation of the Management Plan in our exclusion analysis for several units along the Rio Grande River (see NM–8A Caballo Delta North, NM–8B Caballo Delta South, and NM–10 Selden Canyon and Radium Springs exclusion discussions below).

Western yellow-billed cuckoo and southwestern willow flycatcher habitat at Elephant Butte varies depending on how and when the lake recedes as a result of water in-flow and subsequent storage capacity and delivery needs. Even in the expected high-water years, some southwestern willow flycatcher and western yellow-billed cuckoo habitat would persist at Elephant Butte Reservoir. Areas within Elephant Butte Reservoir at higher elevations that have not been inundated in recent years are declining in suitability. By having Elephant Butte Reservoir fluctuate surface water elevations, it is anticipated that over the long term, this would provide a more favorable and dynamic environment for western yellow-billed cuckoo habitat (Service 2016a, p. 42). We are considering excluding the water storage area of Elephant Butte Reservoir from RM 54 to RM 38 from the final designation of western yellow-billed cuckoo critical habitat under section 4(b)(2) of the Act.

Private or Other Non-Federal Conservation Plans or Agreements and Partnerships, in General

U-Bar Ranch (Unit 33: NM–2 Gila River). The U-Bar Ranch (Ranch) near Cliff, in Grant County, New Mexico, in the Upper Gila Management Area is owned by Pacific Western Land Company (PWLC), a subsidiary of the Freeport-McMoRan Corporation (FMC). Through their efforts and their long-time lessee, FMC has demonstrated a commitment to management practices on the Ranch that have conserved and benefited the western yellow-billed cuckoo population in that area over the past decade. In addition, FMC had privately funded scientific research at and in the vicinity of the Ranch in order to develop data that has contributed to the understanding of habitat selection, distribution, prey base, and threats to the southwestern willow flycatcher. The riparian habitat also has a large number of nesting western yellow-billed cuckoos.

PWLC and the U-Bar Ranch have supported annual southwestern willow flycatcher surveys, where western yellow-billed cuckoo detections are recorded, and research in the Gila valley since 1994. Considering the past and ongoing efforts of management and research to benefit the southwestern willow flycatcher, western yellow-billed cuckoo, and riparian habitat, done in coordination and cooperation with the Service, we are considering excluding areas of the U-Bar Ranch totaling 3,002 ac (1,215 ha) from the final designation of western yellow-billed cuckoo critical habitat under section 4(b)(2) of the Act.

Unit 39; NM–8A Caballo Delta North and NM–8B Caballo Delta South. We are considering exclusion of approximately 345 ac (140 ha) of land based on Reclamation's Southwestern Willow Flycatcher Management Plan. This Management Plan was initiated in 2012 and includes restoration projects and monitoring efforts associated with the southwestern willow flycatcher that are also anticipated to benefit the western yellow-billed cuckoo (Reclamation 2012, p. 37) (see exclusion discussion on Middle Rio Grande 1 (Unit 37: NM–6B) above). The Management Plan commits Reclamation to ensuring at least 801 ac (324 ha) of suitable habitat in the area from the San Marcial, New Mexico, to Fort Quitman, Texas, either independently or in association with multiple agencies (Reclamation 2012, pp. 22, 28, 35) is managed for southwestern willow flycatcher. Because southwestern willow flycatchers and western yellow-billed cuckoos rely on similar riparian habitat, some of the restoration features are anticipated to serve both species in the interim period until the Management Plan is revised to include projects that have the goal of benefitting the western yellow-billed cuckoo specifically. Reclamation has committed to updating and adding the western yellow-billed cuckoo to their Management Plan in their recent section 7 consultation (Number 02ENNM00–2015–F–0734) associated with Elephant Butte Reservoir (Reclamation 2015, entire).

Based on this Management Plan, we are considering excluding the entirety of Unit 39; NM–8A Caballo Delta North and Caballo Delta South; Sierra County; which totals 345 ac (140 ha), from the final designation of western yellow-billed cuckoo critical habitat under section 4(b)(2) of the Act.

Unit 40; NM–9 Animas; Sierra County; Management Plan and Partnership. The Ladder Ranch located along Las Animas Creek contains proposed critical habitat for the western yellow-billed cuckoo in Sierra County, New Mexico. The Ladder Ranch is conducting conservation actions for western yellow-billed cuckoo and its

habitat on their lands and is in the process of finalizing a conservation strategy for the species. We are considering potential exclusion of the entirety of this proposed critical habitat unit in the final designation of western yellow-billed cuckoo critical habitat under section 4(b)(2) of the Act. This unit falls entirely within the Ladder Ranch and totals 608 ac (246 ha).

Unit 41; NM–10 Selden Canyon and Radium Springs; Dona Ana County. We are considering exclusion of the entire 237-ac (96-ha) unit based on management plans provided by Reclamation as well as the IBWC. The Reclamation Southwestern Willow Flycatcher Management Plan was initiated in 2012 and includes restoration projects and monitoring efforts associated with the southwestern willow flycatcher but that are also anticipated to benefit the western yellow-billed cuckoo (Reclamation 2012, p. 37). The Management Plan commits Reclamation to ensuring at least 801 ac (324 ha) of suitable habitat in the area from the San Marcial, New Mexico, to Fort Quitman, Texas, either independently or in association with multiple agencies (Reclamation 2012, pp. 22, 28, 35). Because southwestern willow flycatchers and western yellow-billed cuckoos rely on similar riparian habitat, some of the restoration features are anticipated to serve both species in the interim period until the Management Plan is revised to include projects that have the goal of benefitting the western yellow-billed cuckoo specifically. Reclamation has committed to updating and adding the western yellow-billed cuckoo to their Management Plan in their recent section 7 consultation (Number 02ENNM00–2015–F–0734) associated with Elephant Butte Reservoir (Reclamation 2015, entire).

The IBWC Endangered Species Management Plan (Part 3 in the IBWC Canalization River Management Plan) commits IBWC to establishing or preserving up to 119 ac (48 ha) of southwestern willow flycatcher habitat in the area from Percha Dam, New Mexico, to El Paso, Texas, either independently or in association with Reclamation (IBWC 2016). IBWC is currently completing a biological assessment to address the listing of the yellow-billed cuckoo in their previous Long-Term River Management of the Rio Grande Canalization Project (section 7 Consultation Number 02ENNM00–2012–F–0016). This consultation will address western yellow-billed cuckoo impacts (both positive and negative) associated with the Canalization Project. The western yellow-billed cuckoo is currently included within IBWC's preexisting Endangered Species Management Plan, and the species is anticipated to benefit from the restoration projects that have already been initiated for the southwestern willow flycatcher (IBWC 2016, p. 3–29).

IBWC also has created collaborative relationships with other entities with jurisdiction in the area to work together on habitat restoration and water rights for restoration, including cooperative agreements with the Elephant Butte Irrigation District (EBID), New Mexico Energy Minerals and Natural Resources Department State Parks Division, and the Bureau of Reclamation. The agreement with EBID lays the foundation for a cooperative Environmental Water Transaction Program, including allowing for the irrigation of native plants to be classified as an agricultural use to use Rio Grande Project water. The implementation of the IBWC collaborative conservation project provides for significant conservation, management, improvement, and protection of the physical or biological features essential for the cuckoo. The conservation gains to the cuckoo identified south of Caballo Dam are possible because of the development of the water transaction program.

Based on these Management Plans, we are considering excluding the entirety of Unit 41; NM–10 Selden Canyon and Radium Springs; totaling 237 ac (96 ha), from the final designation of western yellow-billed cuckoo critical habitat under section 4(b)(2) of the Act.

Idaho

Tribal Lands

Unit 65; ID–1 Snake River 1 Fort Hall Indian Reservation; Tribal Management Plans and Partnerships. The Fort Hall Indian Reservation contains a portion of the Snake River 1 Unit in Bannock and Bingham Counties, Idaho. We have met with staff from the Shoshone-Bannock Tribes and discussed their existing and proposed conservation actions and management plans, which also benefit the western yellow-billed cuckoo, for the area proposed for designation as critical habitat. We will continue to coordinate with the Tribes on these management plans for potential exclusion of 3,219 ac (1,303 ha) of Fort Hall Indian Reservation land from the final designation of western yellow-billed cuckoo critical habitat under section 4(b)(2) of the Act.

Utah

Tribal Lands

Green River; Uintah County, Utah (Unit 70: UT–1); Tribal Management Plans and Partnerships—Ute Tribe, Uintah and Ouray Indian Reservation. The Uintah and Ouray Indian Reservation contains revised proposed critical habitat for western yellow-billed cuckoo along the Green River in Uintah County, Utah. The Ute Tribe is conducting conservation actions for western yellow-billed cuckoo and its habitat on their lands and has finalized a conservation strategy for the species (Sinclear and Simpson 2016, entire). We are considering potential exclusion of 14,611 ac (5,913 ha) of Ute Tribal lands from this unit in the final designation of western yellow-billed cuckoo critical habitat under section 4(b)(2) of the Act.

Consideration of Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. To assess the probable economic impacts of a designation, we must first evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. We then must evaluate the impacts that a specific critical habitat designation may have by restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the areas proposed. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat for this particular species. The probable economic impact of a proposed critical habitat designation is analyzed by comparing scenarios ''with critical habitat'' and ''without critical habitat.'' The ''without critical habitat'' scenario represents the baseline for the analysis, which includes the existing regulatory and socio-economic burden imposed on landowners, managers, or other resource users potentially affected by the designation of critical habitat (*e.g.,* under the Federal listing as well as other Federal, State, and local regulations). The baseline, therefore, represents the costs of all efforts attributable to the listing of the species under the Act, effectively assuming full compliance with sections of the Act relevant to the analysis(*i.e.,* conservation of the species and its habitat incurred regardless of whether critical habitat is designated). The ''with critical habitat'' scenario describes the incremental impacts associated specifically with the designation of

critical habitat for the species. The incremental conservation efforts and associated impacts would not be expected without the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs. These are the costs we use when evaluating the benefits of inclusion and exclusion of particular areas from the final designation of critical habitat should we choose to conduct an optional 4(b)(2) exclusion analysis. We seek public input on whether it is appropriate to assume full compliance with the requirements associated with a species listing and other key land use regulations in constructing a baseline for this analysis. If full compliance does not adequately represent the baseline regulatory environment, we seek public input on what range of compliance rates is better aligned with practice in the field and how noncompliance may influence the potential costs and benefits of the critical habitat rule. We additionally seek comment related to the assumption of full compliance with the critical habitat rule and how this assumption may influence the potential costs and benefits of the rule.

For the 2014 proposed designation, we developed an incremental effects memorandum (IEM) considering the probable incremental economic impacts that may result from the proposed designation of critical habitat. We also completed a review of the potential economic effects of the proposed designation of critical habitat (Industrial Economics Incorporated (IEc) 2013a; IEc 2013b). We have updated the IEM for this revised proposed designation by identifying those areas being considered for critical habitat. The information contained in our updated IEM was used to develop a screening report for the revised proposed designation of critical habitat for the western yellow-billed cuckoo (Service 2019, entire). We did this in order to focus our analysis on the key factors that are likely to result in incremental economic impacts. The purpose of the screening report is to filter out the geographic areas in which the critical habitat designation is unlikely to result in incremental economic impacts. Our review of potential economic effects considers baseline impacts (*i.e.,* impacts absent critical habitat designation) and includes probable economic impacts where land and water use may be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the species. The screening report filters out particular areas of critical habitat that are already subject to such protections and are, therefore, unlikely to incur significant incremental economic impacts. Ultimately, the screening report allows us to focus our analysis on evaluating the specific areas or sectors that may incur probable incremental economic impacts as a result of the designation. The screening report also assesses whether any unoccupied units may require additional management or conservation efforts as a result of the critical habitat designation and whether the units may incur incremental economic impacts. We are not considering designating any unoccupied areas. To better identify the potential economic impacts, we have developed a revised screening analysis memorandum for the revised proposed critical habitat (IEc 2019a, entire; IEc 2019b, entire). Our revised IEM, the screening analysis memorandum, and information described in this rule are what we consider our revised draft economic analysis of the revised proposed critical habitat designation for the western yellow-billed cuckoo. The supporting information for our revised economic analysis is available on *http://www.regulations.gov* (Docket No. FWS–R8–ES–2013–0011).

Executive Orders 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consistent with the E.O. regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly impacted entities, where practicable and reasonable. We assess to the extent practicable, the probable impacts, if sufficient data are available, to both directly and indirectly impacted entities. As part of our screening report, 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 western yellow-billed cuckoo, first we identified, in our revised IEM, probable incremental economic impacts associated with the following categories of activities: (1) Water management, including hydropower operations; (2) restoration and conservation projects; (3) fire management; (4) transportation activities, including bridge construction; (5) recreation activities; (6) livestock grazing and agriculture; (7) mining; (8) residential and commercial development; and (9) border protection activities. We considered each industry or category individually. Additionally, we considered whether their activities have any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement, as the designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. In areas where the western yellow-billed cuckoo is present, Federal agencies will already be required to consult with the Service under section 7 of the Act on activities they fund, permit, or implement that may affect the species. If we finalize this revised proposed critical habitat designation, consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process. Therefore, disproportionate impacts to any geographic area or sector would not likely be a result of this critical habitat designation.

In our revised IEM, we attempted to clarify the distinction between the effects that will result from the species being listed and those attributable to the critical habitat designation (*i.e.,* difference between the jeopardy and adverse modification standards). Because the listing of the western yellow-billed cuckoo is relatively recent, we do not have an extensive consultation history for the species. As a result, it is difficult to discern which conservation efforts are attributable to the species being listed and those which will result solely from the designation of critical habitat. However, the following specific circumstances in this case help to inform our evaluation: (1) The essential physical and biological features identified for critical habitat are the same features essential for the life requisites of the species, and (2) any actions that would result in harm or harassment sufficient to constitute jeopardy to the western yellow-billed cuckoo would also likely adversely affect the critical habitat containing the physical or biological features essential to the conservation of the species. The revised IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this species. This evaluation of the incremental effects has been used as the basis to evaluate the probable incremental economic impacts of this revised proposed designation of critical habitat.

Except in limited instances, which the Service cannot predict at this time, project modifications requested to avoid adverse modification are likely to be the same as those needed to avoid jeopardy. Notwithstanding the low probability of such limited instances occurring, when the Service completes a consultation for the western yellow-billed cuckoo within critical habitat, that consultation will evaluate whether that project would result in adverse modification.

The Service is not proposing to designate areas outside of the geographical area occupied by the species as critical habitat. All of the proposed units are occupied by the western yellow-billed cuckoo during their breeding season. For migratory species like the western yellow-billed cuckoo, when conducting section 7 consultations the Service treats the species as ''present'' in confirmed breeding habitat regardless of where the birds are in the annual cycle (Service 1998, p. xvi). Therefore, the Service will conduct an analysis under the jeopardy standard for projects that affect confirmed breeding habitat of the species. Moreover, occupied breeding habitat is considered by the Service to be occupied year-round for the evaluation of project-related effects that degrade habitat quality. An evaluation of consultations for other riparian-obligate listed migratory bird species that occupy some of the same areas (*i.e.,* southwestern willow flycatcher and least Bell's vireo) informs the Service that project modifications intended to address adverse project effects focus primarily on various habitat restoration and conservation mechanisms, whether the adverse effects are upon members of the listed species or its designated critical habitat. We anticipate that these mechanisms overlap because the impacts in either case will most likely be affecting the persistence, development, and regeneration of habitat. The result is that the application of such measures is anticipated to simultaneously remove jeopardy and adverse modification outcomes.

Based on our 2013 and 2019 review of potential economic impacts, only administrative costs were expected in the revised proposed critical habitat designation. While additional analysis for critical habitat in a consultation will require time and resources by both the Federal action agency and the Service, it is believed that, in most circumstances, these costs would be predominantly administrative in nature and would not be significant.

The revised proposed critical habitat designation for the western yellow-billed cuckoo includes 72 units in 7 western States: Arizona, California, Colorado, Idaho, New Mexico, Texas, and Utah. A total of 493,665 ac (199,779 ha) is proposed of which 145,710 ac (58,968 ha) are being considered for exclusions. Approximately 33 percent of the proposed total acreage is Federal land, 11 percent is State land, 14 percent is owned by Tribal entities, and 42 percent is privately owned or owned by local government entities. All revised proposed critical habitat units are considered to be occupied. 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 would be subject to consultations that may involve private entities as third parties are residential and commercial development that may occur on Tribal or private lands. However, based on coordination efforts with Tribal partners and State and local agencies, the cost to private entities within these sectors is expected to be relatively minor (administrative costs of less than $5,200 per formal consultation effort) and, therefore, would not be significant.

The probable incremental economic impacts of the western yellow-billed cuckoo critical habitat designation are expected to be limited to additional administrative effort, as well as minor costs of conservation efforts resulting from a small number of future section 7 consultations. This anticipated outcome is due to the revised proposed critical habitat being considered occupied by the species, and incremental economic impacts of critical habitat designation, other than administrative costs, are unlikely. At approximately $5,200 or less per formal consultation, in order to reach the threshold of $100 million of incremental administrative impacts in a single year, critical habitat designation would have to result in more than 20,000 formal consultations in a single year. In our 2014 review of the economic analysis, based on consultations for other listed species in the areas occupied by the western yellow-billed cuckoo, we estimated that 100 formal consultations would be initiated in the first year after listing and fewer would be initiated in subsequent years. The actual number of formal consultations for western yellow-billed cuckoo since listing in 2014 was four for the first year (Oct. 2014 to Oct. 2015), three for the second (Oct. 2015 to Oct. 2016), four for the third (Oct. 2016 to Oct. 2017), four for the fourth (Oct. 2017 to Oct. 2018), and one through August 2019. This is a total of 16 formal consultations initiated for the western yellow-billed cuckoo since listing. Our current economic analysis estimates no more than 25 consultations per year (formal and informal combined), with the resulting incremental economic burden estimated to be less than $74,000 in a given year (IEc 2019a, entire). This estimate calculated the administrative cost (staff time) the Federal agency would need to expend on their analysis of adverse modification of critical habitat for each consultation. Therefore, we have concluded that the future probable incremental economic impacts are not likely to exceed $100 million in any single year, and disproportionate impacts to any geographic area or sector are not likely as a result of this critical habitat designation. As we stated earlier, we are soliciting data and comments from the public on the 2019 economic screening analysis, our 2019 IEM, as well as all economic aspects of the proposed rule. We seek comment on whether the effects of this designation are limited to the administrative costs and, if not, what other costs our analysis should examine. We may revise the proposed rule or supporting documents to incorporate or address information we receive during the public comment period.

As a result of information received, we may also exclude additional areas from critical habitat if the Secretary determines that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

Required Determinations

In developing this revised proposed rule, we have reevaluated our previous required determinations as outlined in the sections below.

Regulatory Planning and Review (Executive Orders 12866, 13563, and 13771)

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 rule is a significant regulatory action pursuant to E.O. 12866.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The

executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (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 (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, but are not limited to, businesses with fewer than a given number of employees (depending on the particular subsector), such as manufacturing and mining concerns ranging from fewer than 500 to fewer than 1,500 employees, or wholesale trade entities ranging from fewer than 100 to fewer than 250 employees; or businesses that have less than a given amount of annual sales or business (depending on the particular subsector), such as retail and service businesses ranging from less than $7.5 million to less than $38.5 million in annual sales, construction businesses ranging from less than $15 million to $36.5 million in annual business, and agricultural, fishing, and hunting businesses with annual sales ranging from less than $750,000 to $27 million. To determine whether 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 impacts of a rule must be both significant and substantial to prevent certification of the rule under the RFA and thus require the preparation of an initial regulatory flexibility analysis. If a substantial number of small entities are affected by the proposed critical habitat designation, but the per-entity economic impact is not significant, the Service may certify. Likewise, if the per-entity economic impact is likely to be significant, but the number of affected entities is not substantial, the Service may also certify.

Under the RFA, as amended, and as understood in the light of recent court decisions, Federal agencies are required to evaluate only the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself; in other words, the RFA Act does not require agencies 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 would be directly regulated if we adopt the proposed critical habitat designation. Moreover, Federal agencies are not small entities. Therefore, because no small entities would be directly regulated by this rulemaking, the Service certifies that, if promulgated, the revised proposed critical habitat designation will not have a significant economic impact on a substantial number of small entities.

Moreover, even if this rulemaking were to result in indirect impacts on small entities, we expect that those impacts would be negligible. First, all of the areas we are proposing to designate as critical habitat are occupied; as a result, we generally expect that any activity that would result in destruction or adverse modification of the critical habitat in those areas would also jeopardize the continued existence of the species, so the critical habitat designation would not have an impact on the need for, or outcome of, consultation. In addition, approximately 16 percent of the area within the critical habitat designation is occupied by other listed species and is already included within the critical habitat designated for one or more of those species.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if finalized, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. We do not expect that the revised proposed critical habitat designation for the western yellow-billed cuckoo would significantly affect energy supplies, distribution, or use, as the areas identified as revised proposed critical habitat are along riparian corridors in mostly remote areas with little energy supplies, distribution, or infrastructure in place. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required. However, we will further evaluate this issue as we receive public comment, and will review and revise this assessment as needed.

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 propose to make the following findings:

(1) This rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental

mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or Tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule would significantly or uniquely affect small governments because it will 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. Therefore, a Small Government Agency Plan is not required. However, we will further evaluate this issue as we conduct our economic analysis and revise this assessment if appropriate.

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 western yellow-billed cuckoo 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 for the species and concludes that, if adopted, this designation of critical habitat for western yellow-billed cuckoo does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with Executive Order 13132 (Federalism), this proposed rule does not have significant Federalism effects. A Federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this revised proposed critical habitat designation with appropriate State resource agencies throughout the DPS area (Arizona, California, Colorado, Idaho, Nevada, New Mexico, Montana, Oregon, Texas, Utah, Washington, and Wyoming). Because the species is listed under the Act, the designation of critical habitat in areas currently occupied by the western yellow-billed cuckoo may impose nominal additional regulatory restrictions to those currently in place and, therefore, may have little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments because the areas that contain the physical or biological features essential to the conservation of the species are more clearly defined, and the elements of the 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 local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations or section 10 activities 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 concluded that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. This proposed rule uses standard property descriptions and identifies the elements of physical and biological features essential to the conservation of the western yellow-billed cuckoo within the proposed designated areas to assist the public in understanding the habitat needs of the species.

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 the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (45 U.S.C. 3501 *et seq.*). We may not conduct or sponsor and you are 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 (NEPA; 42 U.S.C. 4321 *et seq.*) 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)). However, when the designation of critical habitat includes States within the Tenth Circuit (for this proposal it applies to areas within Colorado, New Mexico, and Utah), such as that of western yellow-billed cuckoo, under the Tenth Circuit ruling in *Catron County Board of Commissioners* v. *U.S. Fish and Wildlife Service,* 75 F.3d 1429 (10th Cir. 1996), we undertake a NEPA analysis. We invite the public to comment on the extent to which this proposed regulation may have a significant impact on the human environment, or fall within one of the categorical exclusions for actions that have no individual or cumulative effect on the quality of the human environment. We will complete our analysis, in compliance with NEPA, before issuing a final rule.

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

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. The following tribes are identified in the proposed designation: Fort Mojave Indian Tribe; Colorado River Indian Reservation; Fort Yuma Indian Reservation; Cocopah Tribe; Yavapai-Apache Nation; Hualapai Indian Tribe; San Carlos Reservation; Navajo Nation; Santa Clara, Ohkay Owingeh, and San Ildefonso Pueblos; Cochiti, Santo Domingo, San Felipe, Sandia, Santa Ana and Isleta Pueblos; Shoshone-Bannock, Fort Hall Reservation; the Cachil DeHe Band of Wintun Indians; the Ute Tribe, and Uinta, and Ouray Reservations. We have been and will continue to work with the tribes identified above throughout the process of designating critical habitat for the western yellow-billed cuckoo.

References Cited

A complete list of references cited in this rulemaking is available on the internet at *http://www.regulations.gov* in Docket No. FWS–R8–ES–2013–0011 and upon request from the Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposal are Service staff members of the Upper Colorado Basin (Interior Region 7), the Lower Colorado Basin (Interior Region 8), the Columbia-Pacific Northwest (Interior Region 9), and the California Great Basin (Interior Region 10).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to further amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as proposed to be amended on August 15, 2014, at 79 FR 48548, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. Amend § 17.95(b) in the entry for ''Yellow-billed Cuckoo *(Coccyzus americanus),* Western DPS'' by:

■ a. Revising paragraphs (1) through (76); and

■ b. Removing paragraphs (77) through (88).

The revisions read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(b) *Birds.*

* * * * *

Yellow-billed Cuckoo (Coccyzus Americanus), Western DPS

(1) Critical habitat units are depicted for Arizona, California, Colorado, Idaho, New Mexico, Texas, and Utah, on the maps below.

(2) Within these areas, the specific physical or biological features essential to the conservation of western yellow-billed cuckoo consist of three components:

(i) *Riparian woodlands (including mesquite bosques, desert scrub and desert grassland drainages with a tree component, and Madrean evergreen woodland drainages (in the Southwest)).* This physical or biological feature includes rangewide breeding habitat found throughout the DPS range as well as additional breeding habitat characteristics unique to the Southwest:

(A) *Rangewide breeding habitat (including areas in the Southwest).* Rangewide breeding habitat is composed of woodlands within floodplains or in upland areas or terraces often greater than 325 ft (100 m) in width and 200 ac (81 ha) or more in extent with an overstory and understory vegetation component in contiguous or nearly contiguous patches adjacent to intermittent or perennial watercourses. The slope of the watercourses are generally less than 3 percent but may be greater in some instances. Nesting sites within the habitat have an above-

average canopy closure (greater than 70 percent) and have a cooler, more humid environment than the surrounding riparian and upland habitats.

(B) *Southwestern breeding habitat.* Southwestern breeding habitat is composed of more arid riparian woodlands, which includes: Mesquite bosques, desert scrub and desert grasslands drainages with a tree component, and Madrean evergreen woodlands (oak and other tree species), in perennial, intermittent, and ephemeral drainages. These drainages bisect other habitat types, including Madrean evergreen woodland, native and nonnative desert grassland, and desert scrub. More than one habitat type within and adjacent to the drainage may contribute toward nesting habitat. Southwestern breeding habitat is more water-limited, contains a greater proportion of xeroriparian and nonriparian plant species, and is often narrower, more open, patchier, or sparser than elsewhere in the DPS and may persist only as narrow bands or scattered patches along the bankline or as small in-channel islands. The habitat contains a tree or large-shrub component with a variable overstory canopy and understory component that is sometimes less than 200 ac (81 ha). Riparian trees (including xeroriparian) in these ecosystems may even be more sparsely distributed and less prevalent than nonriparian trees. Adjacent habitat may include managed (mowed) nonnative vegetation or terraces of mesquite or other drought-tolerant species within the floodplain. In narrow or arid ephemeral drainages, breeding habitat commonly contains a mix of nonriparian vegetation found in the base habitat as well as riparian (including xeroriparian) trees.

(ii) *Adequate prey base.* This physical or biological feature includes the presence of prey base consisting of large insect fauna (for example, cicadas, caterpillars, katydids, grasshoppers, crickets, large beetles, dragonflies, moth larvae, spiders), small lizards, or frogs for adults and young in breeding areas during the nesting season and in post-breeding dispersal areas.

(iii) *Hydrologic processes, in natural or altered systems, that provide for maintaining and regenerating breeding habitat.* This physical or biological feature includes hydrologic processes found in rangewide breeding habitat as well as additional hydrologic processes unique to the Southwest in southwestern breeding habitat:

(A) *Rangewide breeding habitat hydrologic processes (including the Southwest).* Hydrologic processes (either natural or managed) in river and reservoir systems that encourage sediment movement and deposits and promote riparian tree seedling germination and plant growth, maintenance, health, and vigor (*e.g.,* lower gradient streams and broad floodplains, elevated subsurface groundwater table, and perennial rivers and streams). In some areas where habitat is being restored, such as on terraced slopes above the floodplain, this may include managed irrigated systems that may not naturally flood due to their elevation above the floodplain.

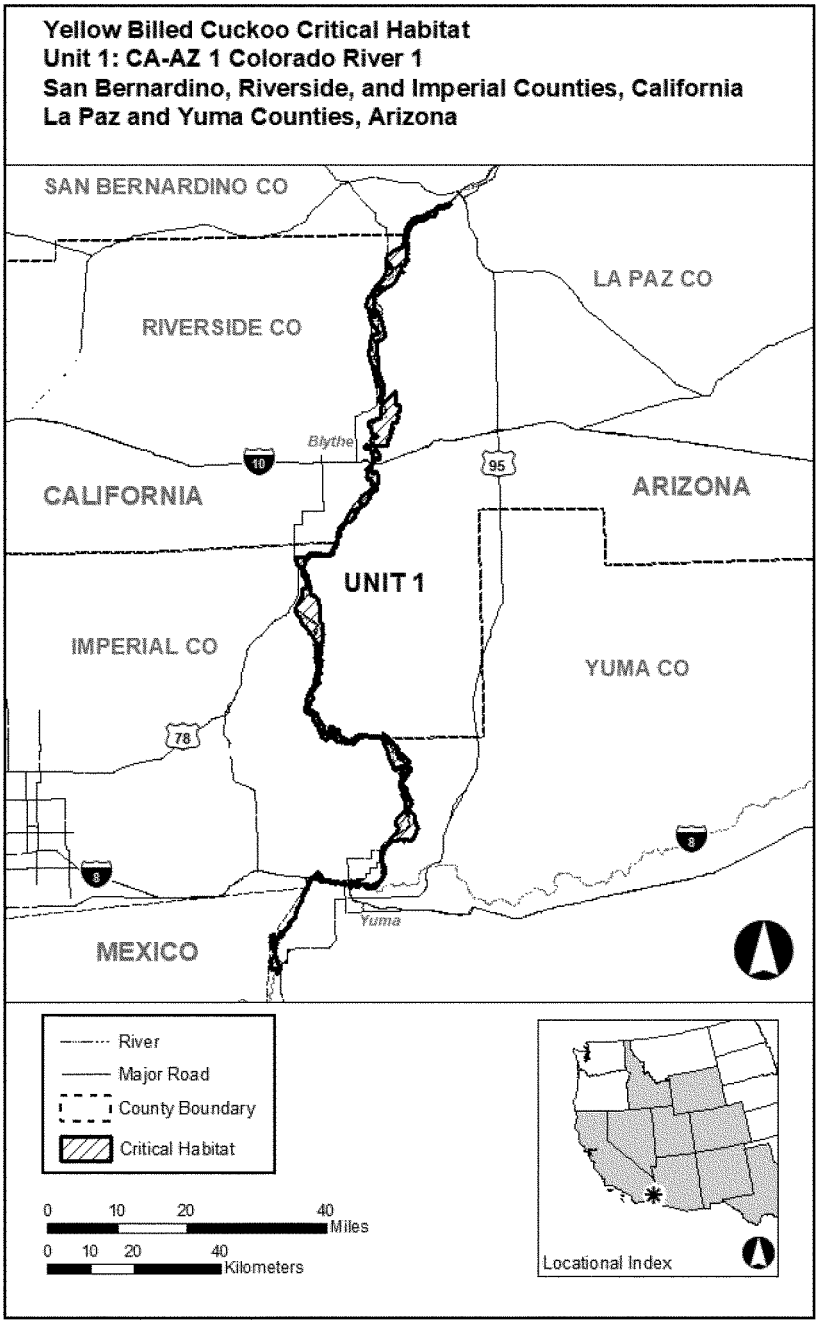
(B) *Southwestern breeding habitat hydrologic processes.* In Southwestern breeding habitat, elevated summer humidity and runoff resulting from seasonal water-management practices or weather patterns and precipitation (typically from North American Monsoon or other tropical weather events) provide suitable conditions for prey-species production and vegetation regeneration and growth. Elevated humidity is especially important in southeastern Arizona, where cuckoos breed in intermittent and ephemeral drainages.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, bridges, and other paved or hardened areas as a result of development) and the land on which they are located existing within the legal boundaries of the critical habitat units designated for the species on the effective date of this rule. Due to the scale on which the critical habitat boundaries are developed, some areas within these legal boundaries may not contain the physical or biological features and therefore are not considered critical habitat.

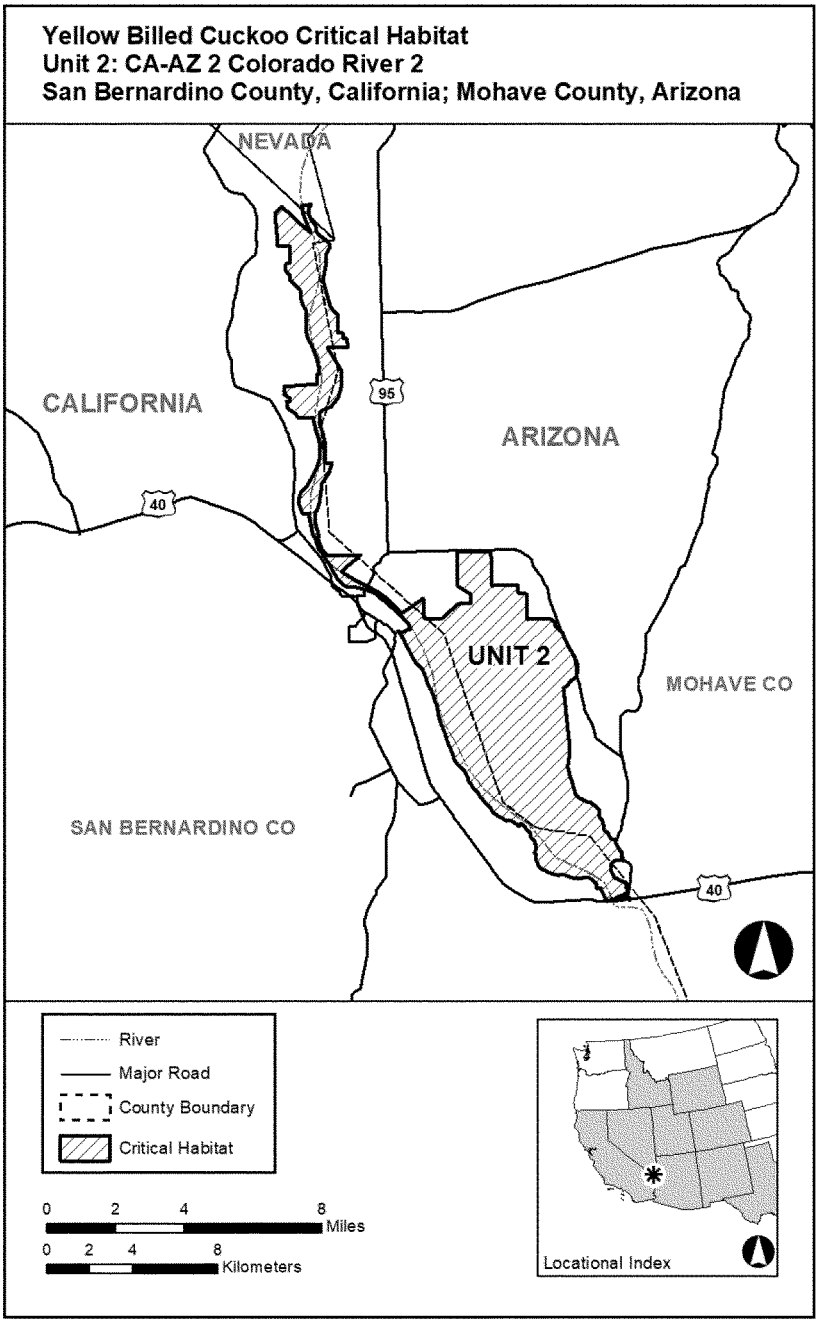
(4) *Critical habitat map units.* Data layers defining map units were created on a base of the Natural Resources Conservation Service National Agriculture Imagery Program (NAIP 2011), and critical habitat was then mapped using North American Datum (NAD) 83, Universal Transverse Mercator Zone 10N coordinates. 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 Sacramento Fish and Wildlife Office's internet site at *http://www.fws.gov/sacramento,* or on *http://www.regulations.gov* at Docket No. FWS–R8–ES–2013–0011. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Unit 1: CA/AZ–1, Colorado River 1; Imperial, Riverside, and San Bernardino Counties, California, and Yuma and La Paz Counties, Arizona. Map of Unit 1 follows:

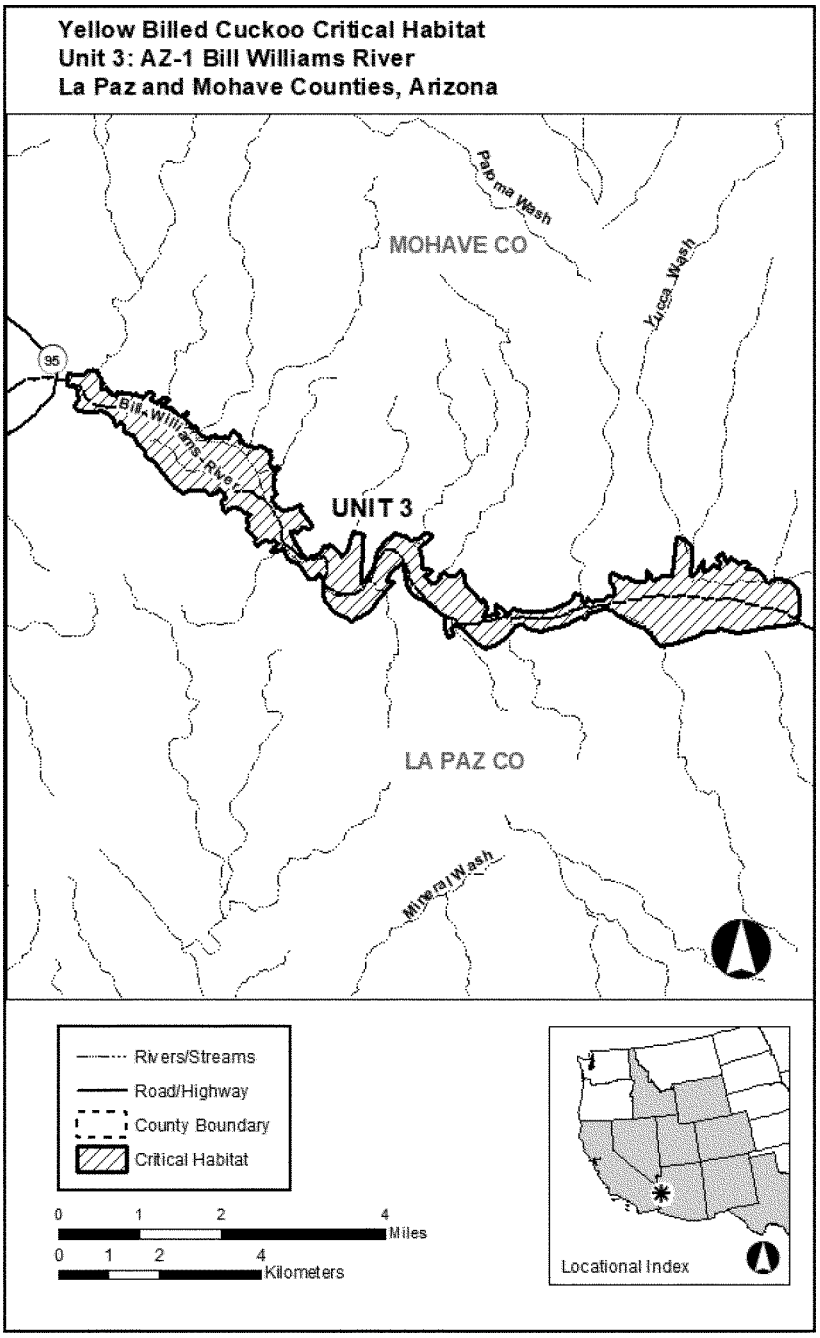
BILLING CODE 4333–15–P



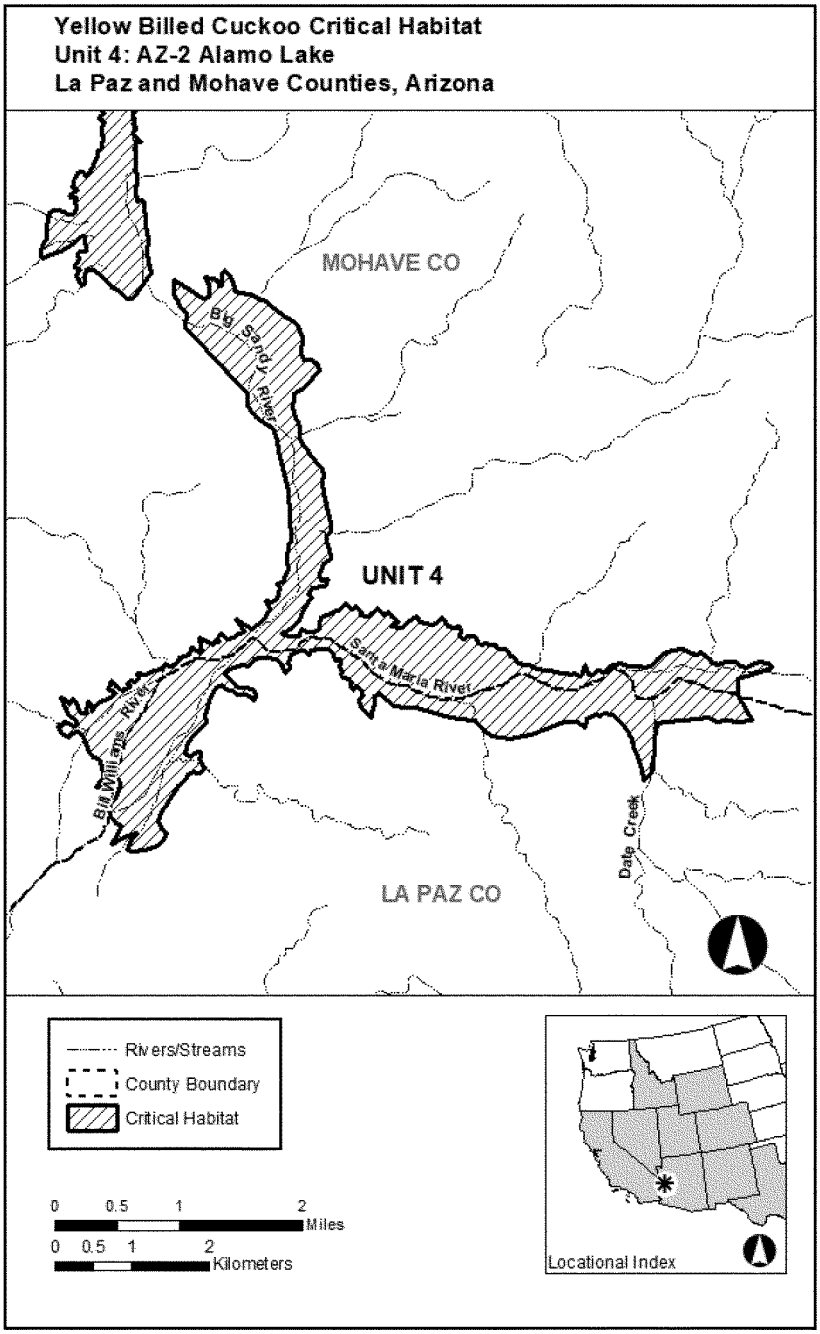
(6) Unit 2: CA/AZ–2, Colorado River 2; San Bernardino County, California, and Mohave County, Arizona. Map of Unit 2 follows:



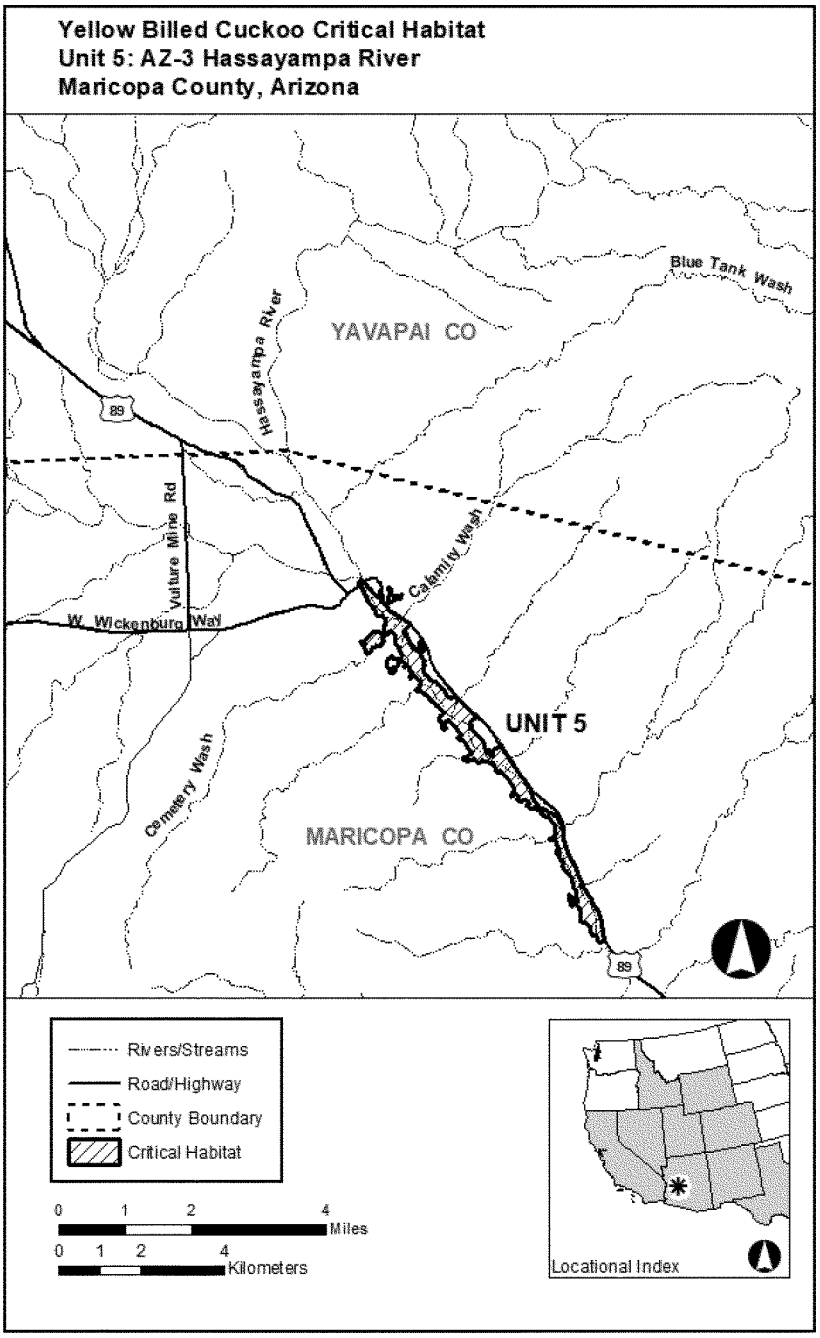
(7) Unit 3: AZ–1, Bill Williams River; Mojave and La Paz Counties, Arizona.
Map of Unit 3 follows:



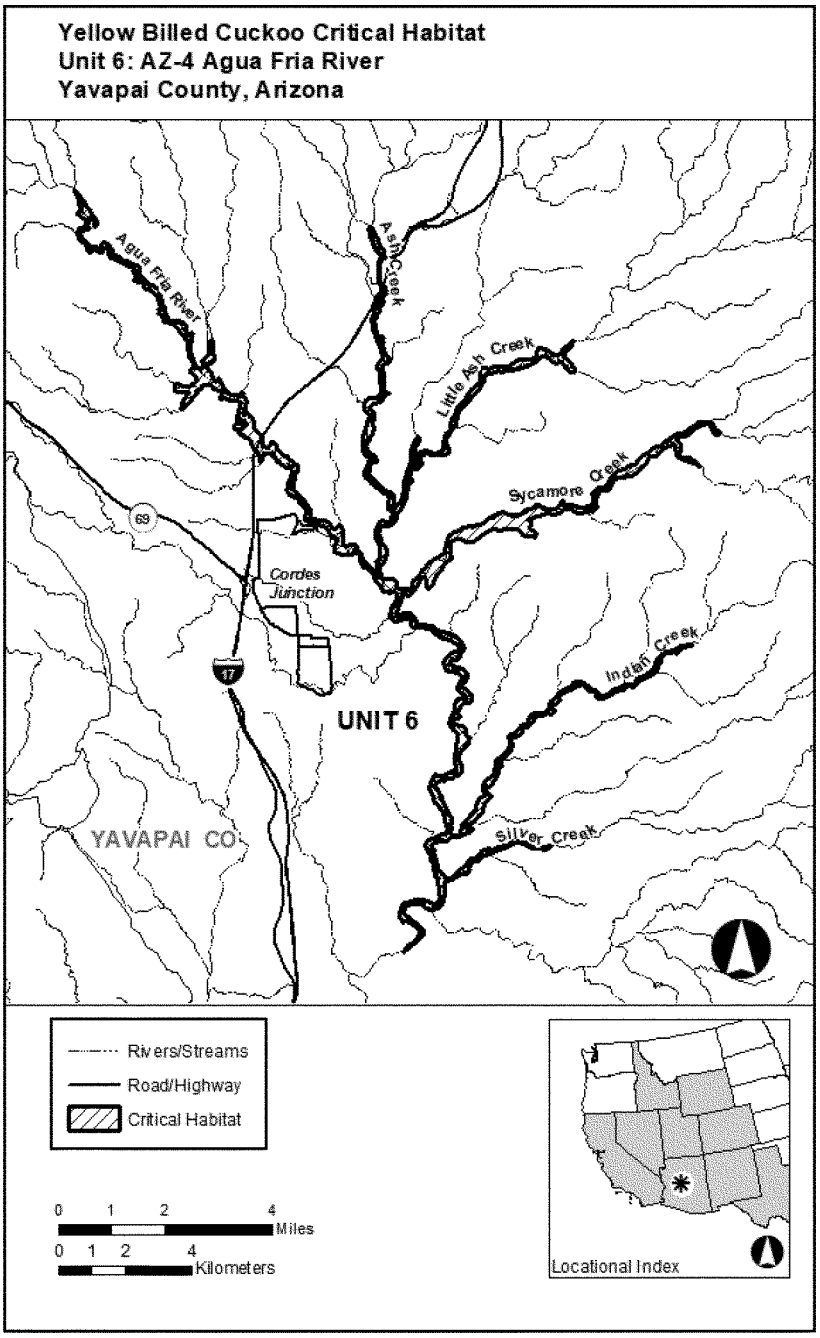
(8) Unit 4: AZ–2, Alamo Lake, Mohave and La Paz Counties, Arizona.
Map of Unit 4 follows:



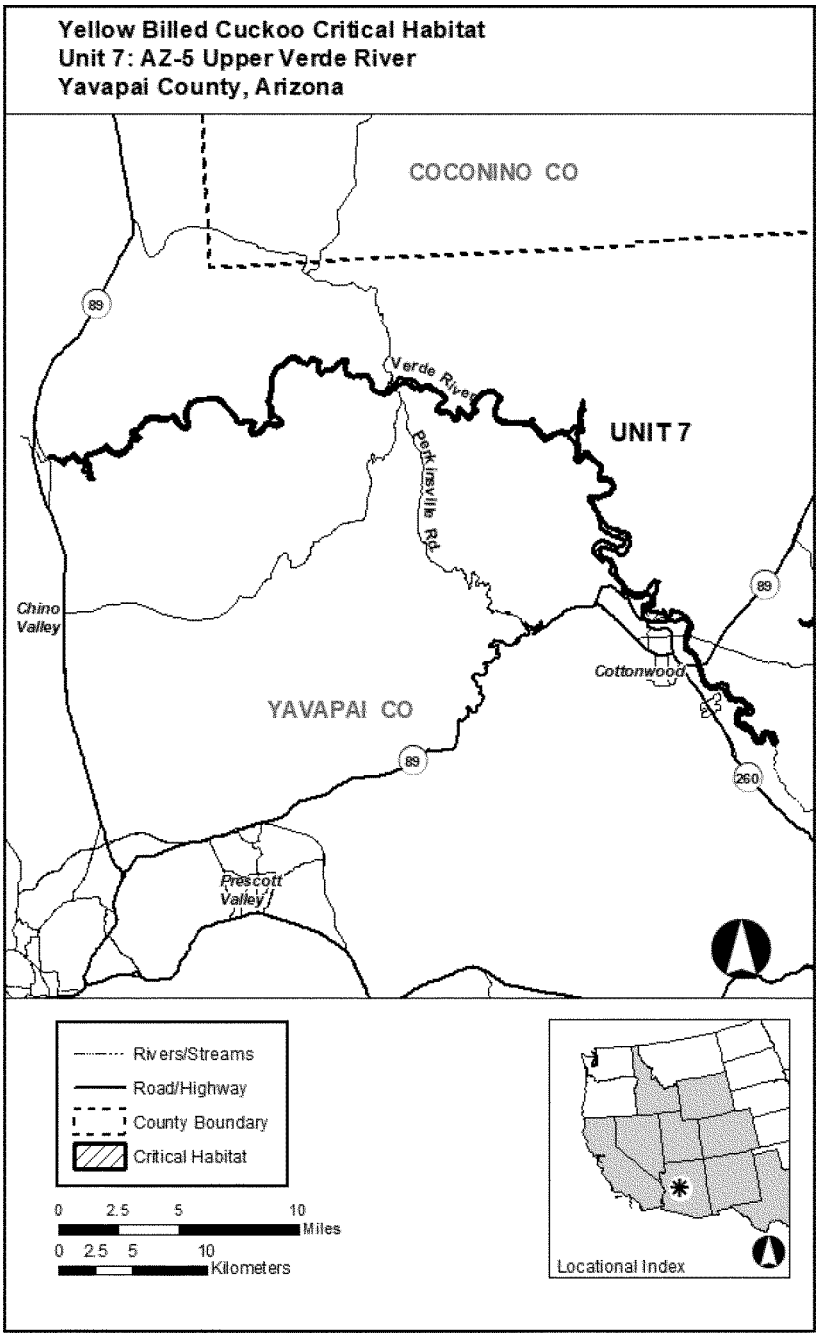
(9) Unit 5: AZ–3, Hassayampa River; Yavapai and Maricopa Counties, Arizona. Map of Unit 5 follows:



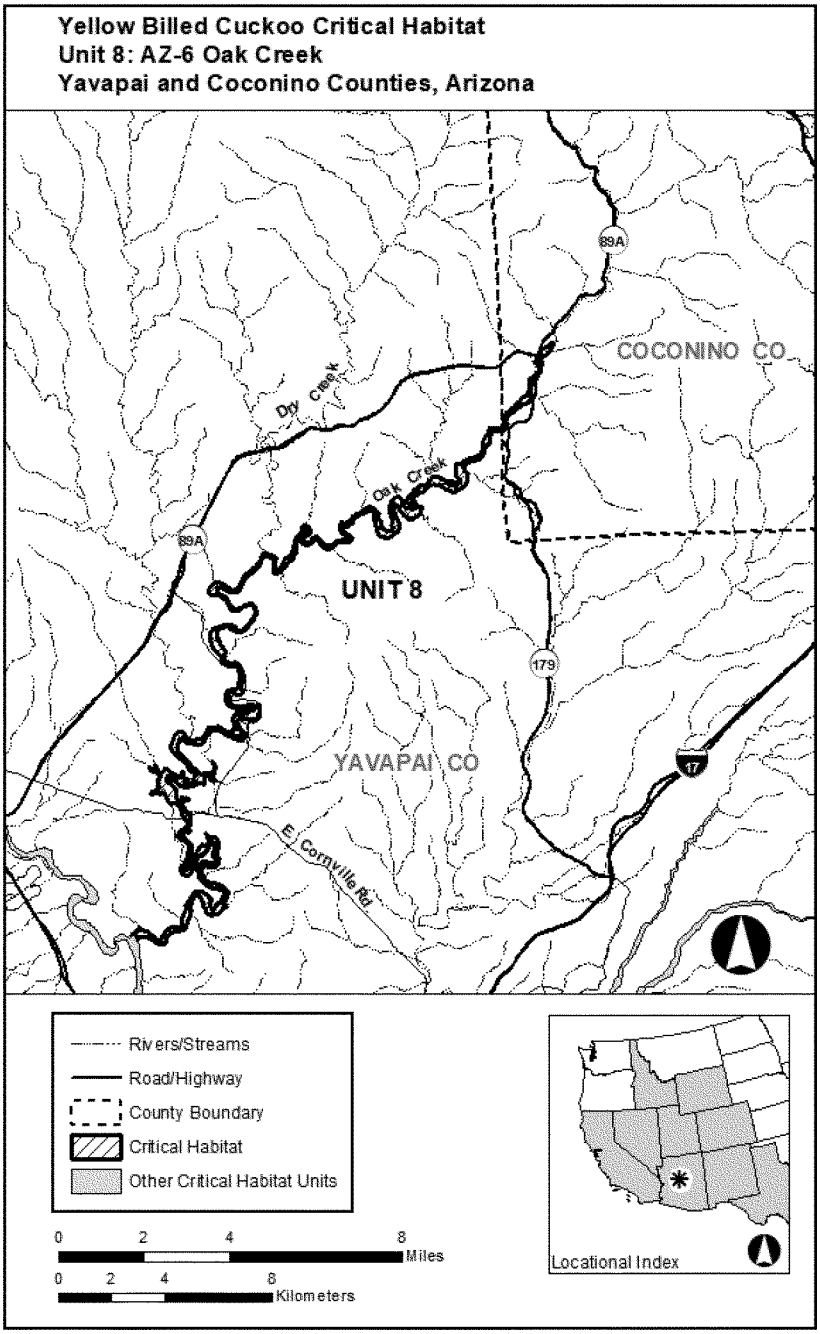
(10) Unit 6: AZ–4, Agua Fria River; Yavapai County, Arizona. Map of Unit 6 follows:



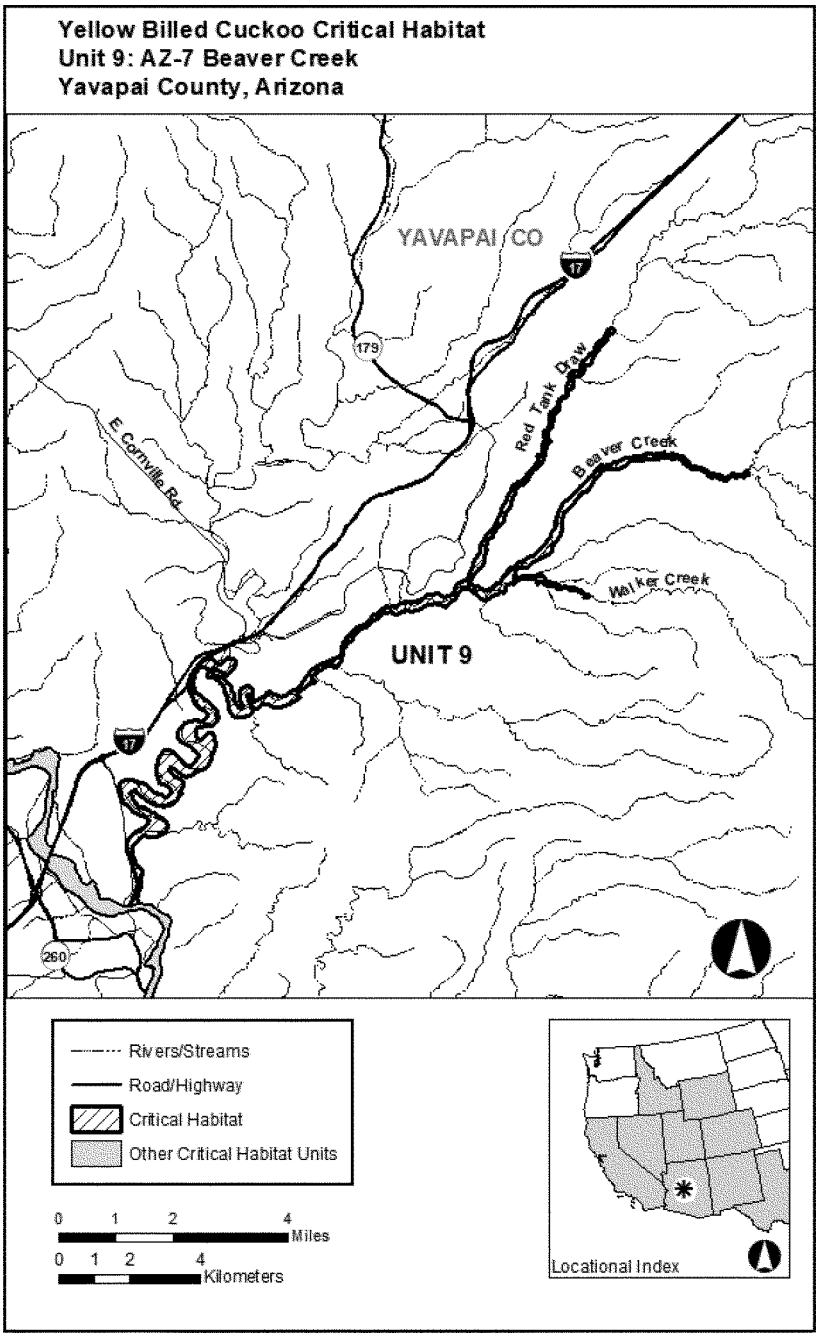
(11) Unit 7: AZ–5, Upper Verde River; Yavapai County, Arizona. Map of Unit 7 follows:



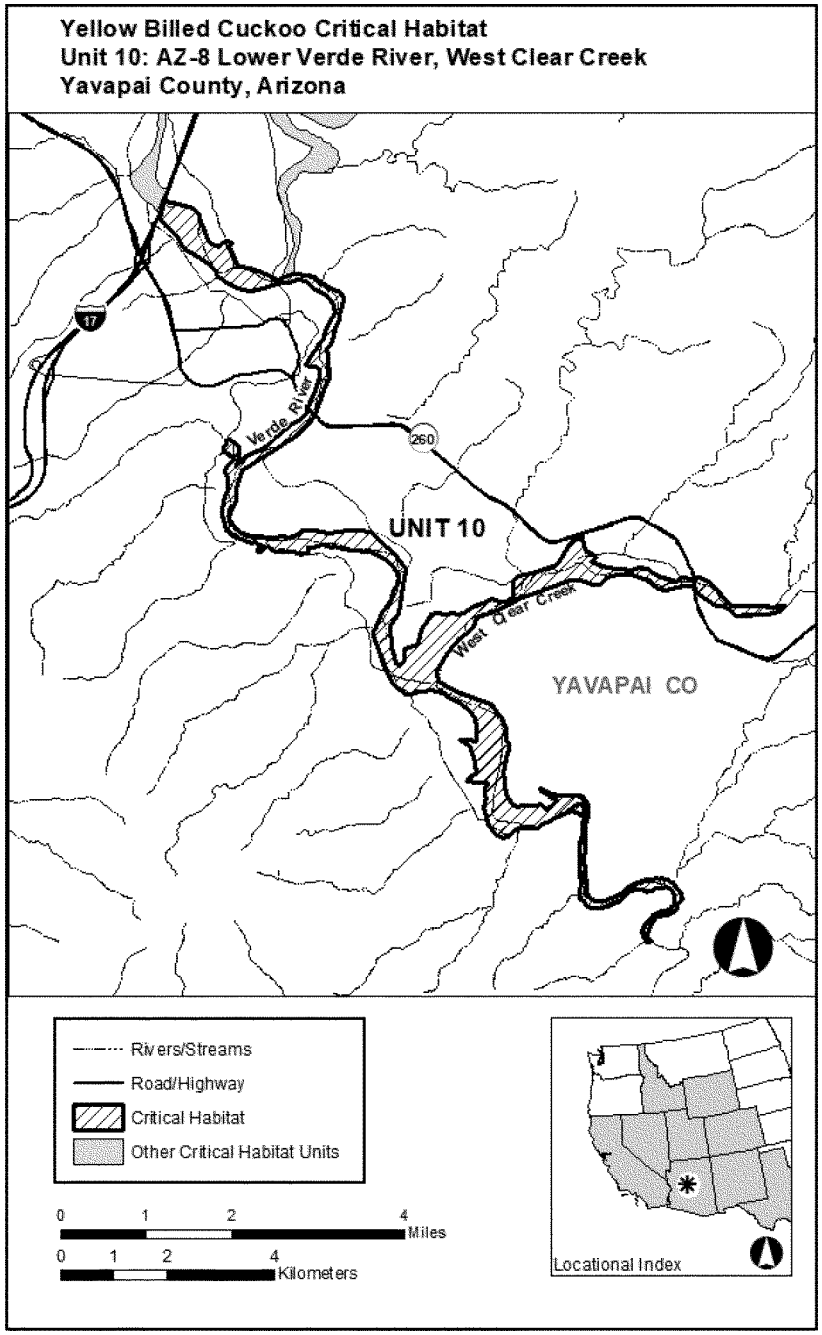
(12) Unit 8: AZ–6, Oak Creek; Yavapai and Coconino Counties, Arizona. Map of Unit 8 follows:



(13) Unit 9: AZ–7, Beaver Creek; Yavapai County, Arizona. Map of Unit 9 follows:

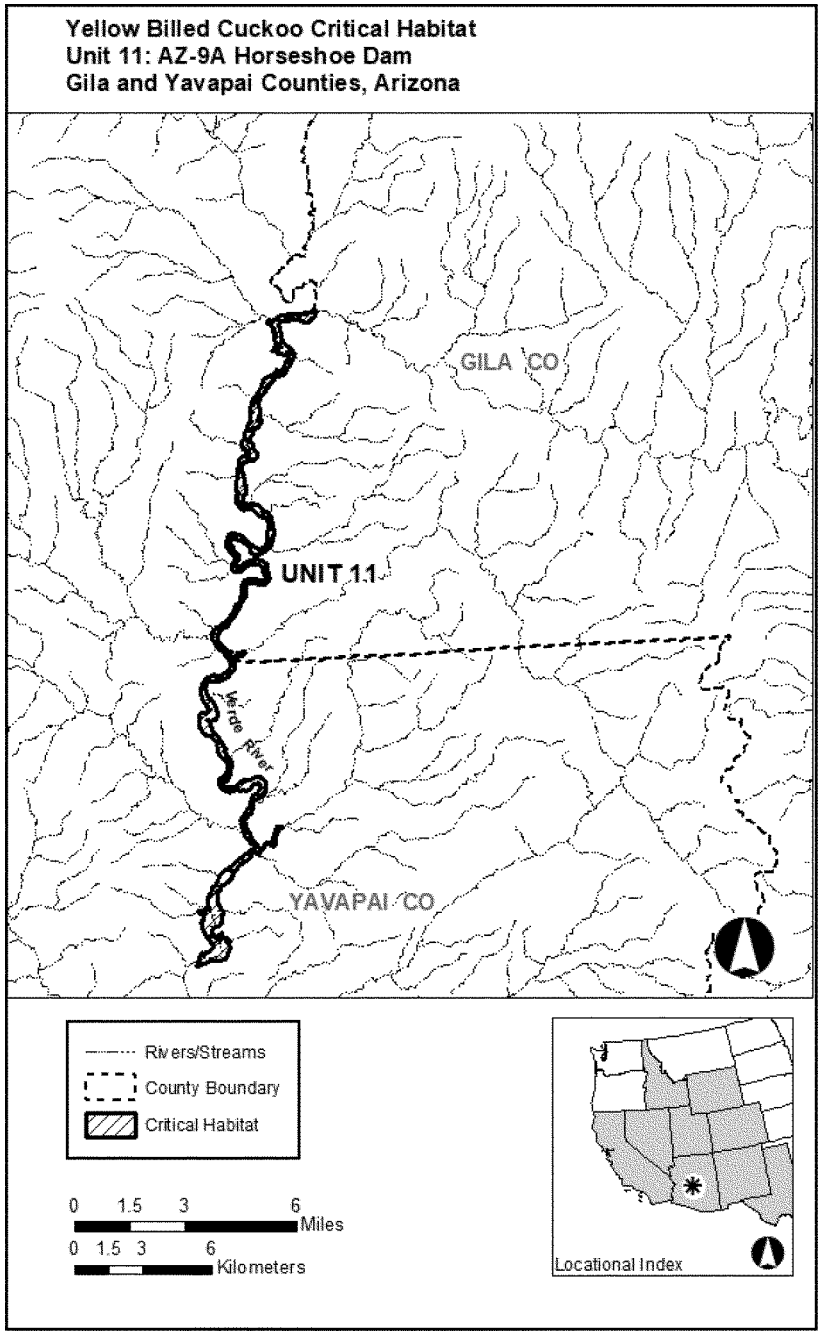


(14) Unit 10: AZ–8, Lower Verde River and West Clear Creek; Yavapai County, Arizona. Map of Unit 10 follows:

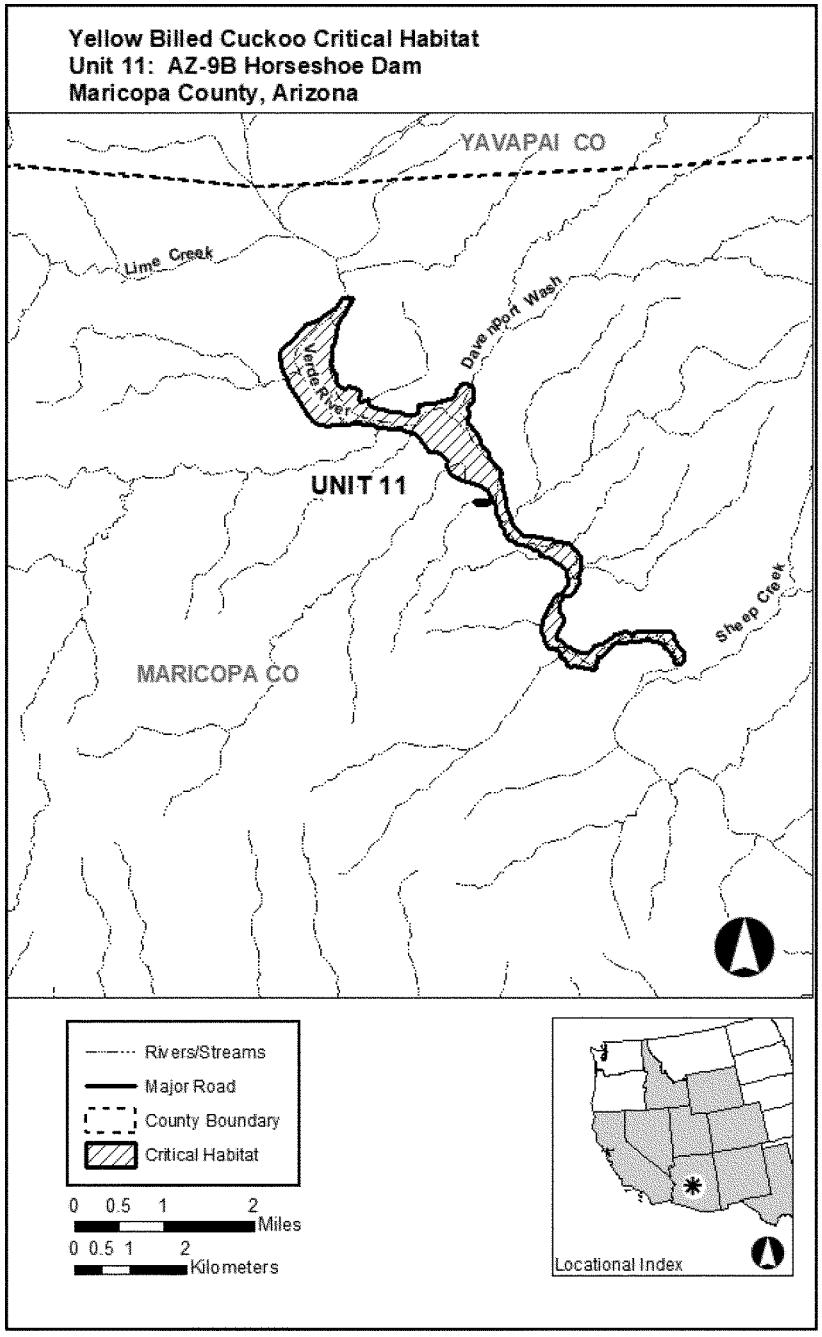


(15) Unit 11: AZ–9A and AZ–9B, Horseshoe Dam; Gila, Maricopa, and Yavapai Counties, Arizona. Maps of Unit 11 follow:

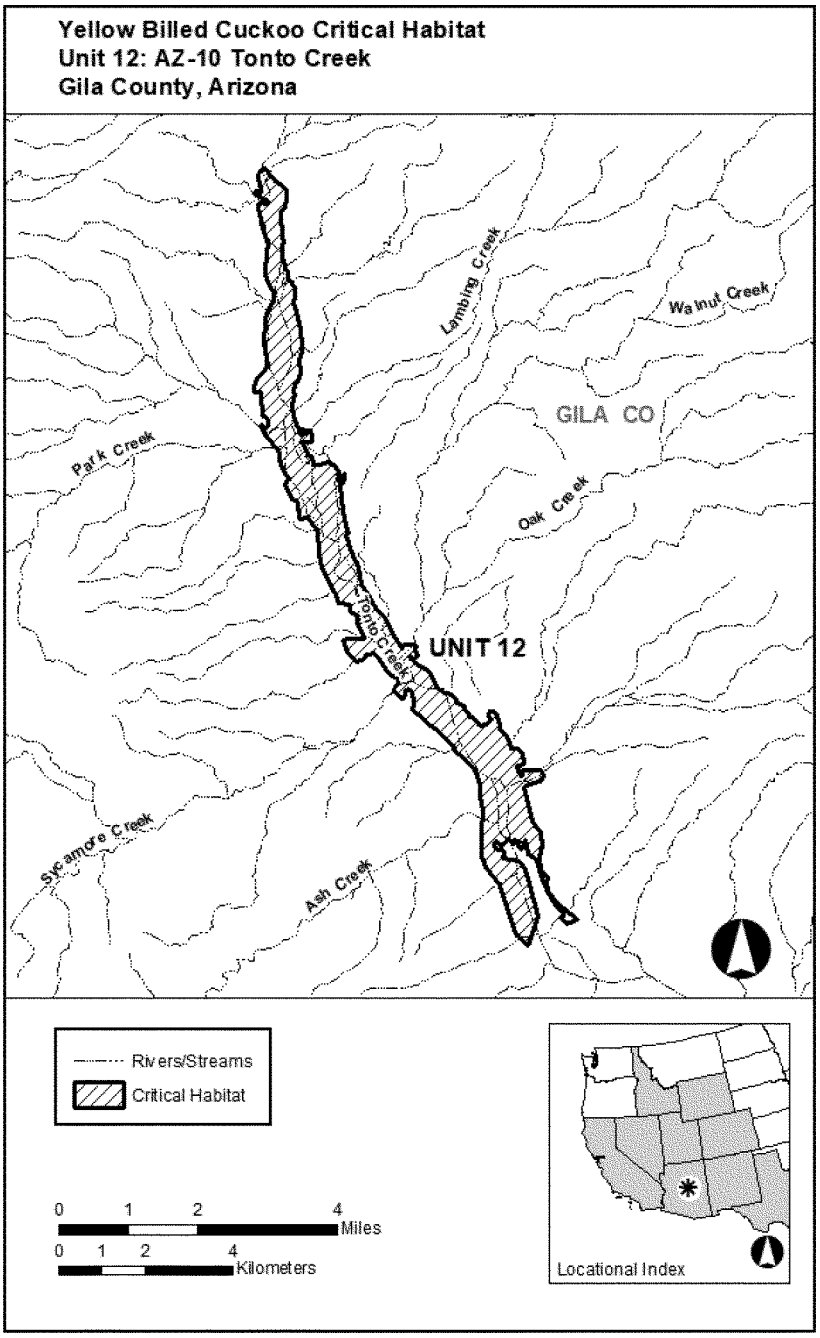
(i) Map of Unit 11: AZ–9A, Horseshoe Dam.



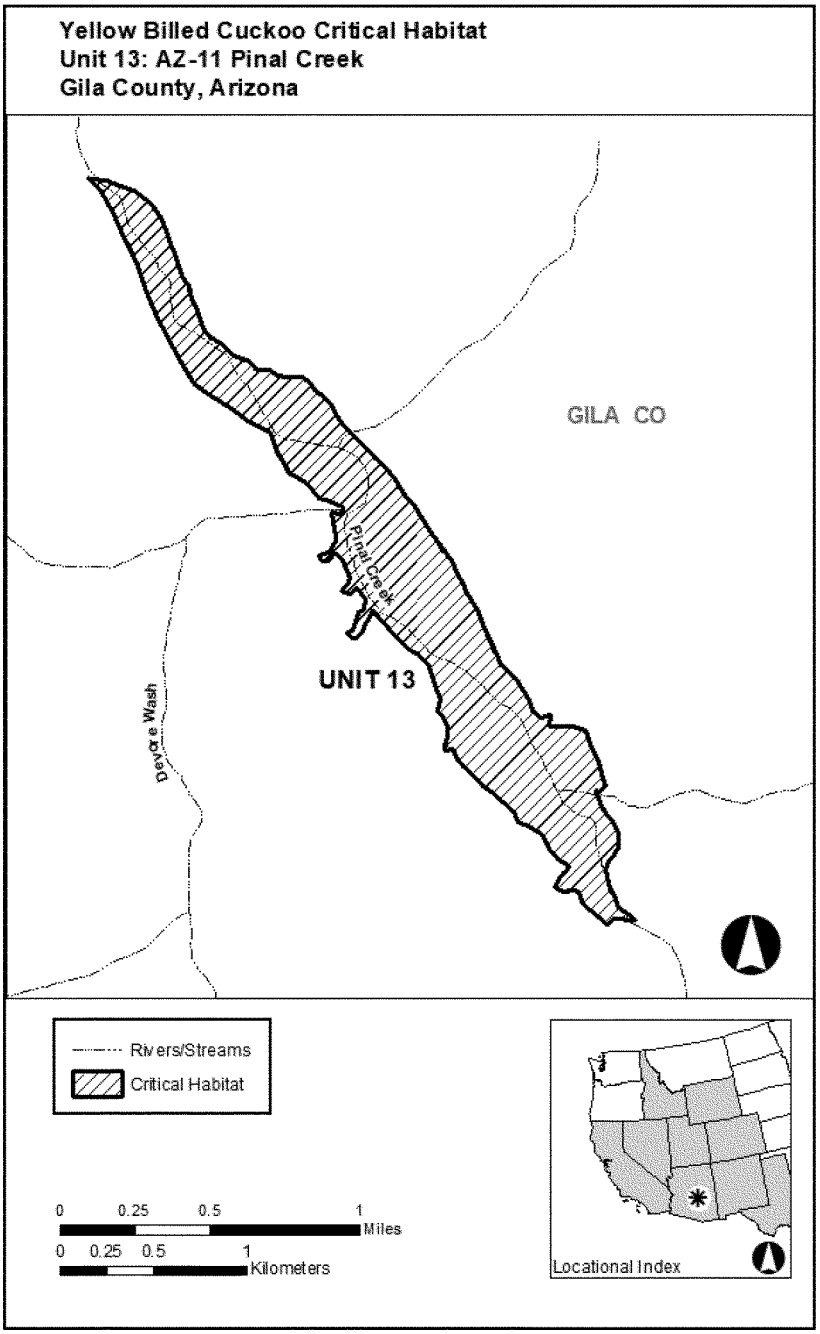
(ii) Map of Unit 11: AZ–9B, Horseshoe Dam.



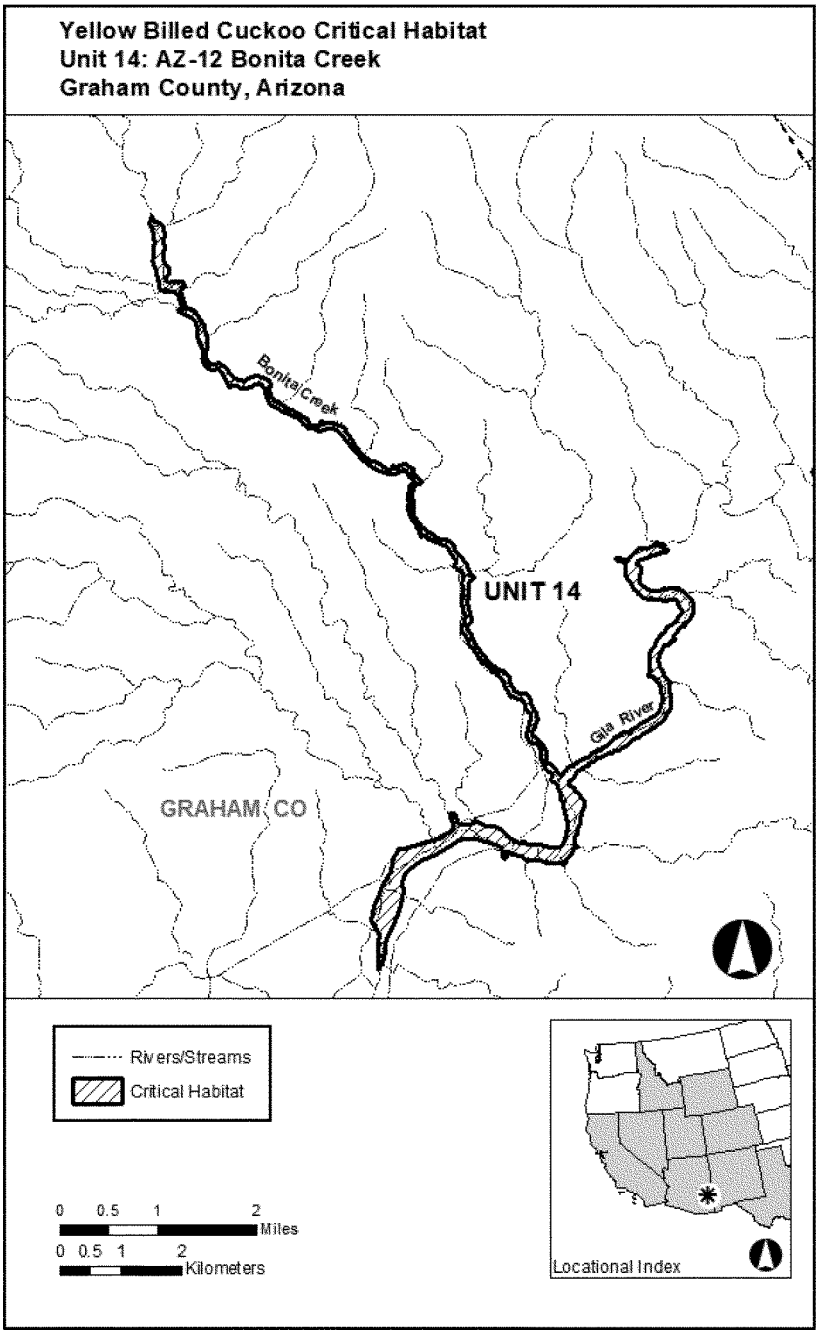
(16) Unit 12: AZ–10, Tonto Creek; Gila County, Arizona. Map of Unit 12 follows:



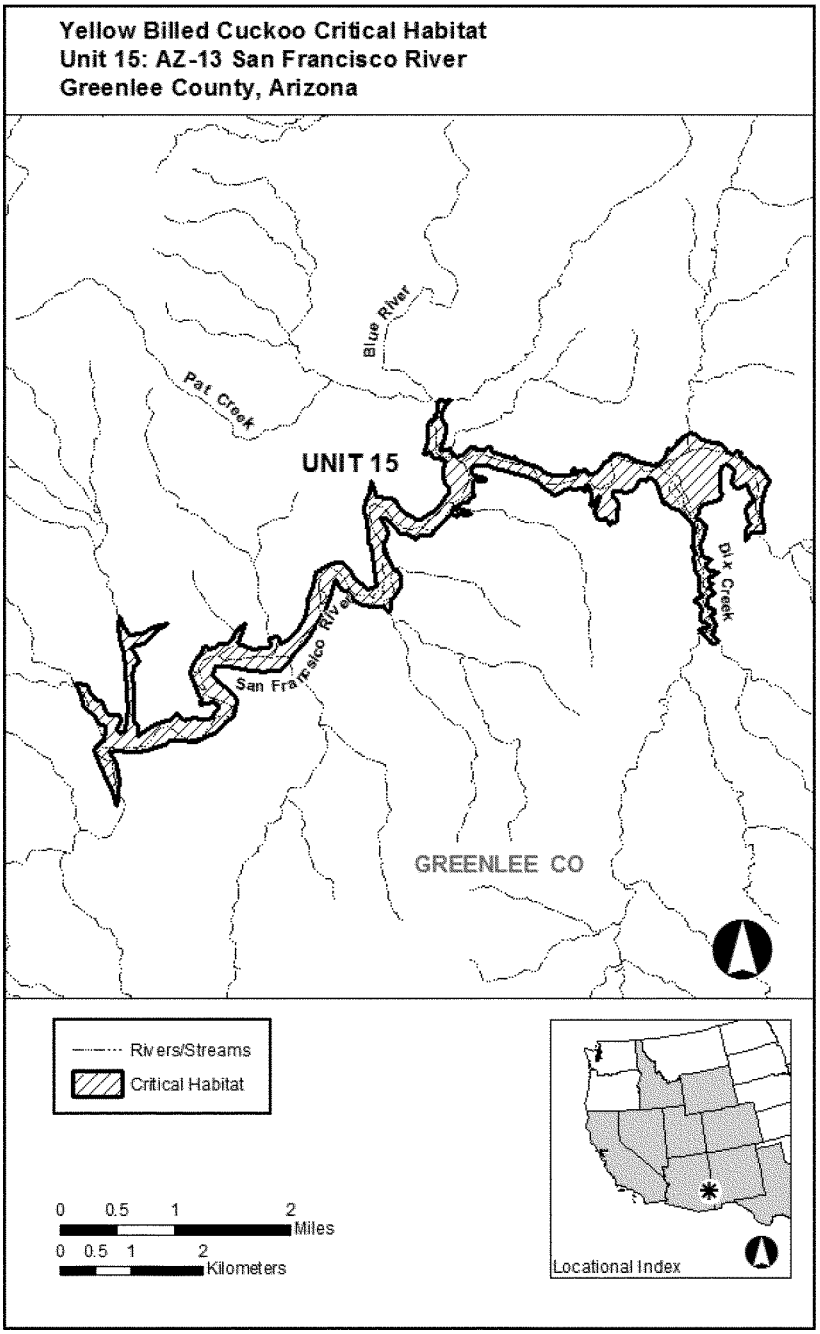
(17) Unit 13: AZ–11, Pinal Creek; Gila County, Arizona. Map of Unit 13 follows:



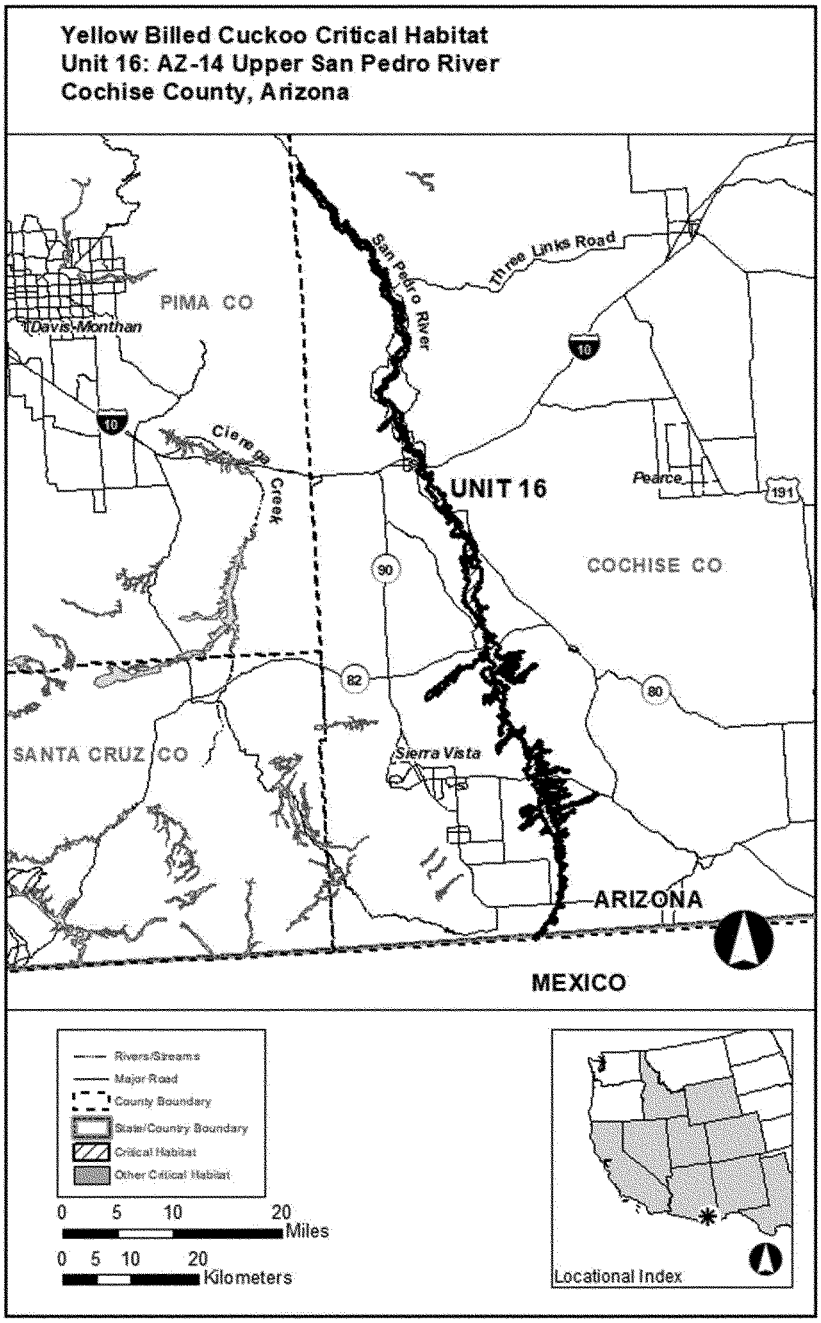
(18) Unit 14: AZ–12, Bonita Creek; Graham County, Arizona. Map of Unit 14 follows:



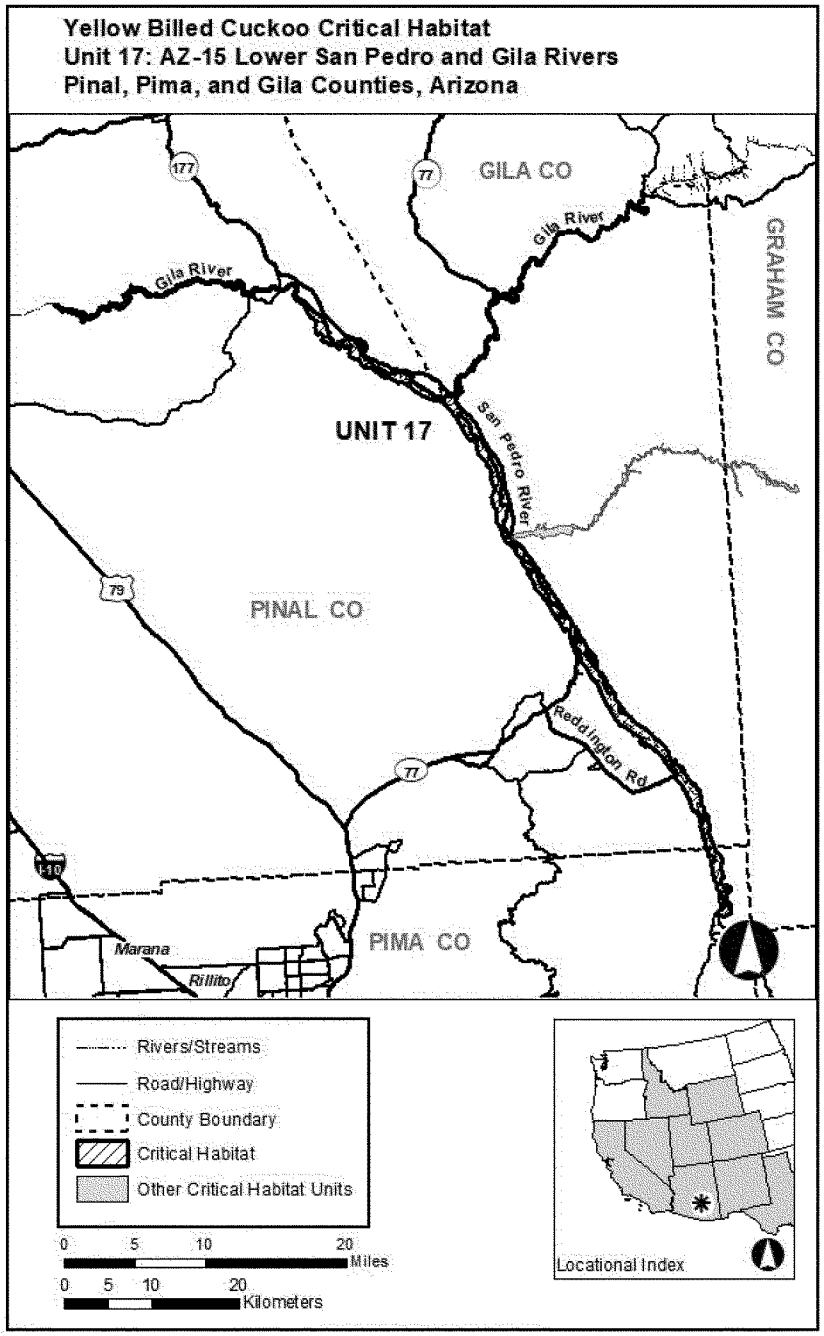
(19) Unit 15: AZ–13, San Francisco River; Greenlee County, Arizona. Map of Unit 15 follows:



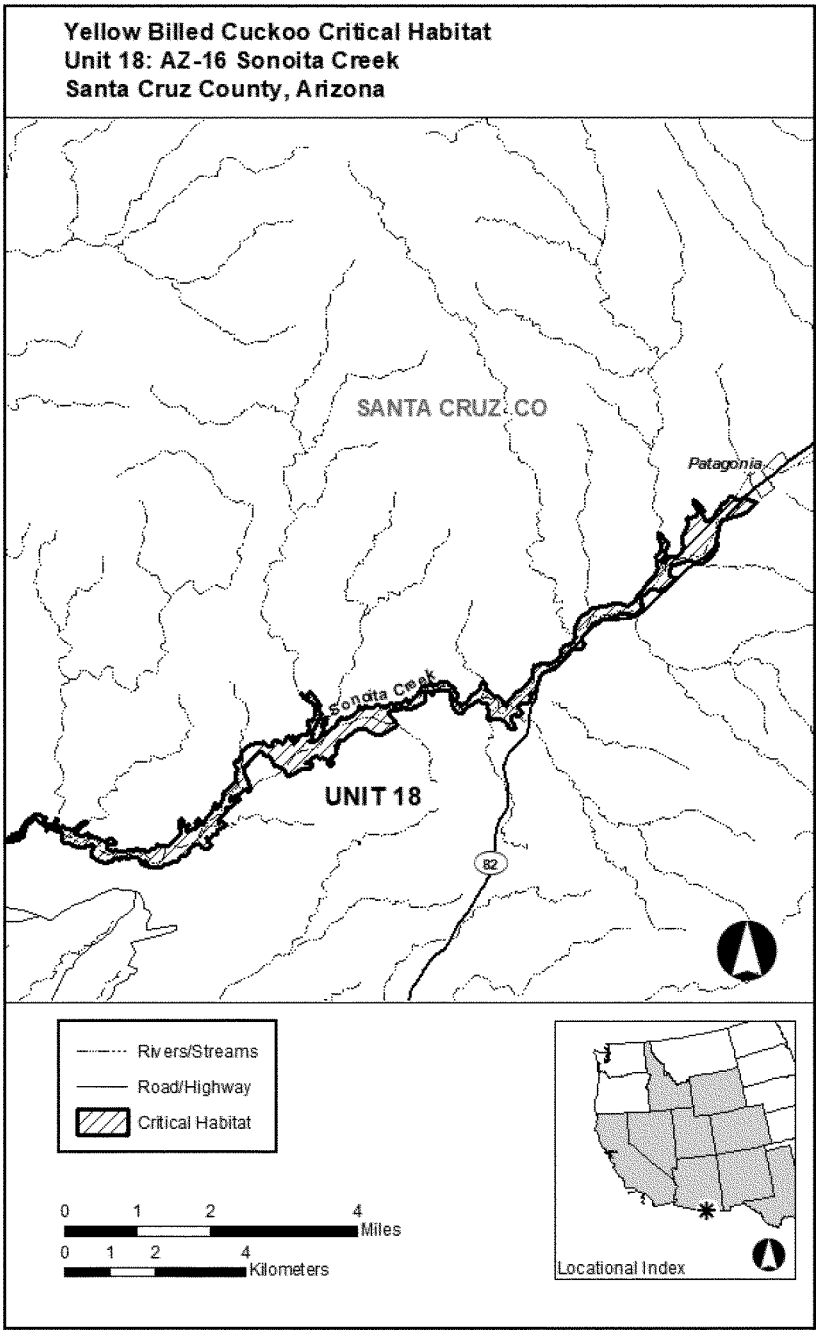
(20) Unit 16: AZ–14, Upper San Pedro River; Cochise County, Arizona. Map of Unit 16 follows:



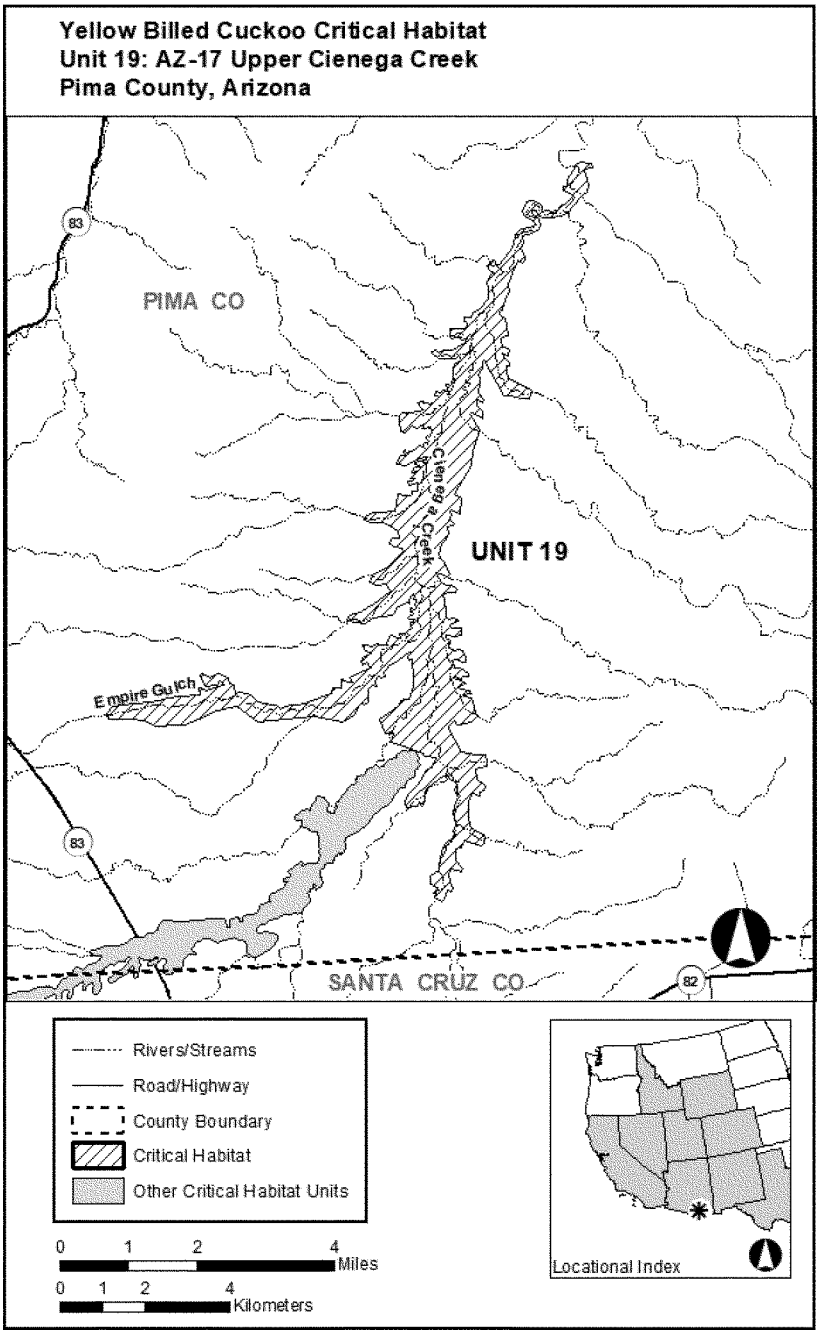
(21) Unit 17: AZ–15, Lower San Pedro River and Gila River; Pima, Pinal, and Gila Counties, Arizona. Map of Unit 17 follows:



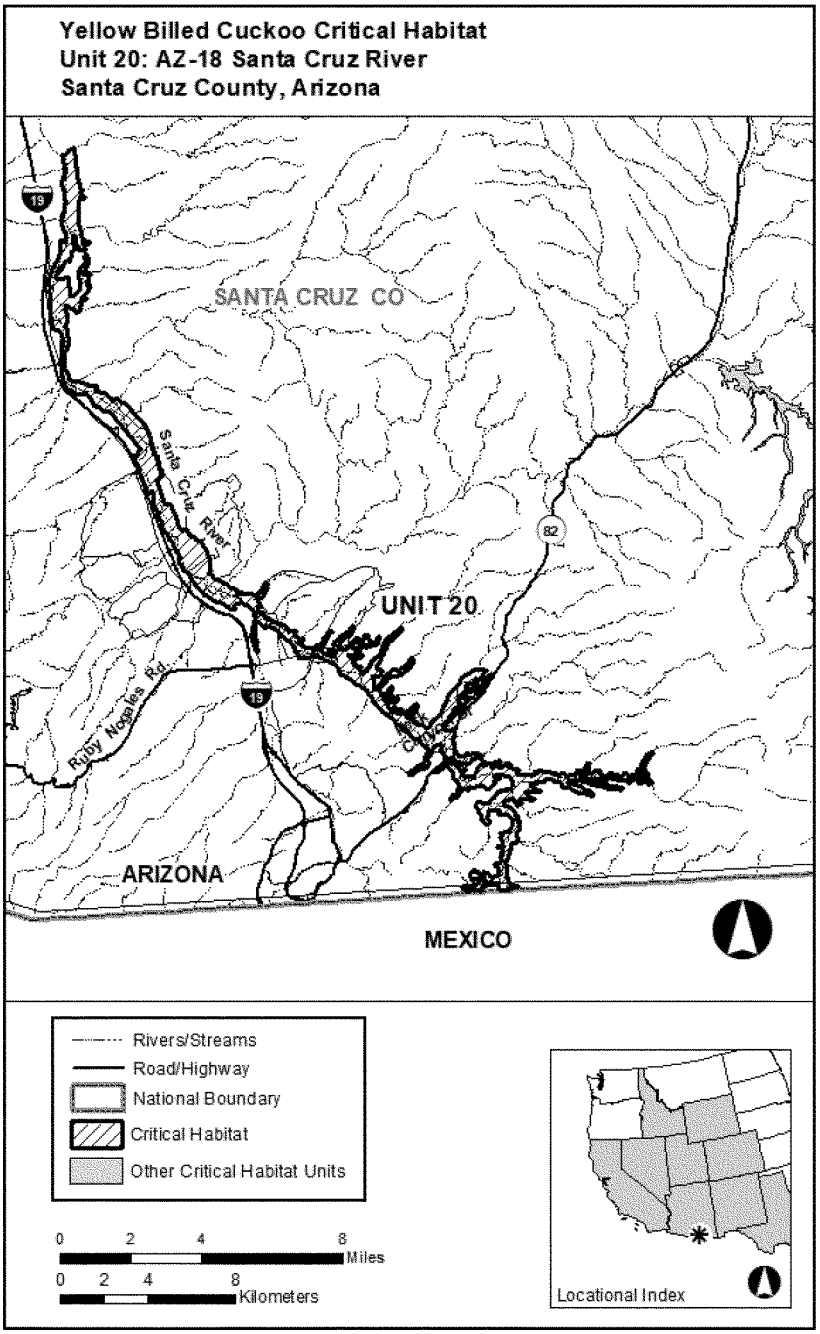
(22) Unit 18: AZ–16, Sonoita Creek; Santa Cruz County, Arizona. Map of Unit 18 follows:



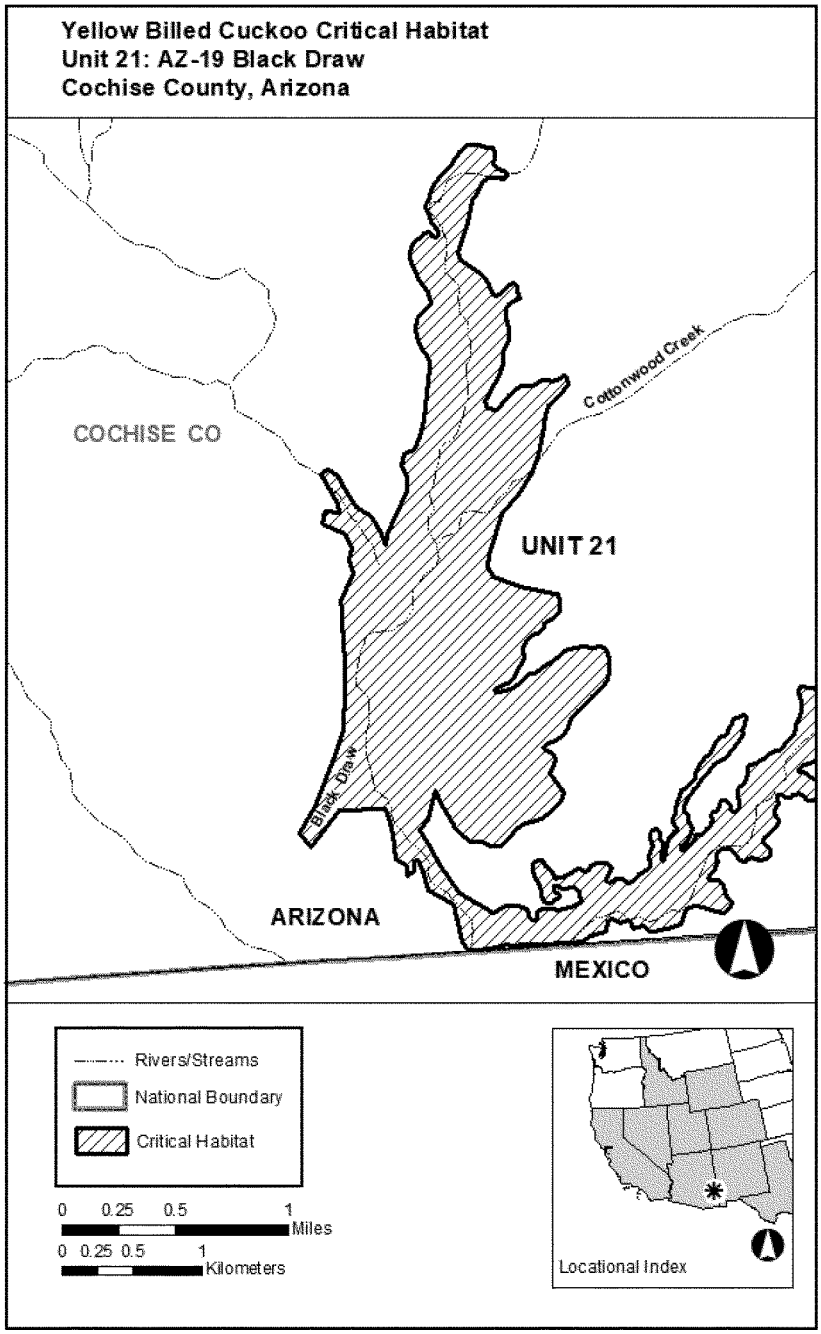
(23) Unit 19: AZ–17, Upper Cienega Creek; Pima County, Arizona. Map of Unit 19 follows:



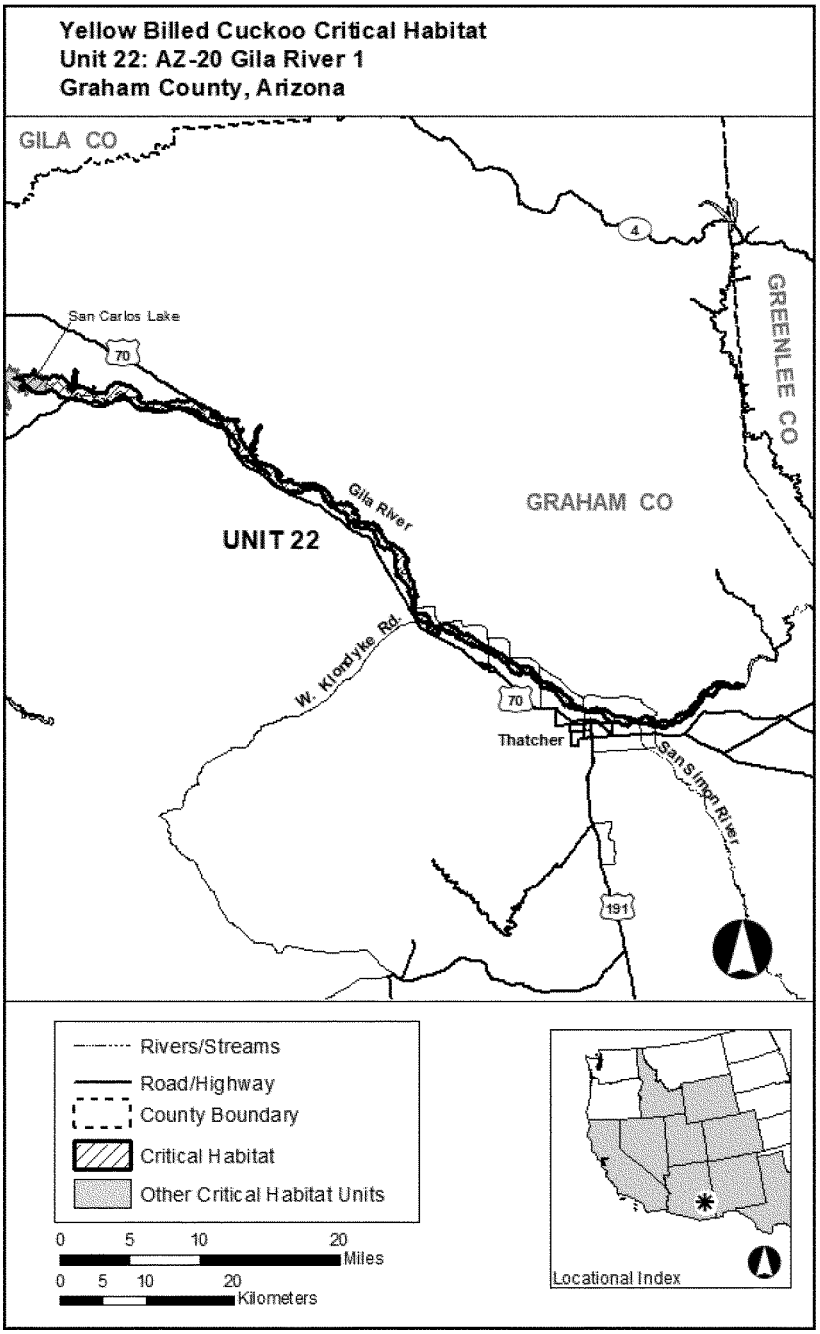
(24) Unit 20: AZ–18, Santa Cruz River; Santa Cruz County, Arizona. Map of Unit 20 follows:



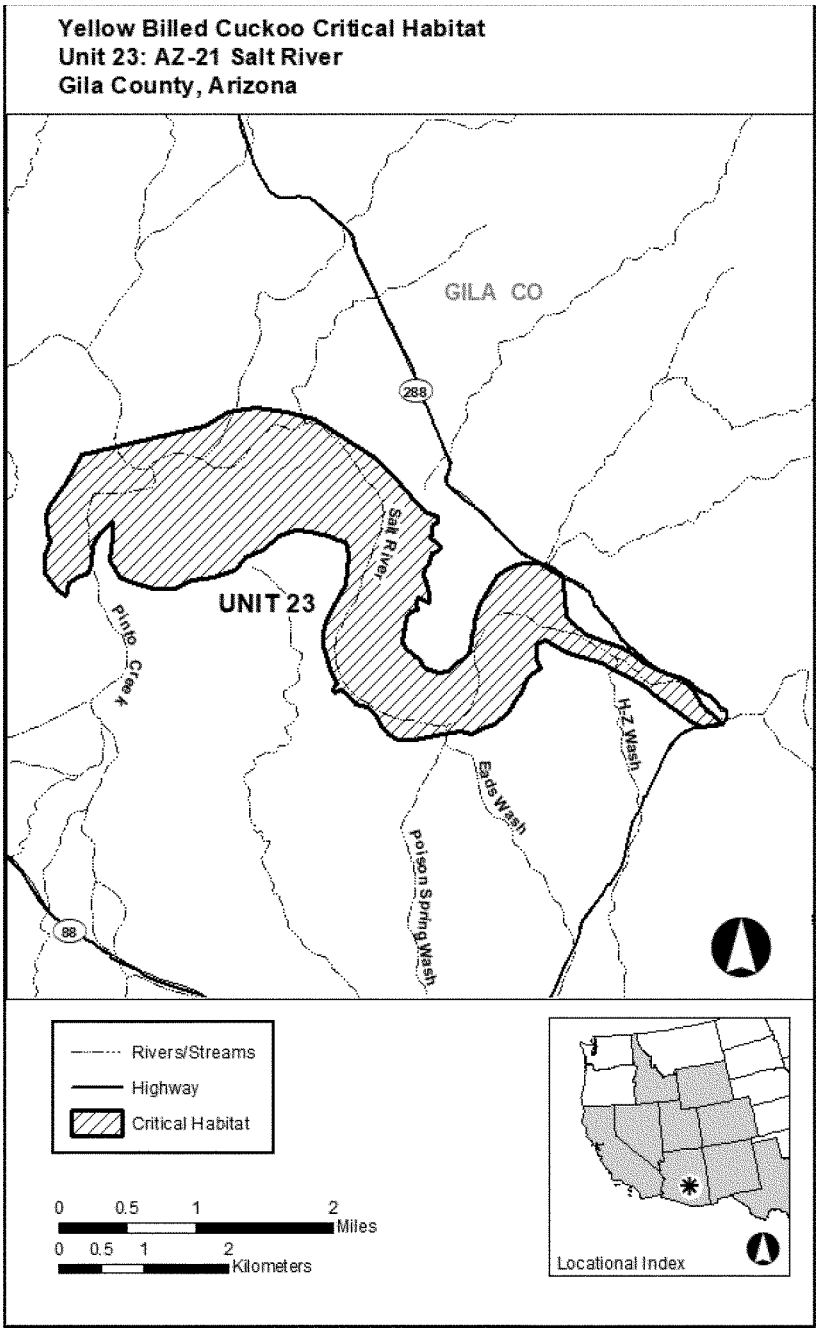
(25) Unit 21: AZ–19, Black Draw; Cochise County, Arizona. Map of Unit 21 follows:



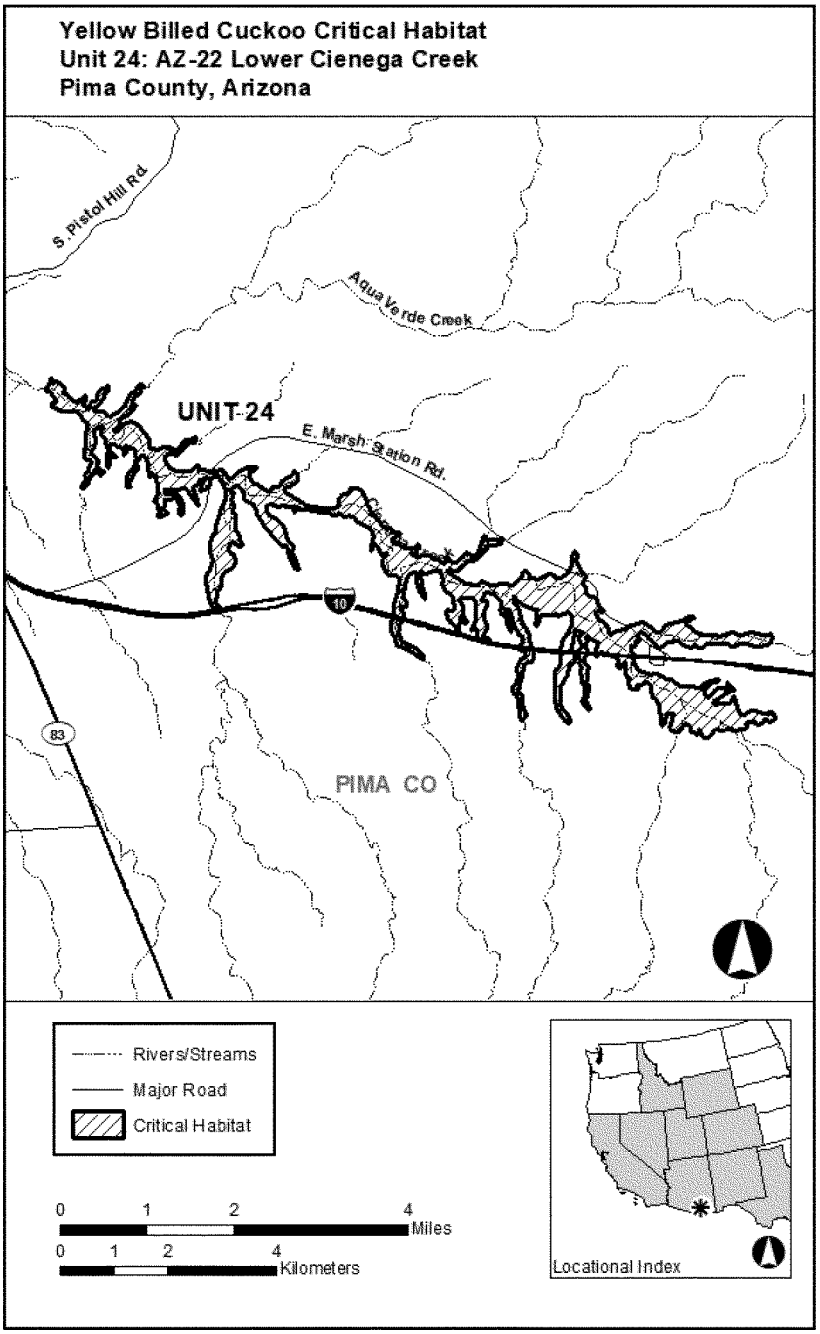
(26) Unit 22: AZ–20, Gila River 1; Graham County, Arizona. Map of Unit 22 follows:



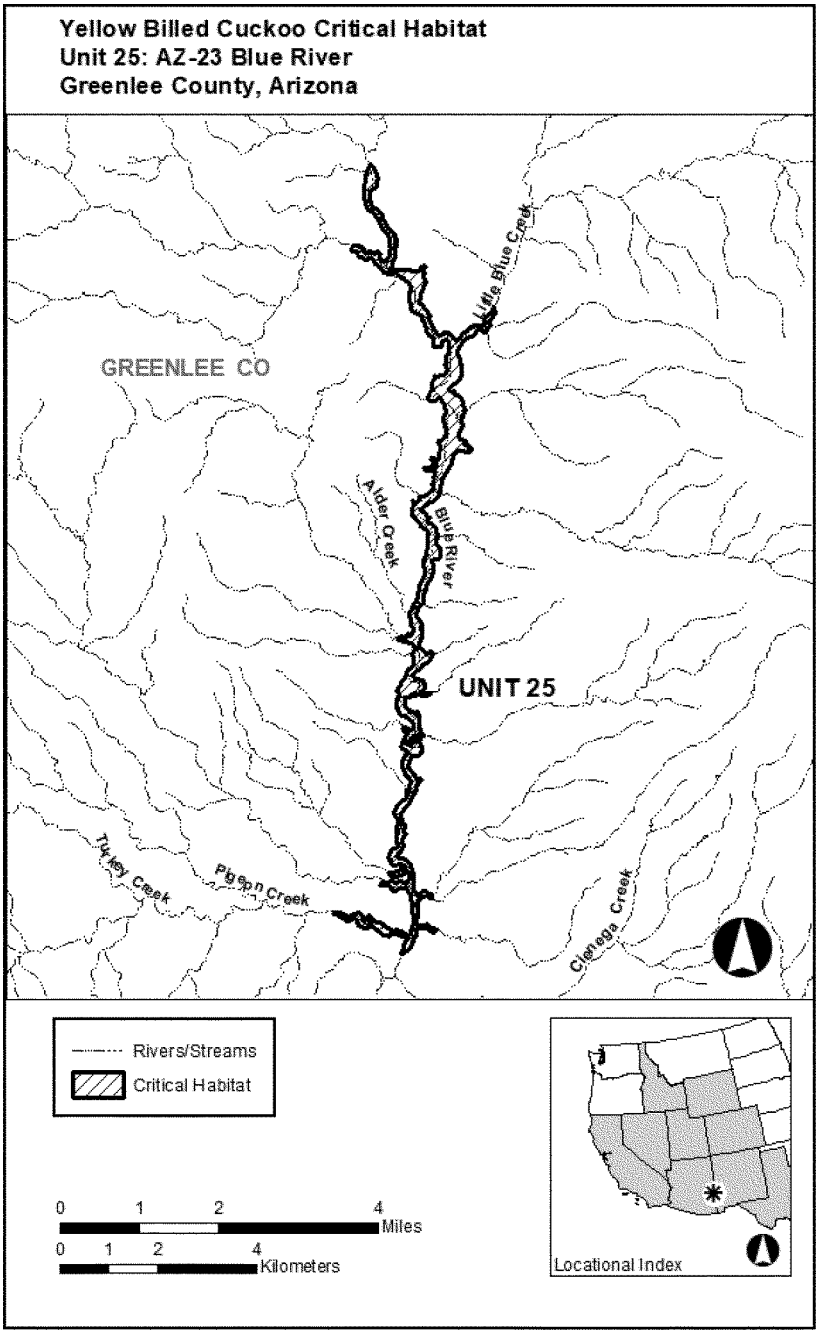
(27) Unit 23: AZ–21, Salt River; Gila County, Arizona. Map of Unit 23 follows:



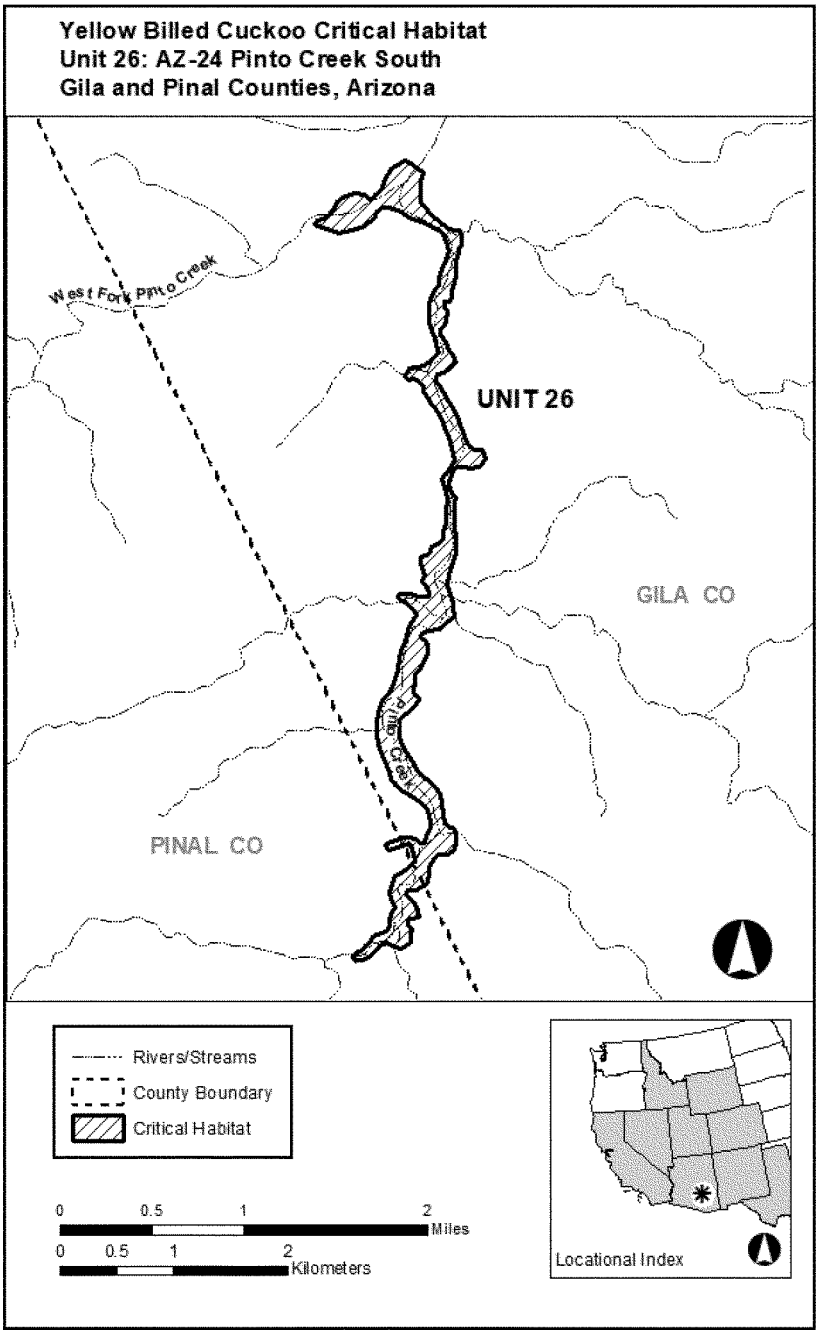
(28) Unit 24: AZ–22, Lower Cienega Creek; Pima County, Arizona. Map of Unit 24 follows:



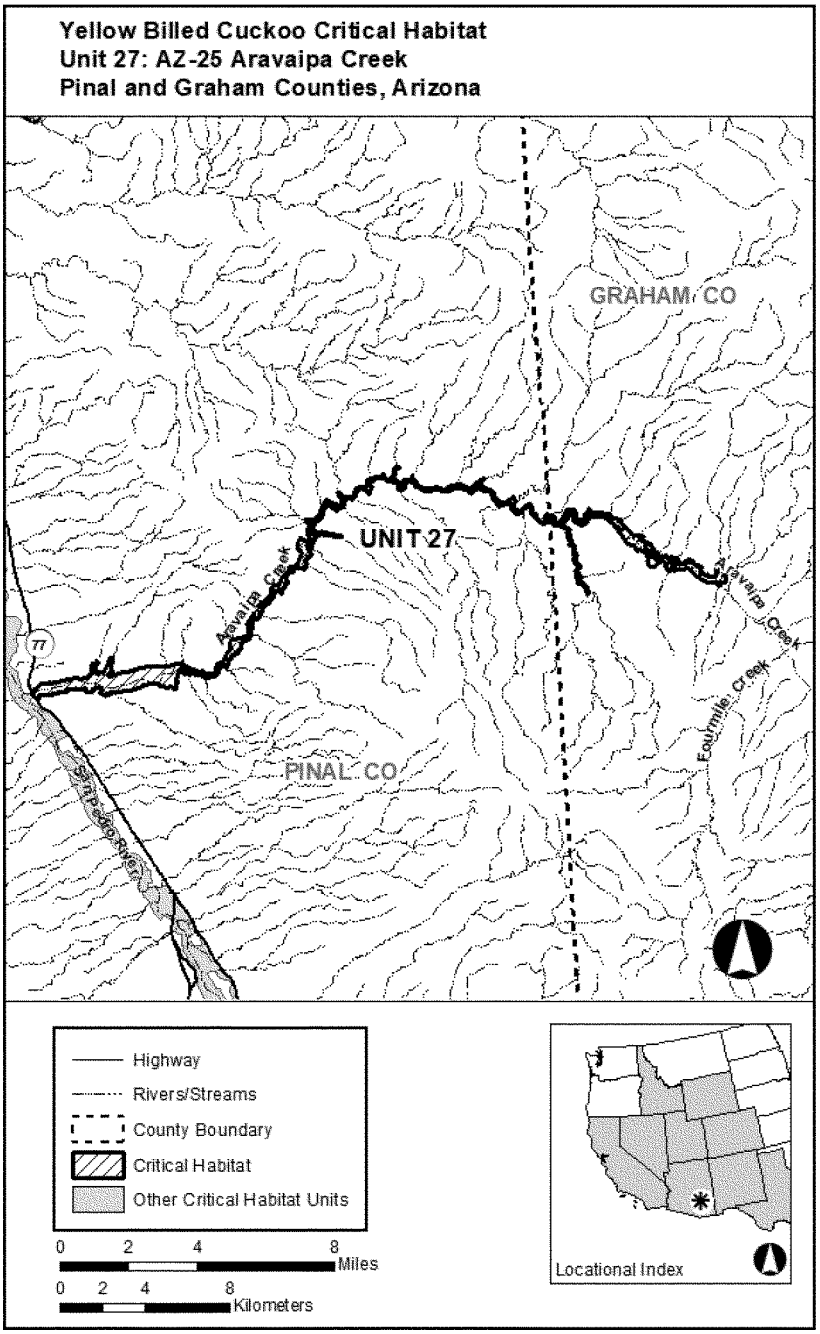
(29) Unit 25: AZ–23, Blue River; Greenlee County, Arizona. Map of Unit 25 follows:



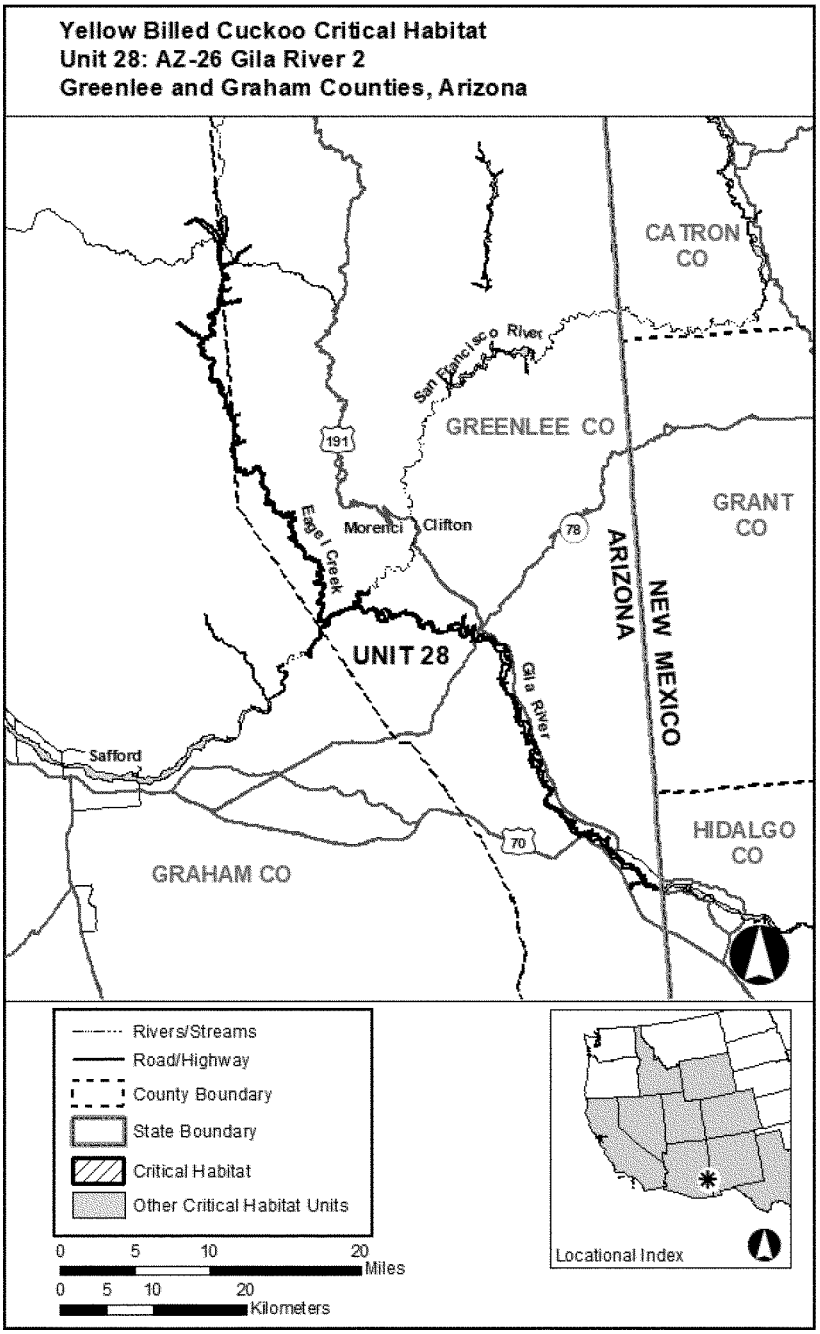
(30) Unit 26: AZ–24, Pinto Creek South; Gila and Pinal Counties, Arizona.
Map of Unit 26 follows:



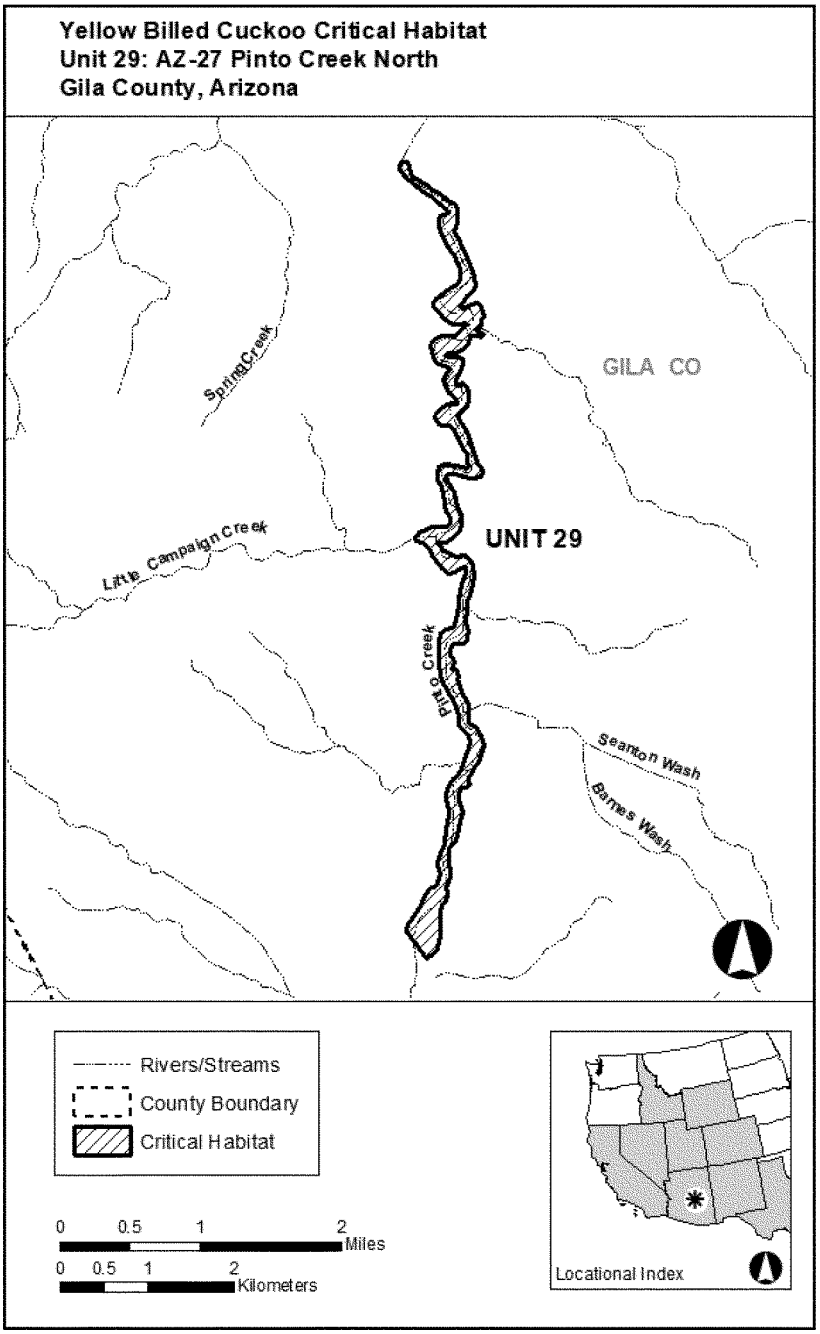
(31) Unit 27: AZ–25, Aravaipa Creek; Pinal and Graham Counties, Arizona.
Map of Unit 27 follows:



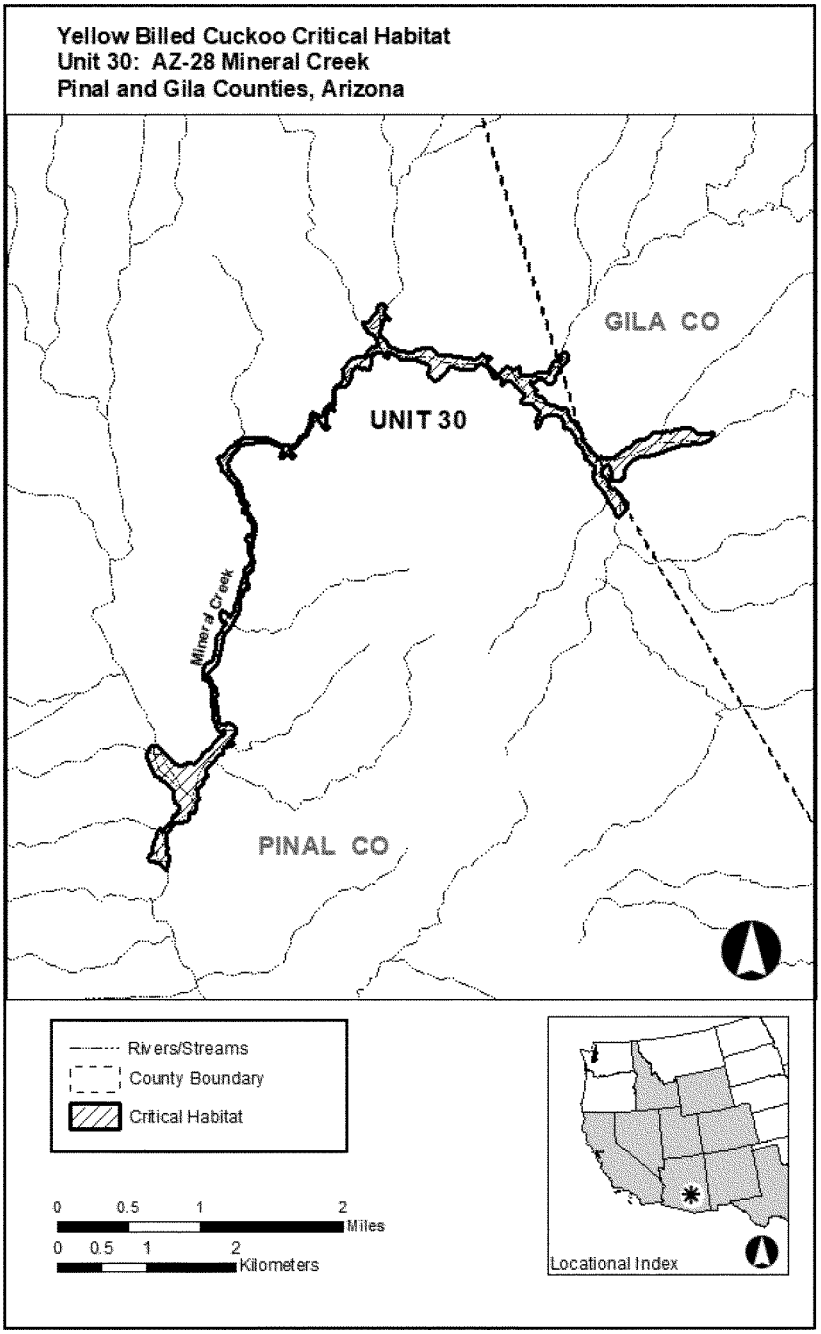
(32) Unit 28: AZ–26, Gila River 2; Graham and Greenlee Counties, Arizona. Map of Unit 28 follows:



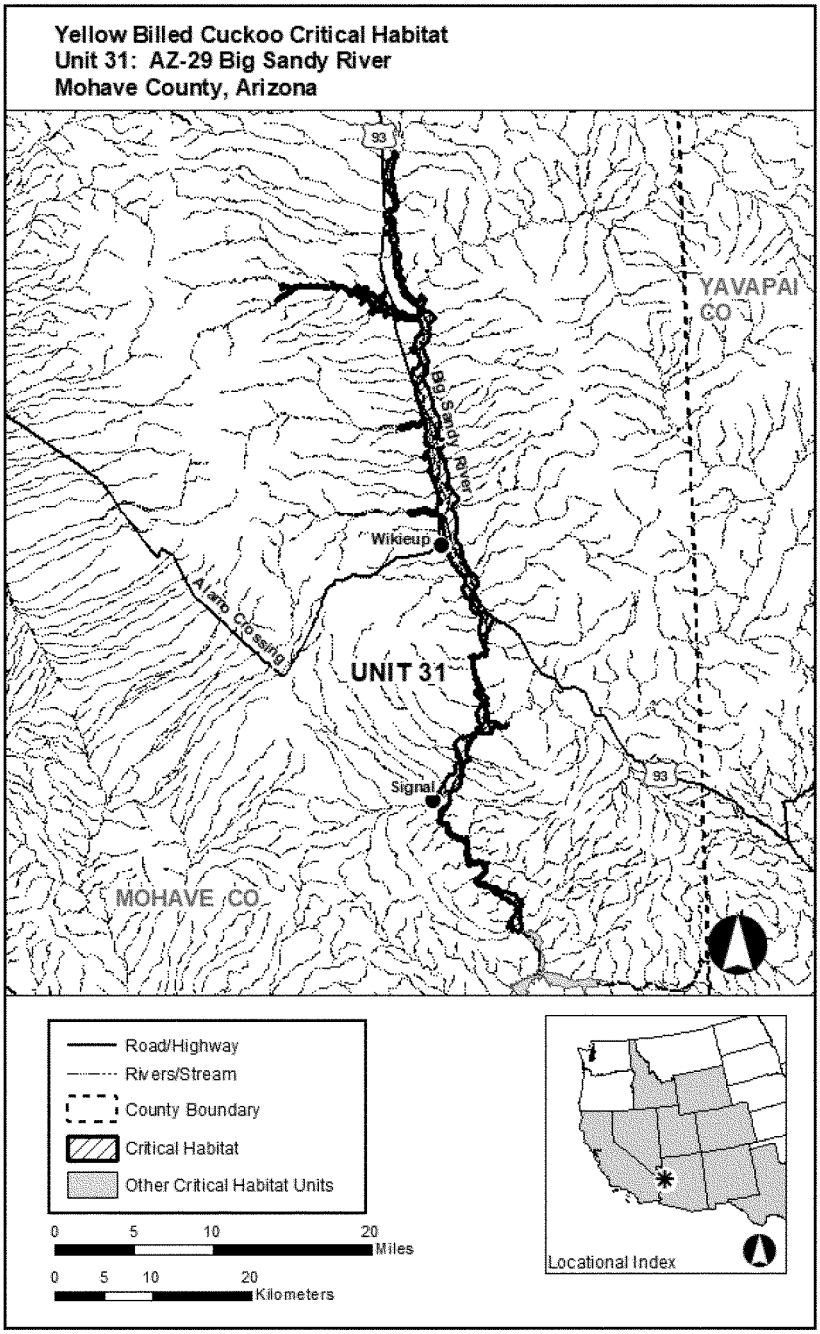
(33) Unit 29: AZ–27, Pinto Creek North; Gila County, Arizona. Map of Unit 29 follows:



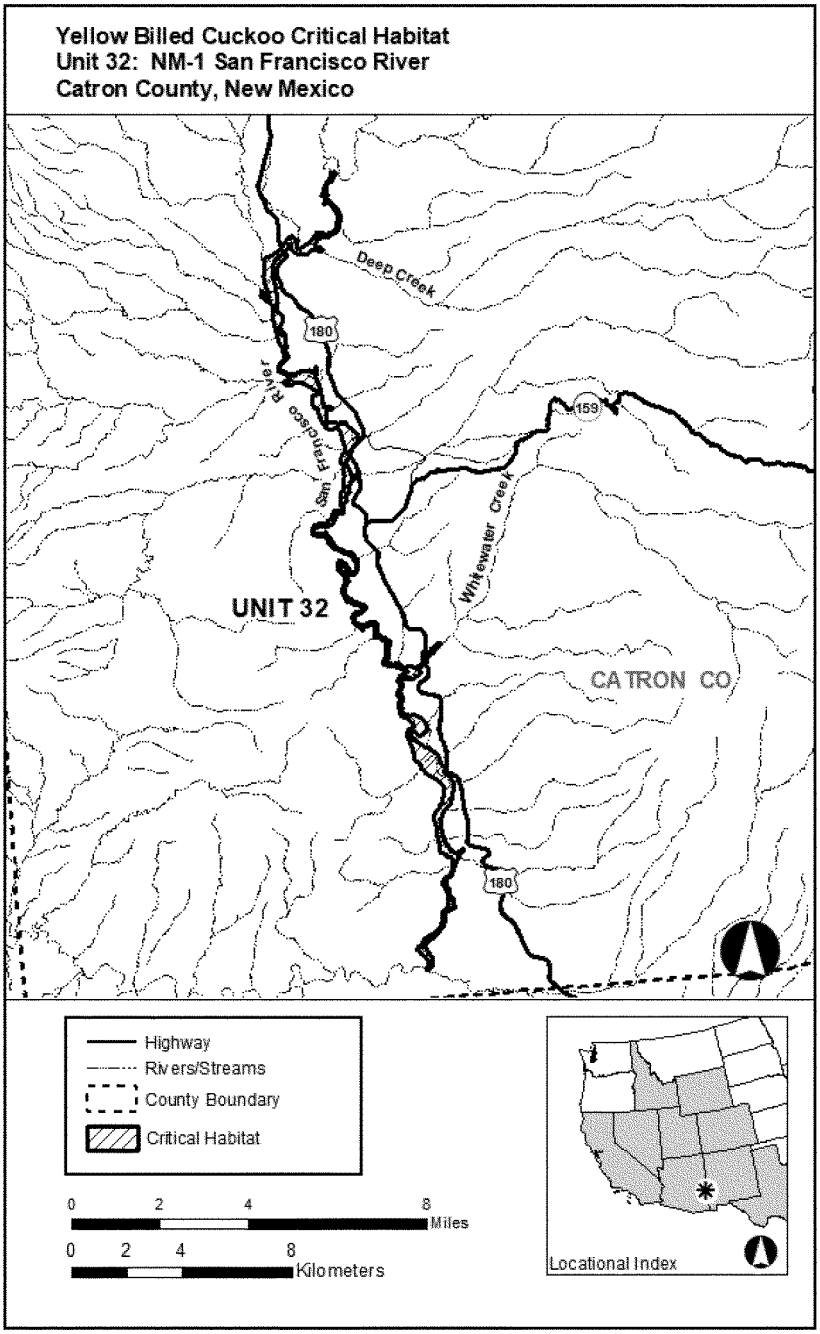
(34) Unit 30: AZ–28, Mineral Creek; Pinal and Gila Counties, Arizona. Map of Unit 30 follows:



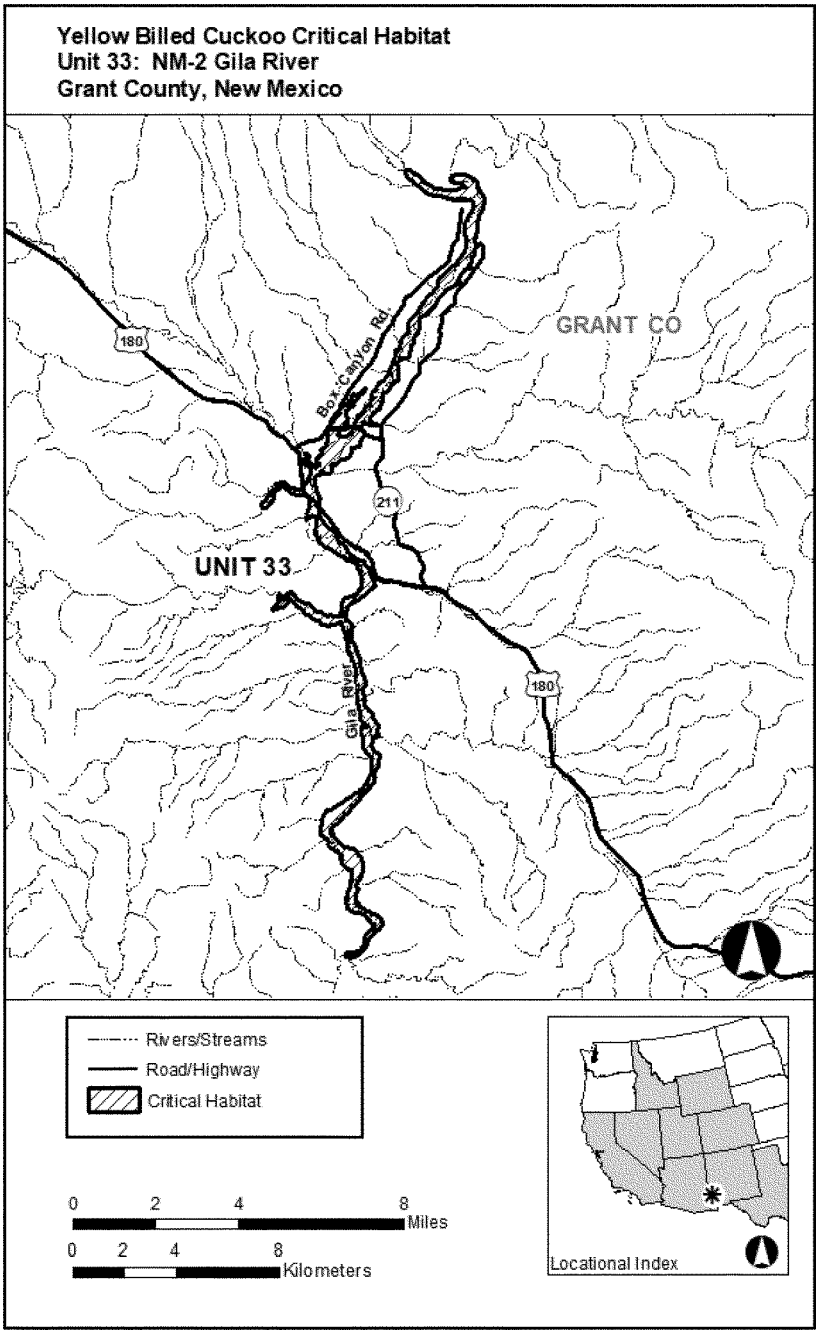
(35) Unit 31: AZ–29, Big Sandy River; Mohave County, Arizona. Map of Unit 31 follows:



(36) Unit 32: NM–1, San Francisco River; Catron County, New Mexico. Map of Unit 32 follows:

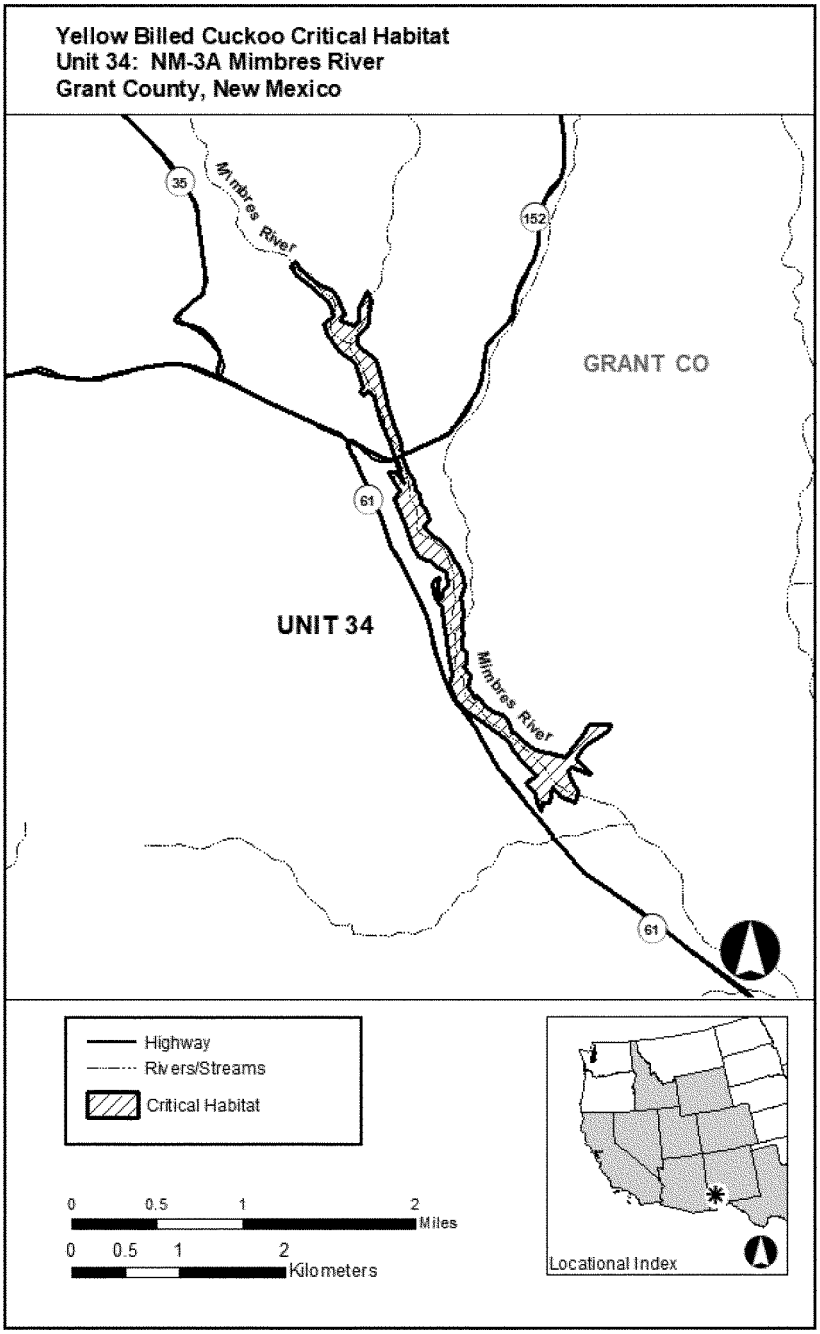


(37) Unit 33: NM–2, Gila River; Grant County, New Mexico. Map of Unit 33 follows:

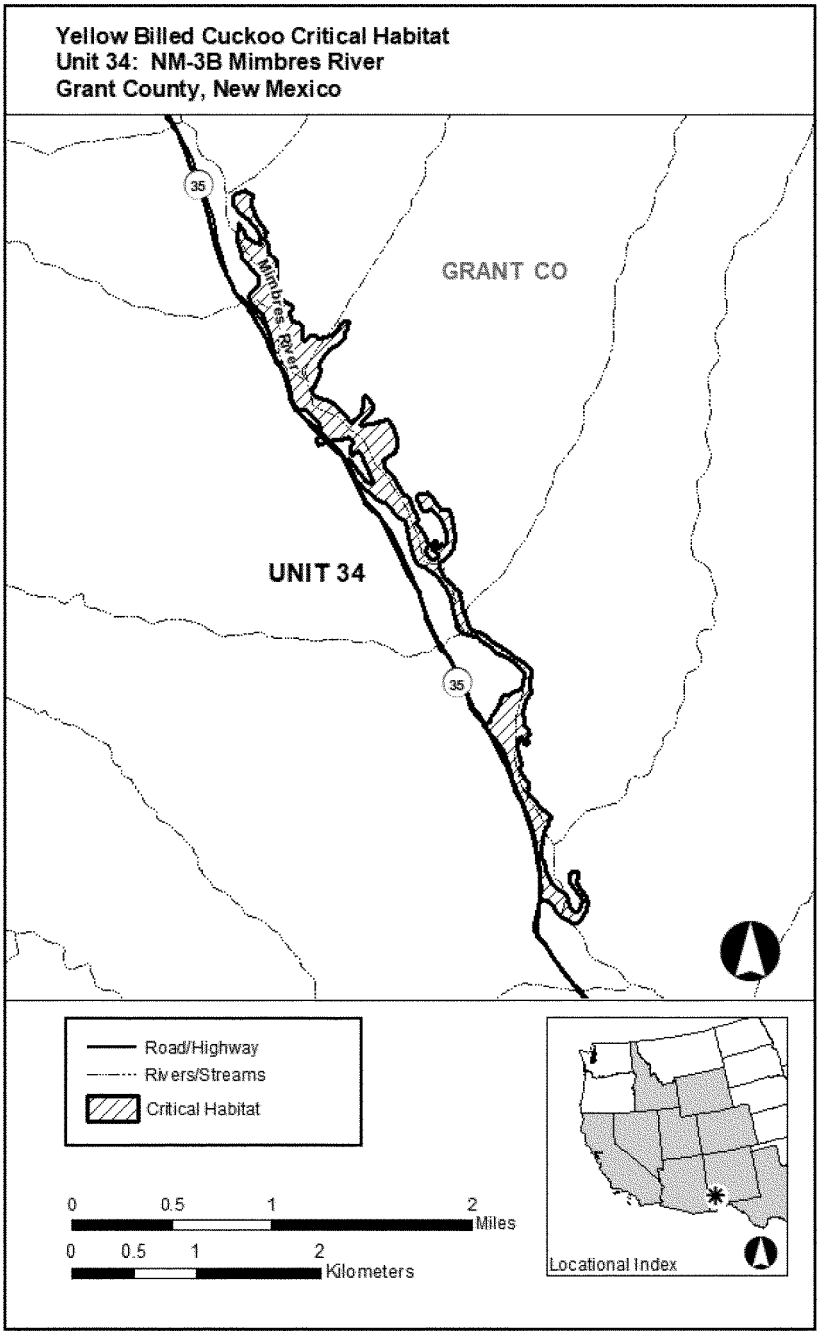


(38) Unit 34: NM–3A and NM–3B, Mimbres River; Grant County, New Mexico. Maps of Unit 34 follow:

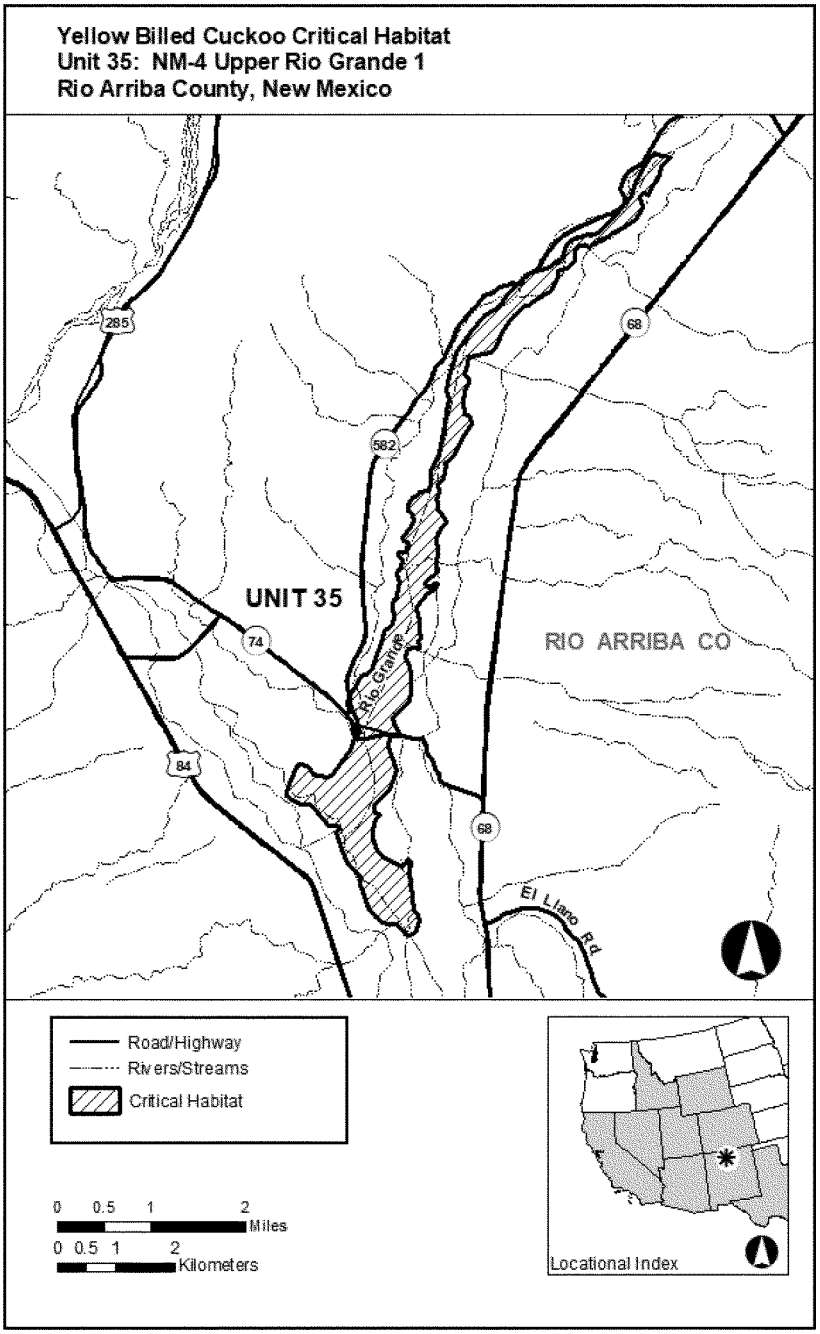
(i) Map of Unit 34: NM–3A, Mimbres River.



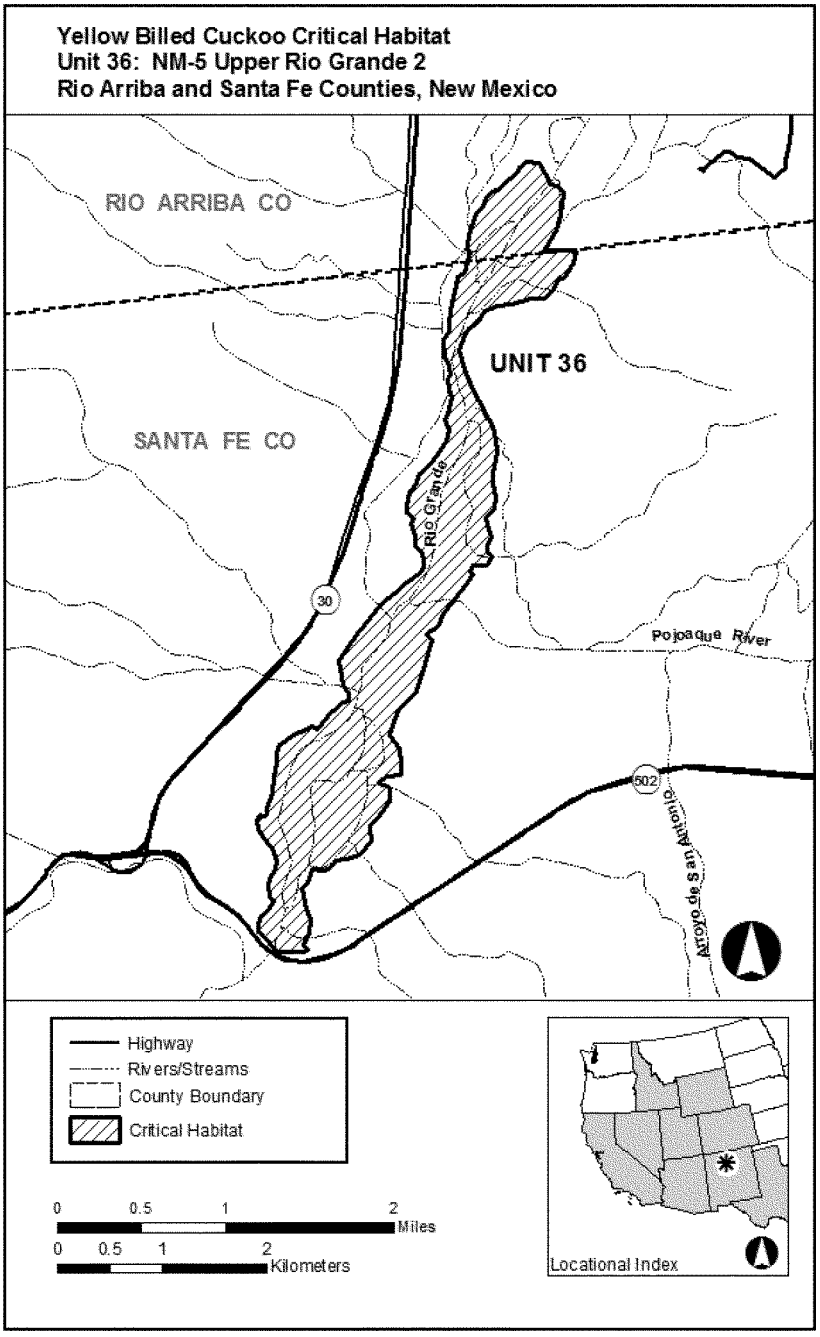
(ii) Map of Unit 34: NM–3B, Mimbres River.



(39) Unit 35: NM–4, Upper Rio Grande 1; Rio Arriba County, New Mexico. Map of Unit 35 follows:

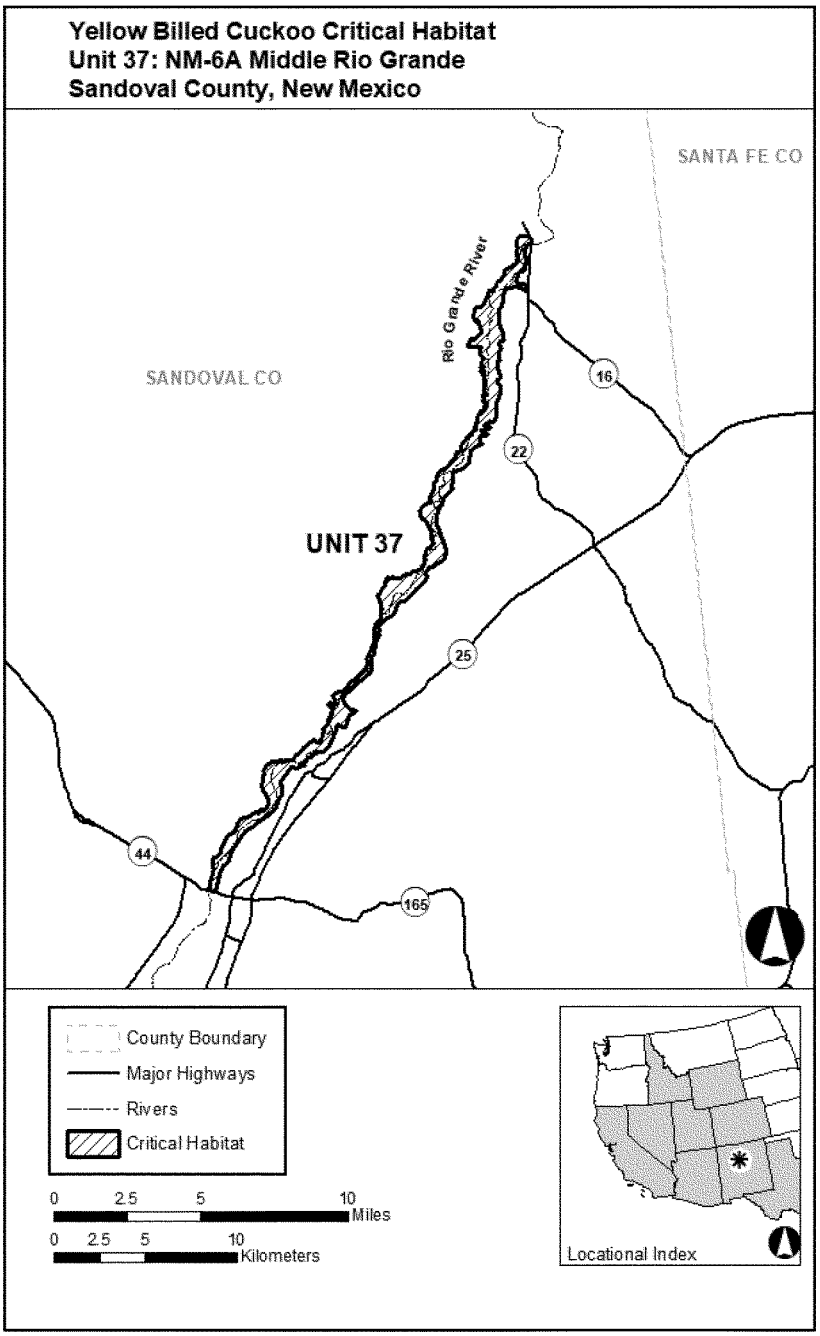


(40) Unit 36: NM–5, Upper Rio Grande 2; Santa Fe and Rio Arriba Counties, New Mexico. Map of Unit 36 follows:

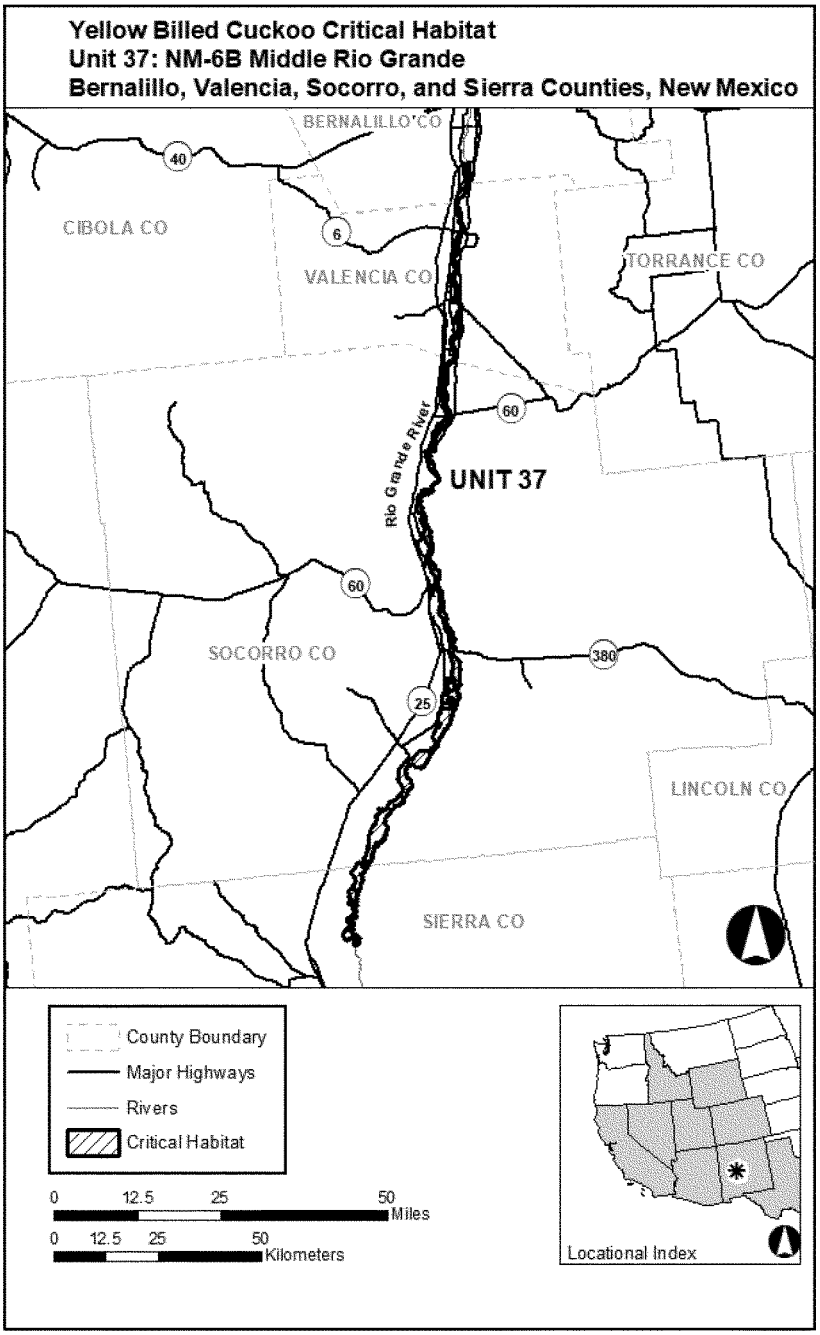


(41) Unit 37: NM–6A and NM–6B, Middle Rio Grande; Sierra, Socorro, Valencia, Bernalillo, and Sandoval Counties, New Mexico. Maps of Unit 37 follow:

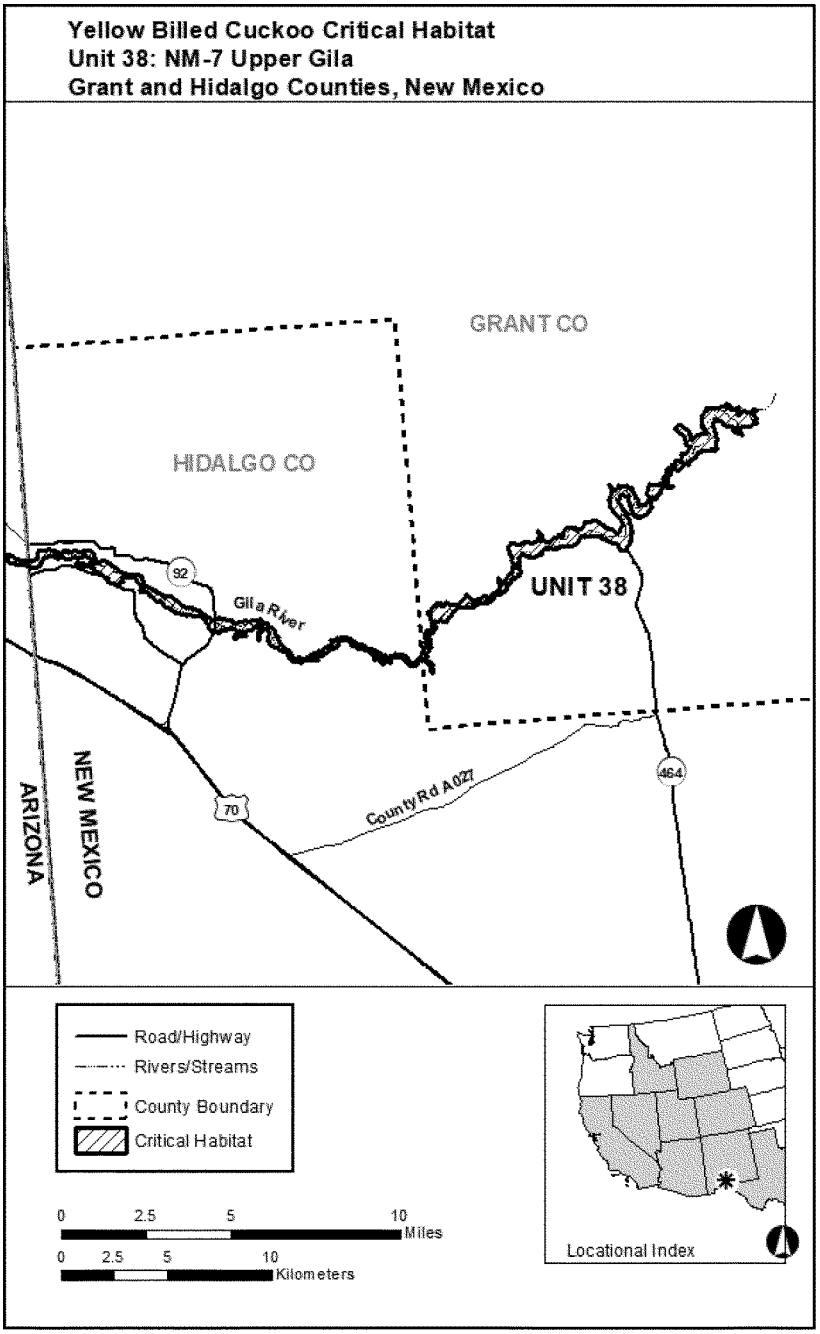
(i) Map of Unit 37: NM–6A, Middle Rio Grande.



(ii) Map of Unit 37: NM–6B, Middle Rio Grande

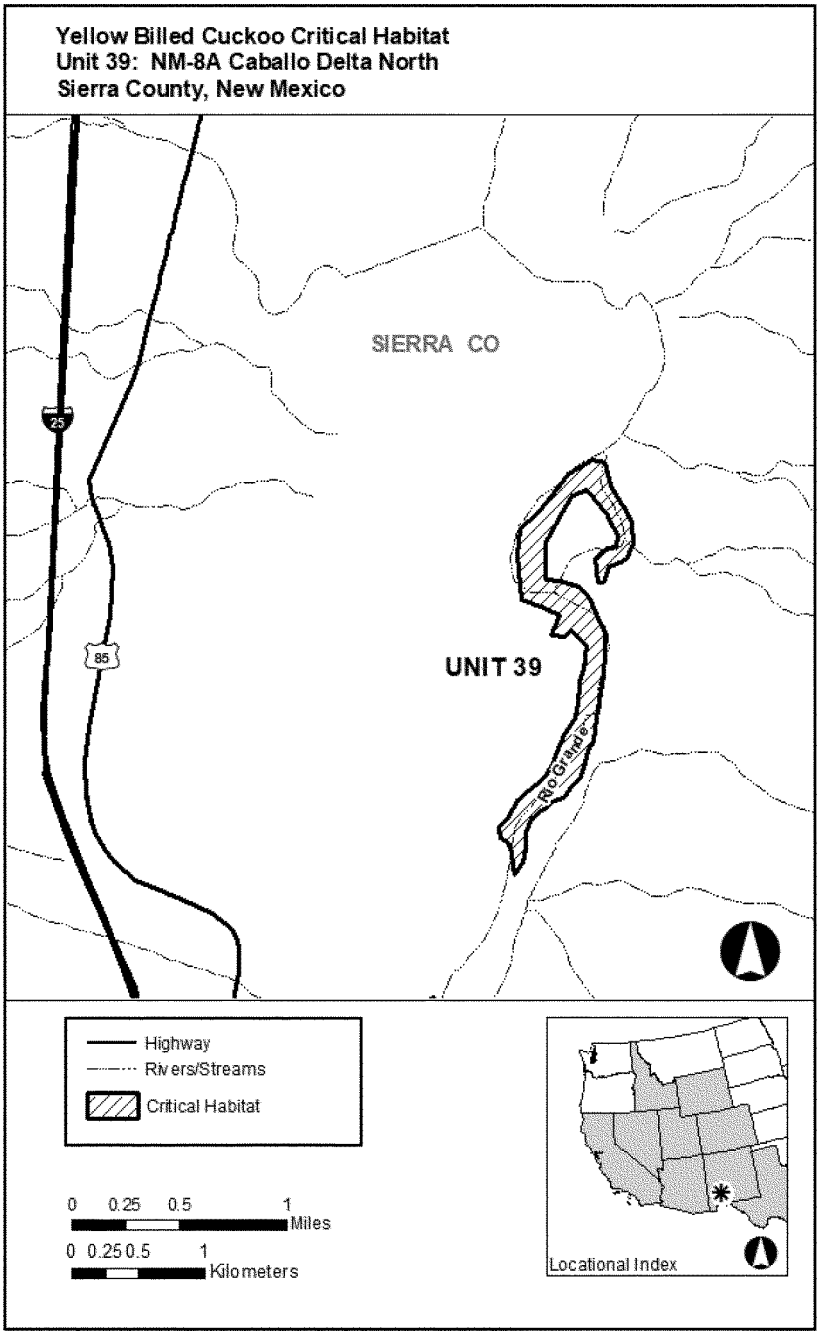


(42) Unit 38: NM–7, Upper Gila River; Grant and Hidalgo Counties, New Mexico. Map of Unit 38 follows:

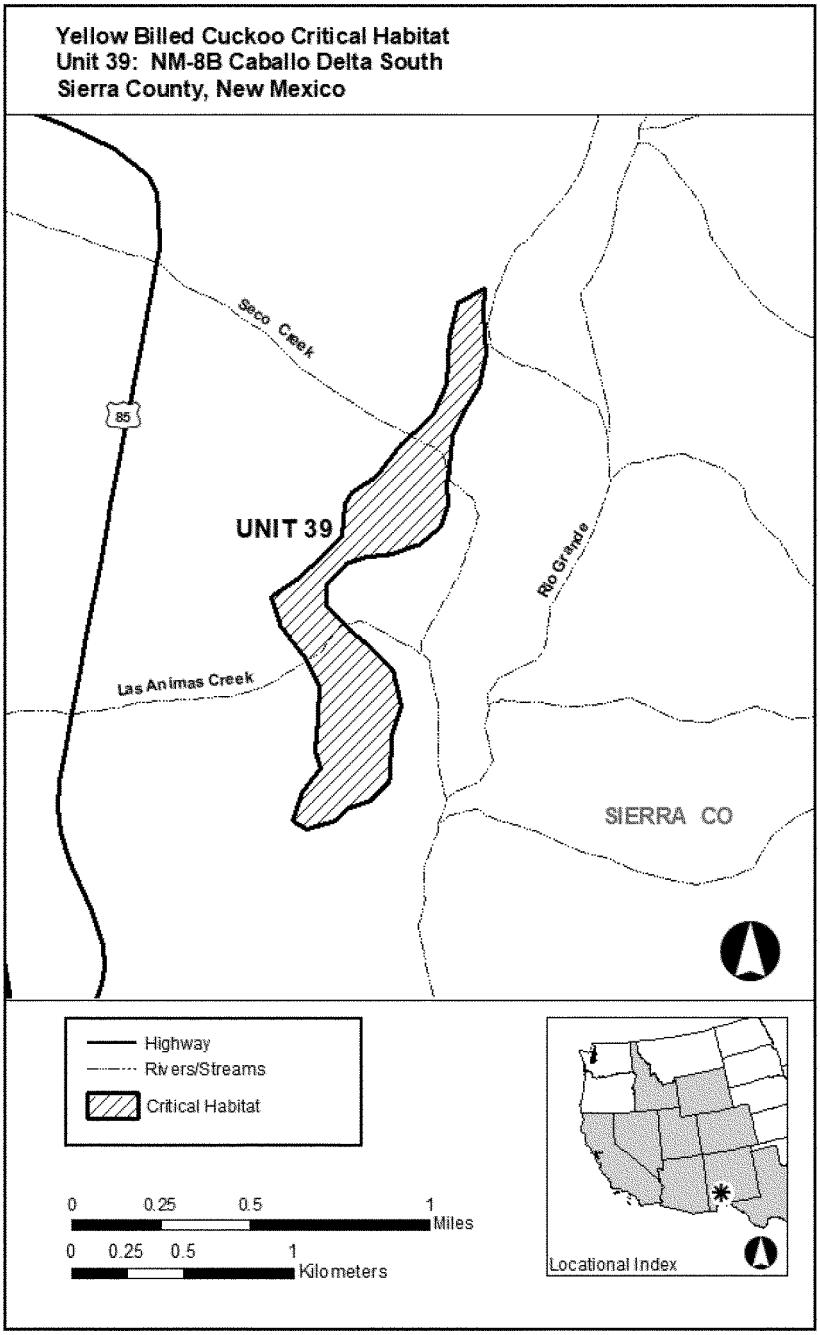


(43) Unit 39: NM–8A, Caballo Delta North and NM–8B, Caballo Delta South; Sierra County, New Mexico. Maps of Unit 39 follow:

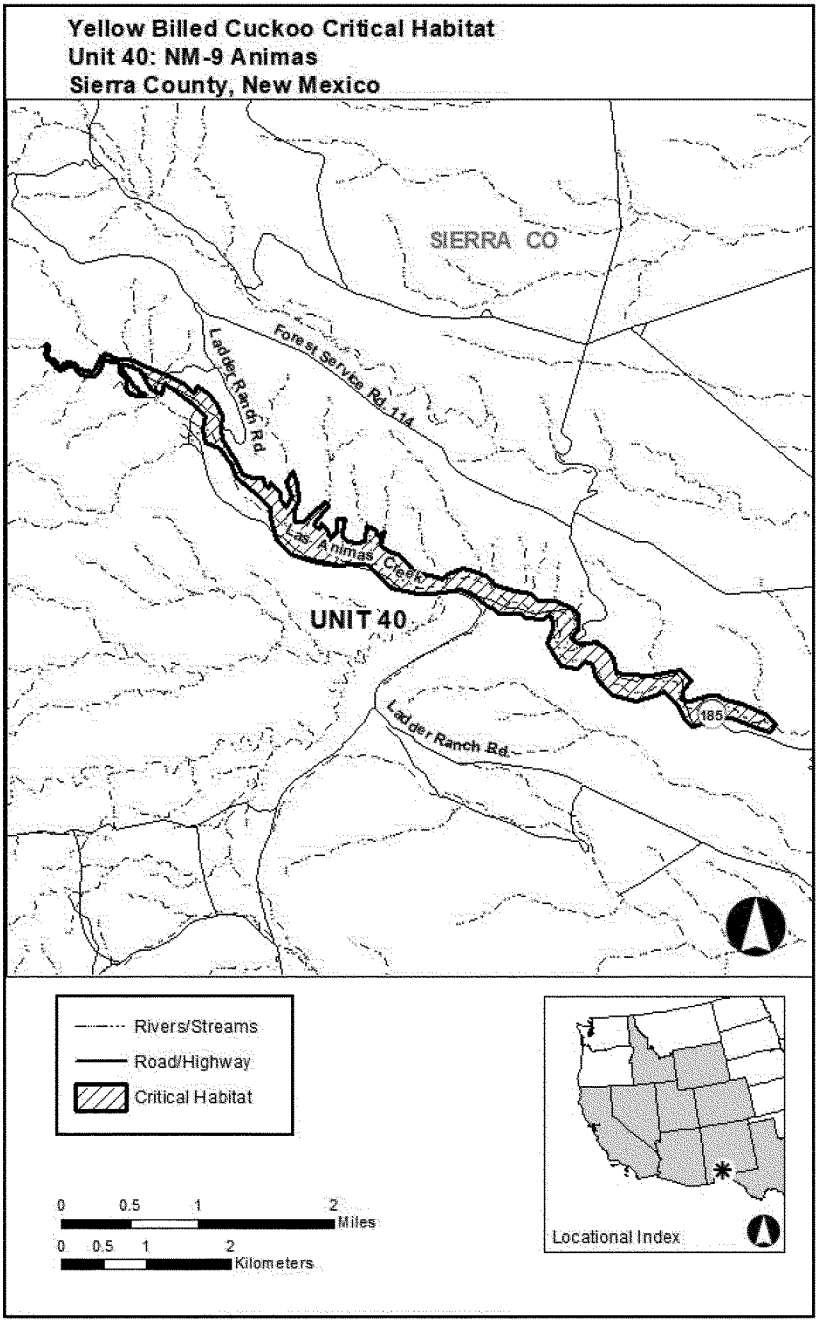
(i) Map of Unit 39: NM–8A, Caballo Delta North.



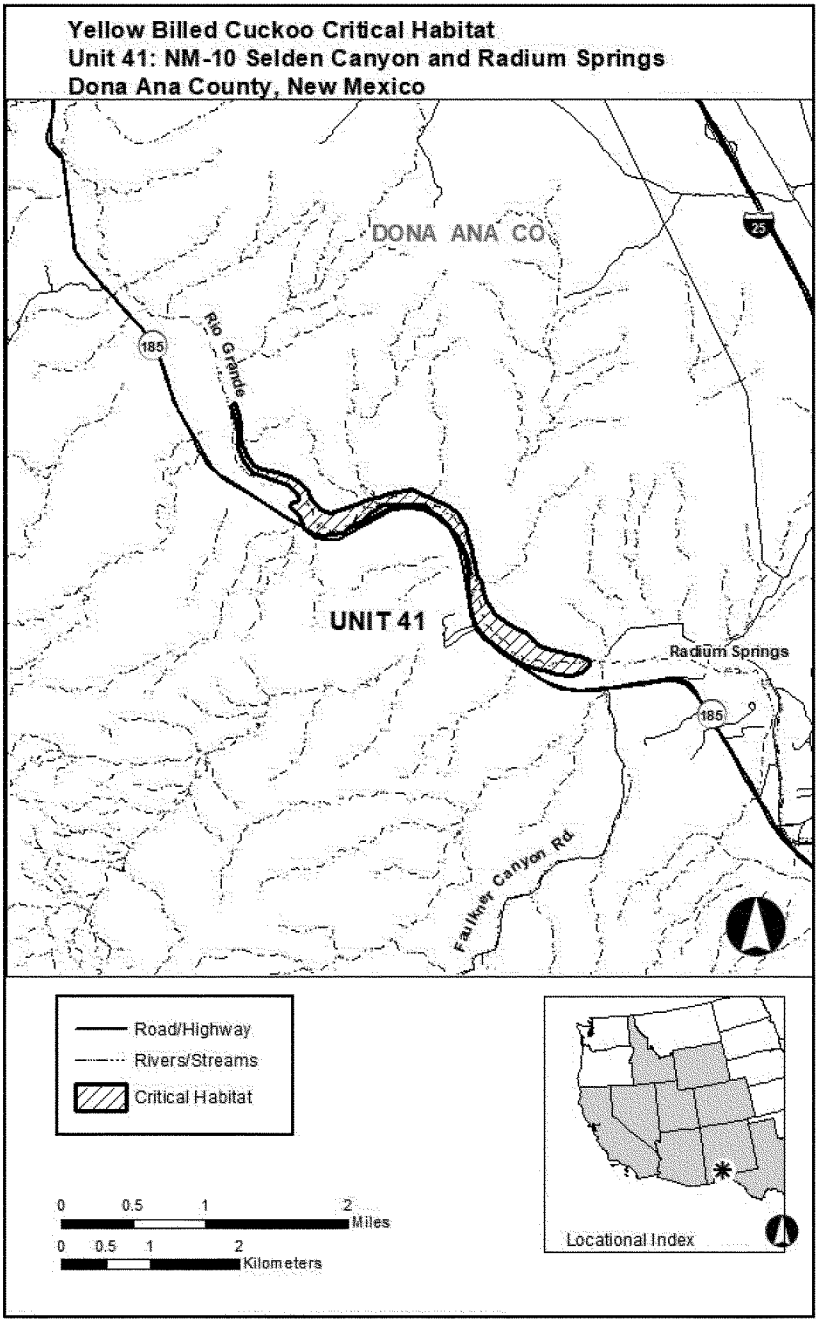
(ii) Map of Unit 39: NM–8B, Caballo Delta South.



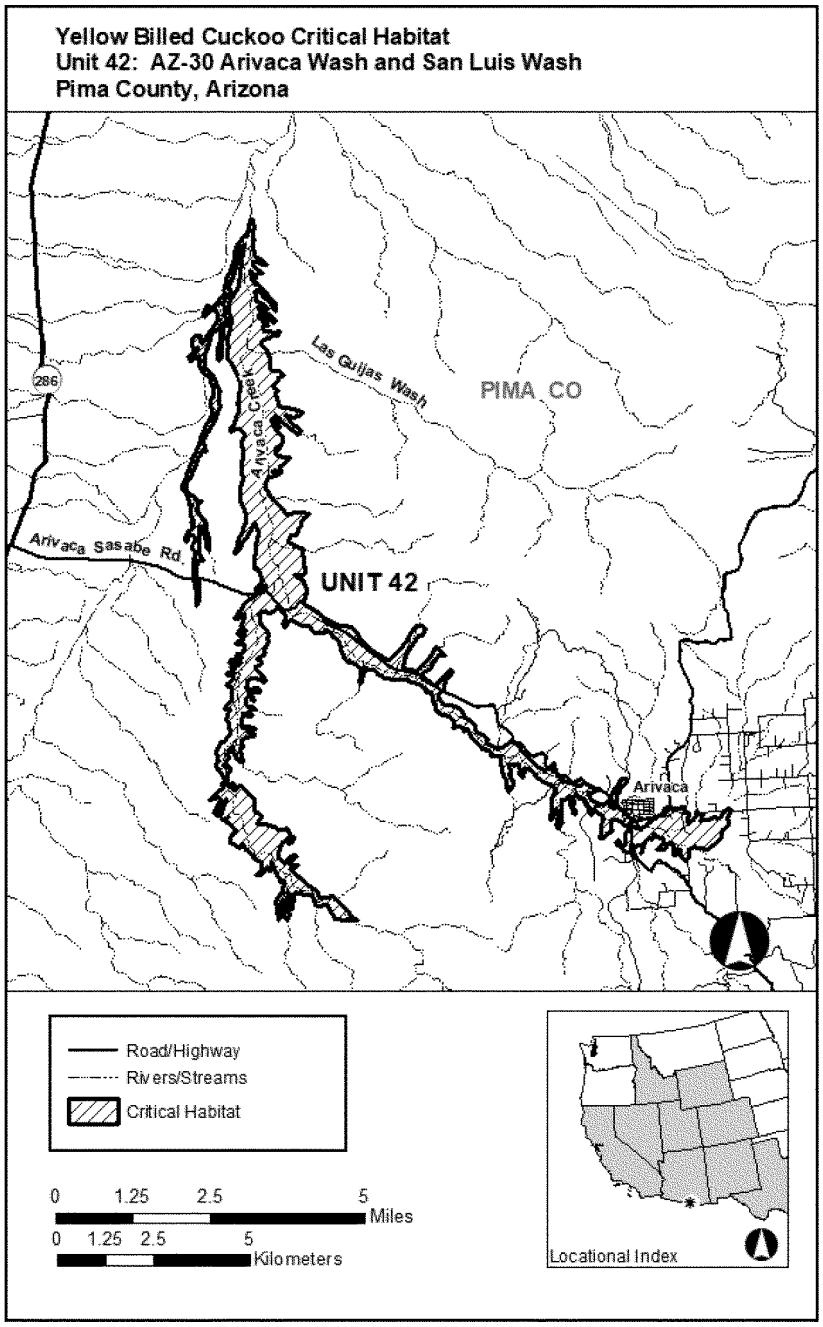
(44) Unit 40: NM–9, Animas; Sierra County, New Mexico. Map of Unit 40 follows:



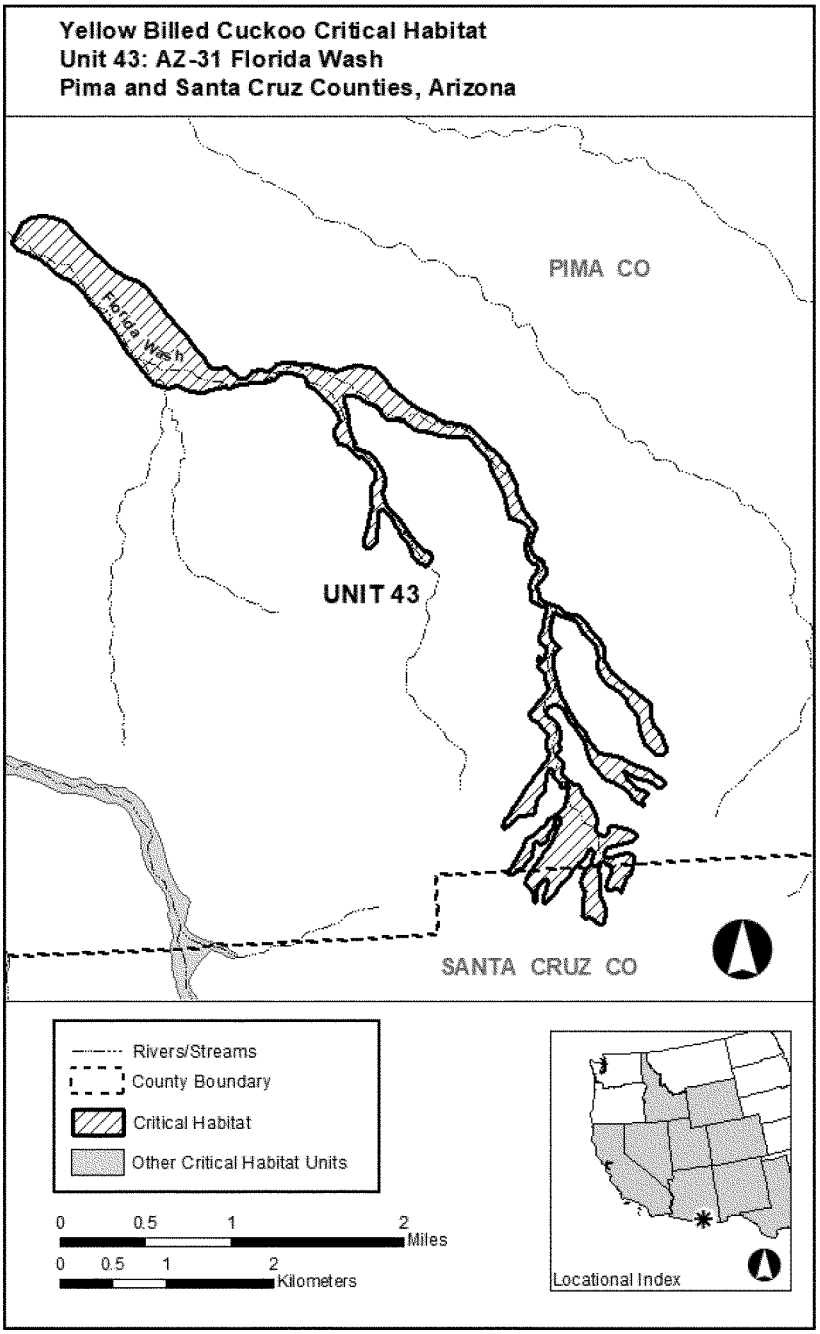
(45) Unit 41: NM–10, Selden Canyon and Radium Springs; Doña Ana County, New Mexico. Map of Unit 41 follows:



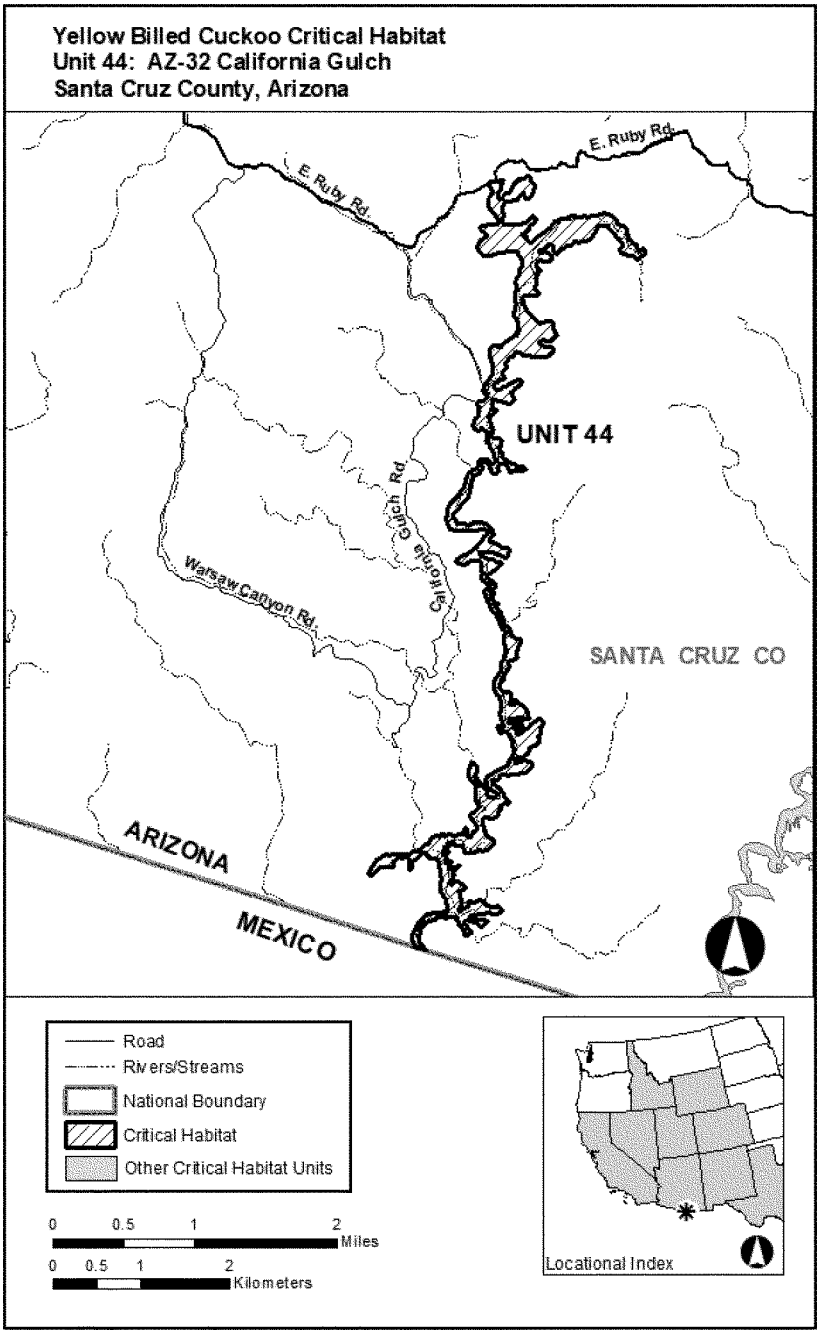
(46) Unit 42: AZ–30, Arivaca Wash and San Luis Wash; Pima County, Arizona. Map of Unit 42 follows:



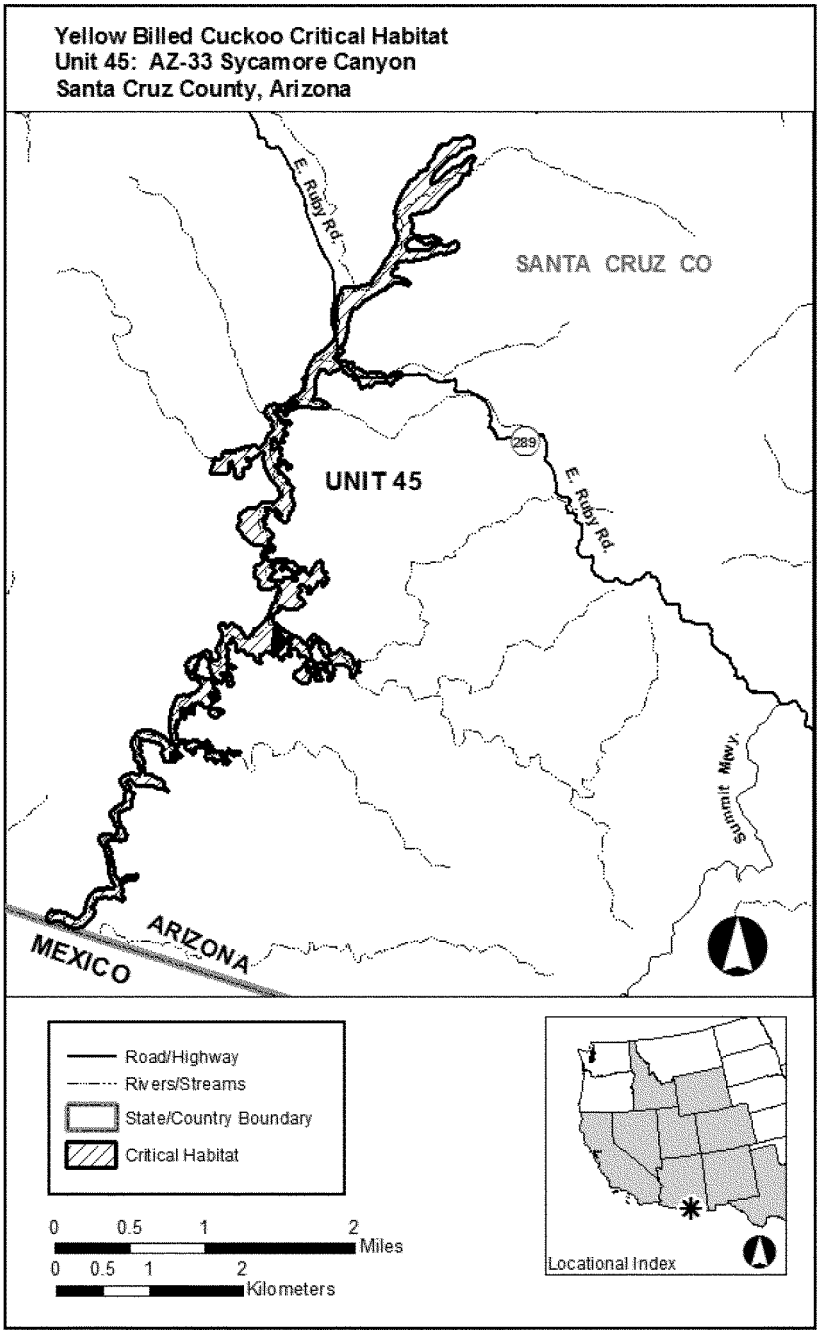
(47) Unit 43: AZ–31, Florida Wash; Pima and Santa Cruz Counties, Arizona.
Map of Unit 43 follows:



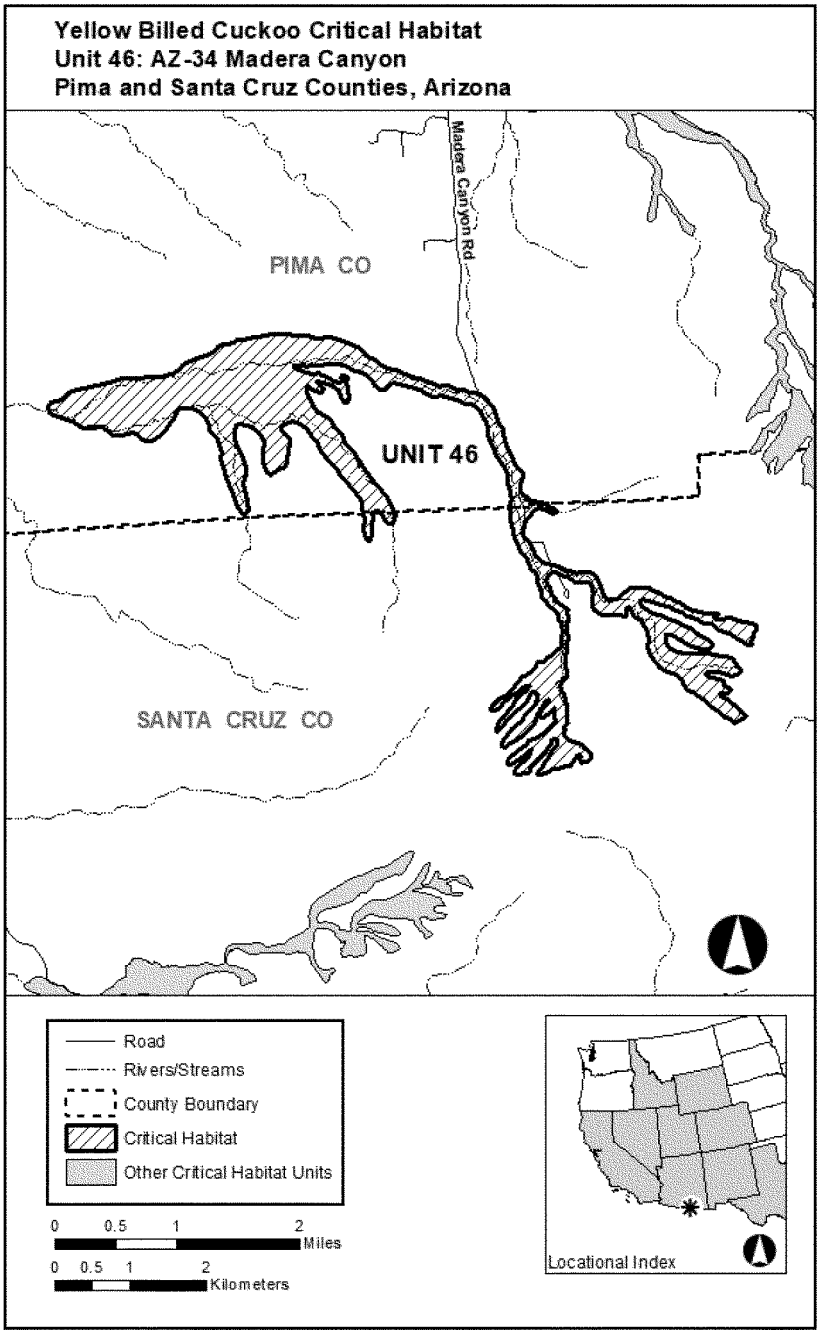
(48) Unit 44: AZ–32, California Gulch; Santa Cruz County, Arizona. Map of Unit 44 follows:



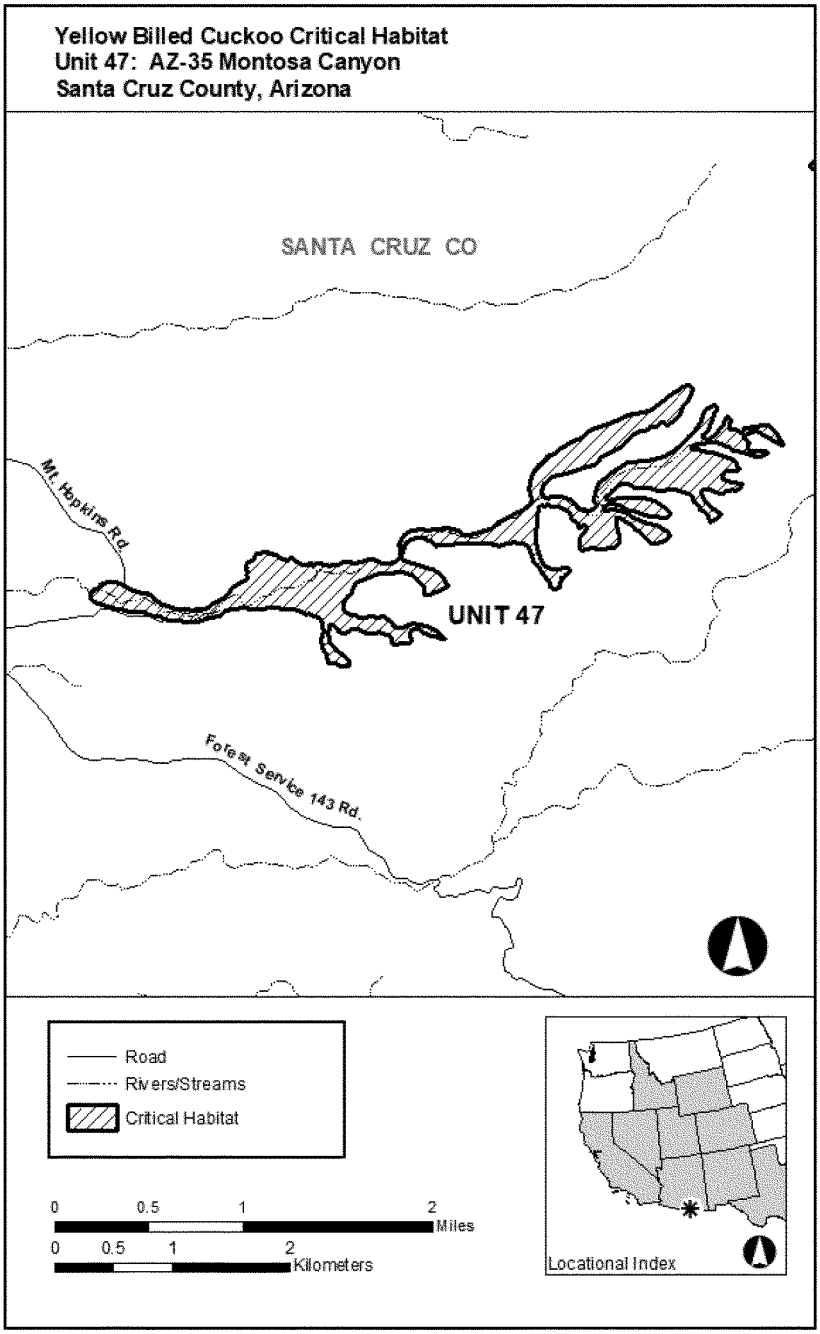
(49) Unit 45: AZ–33, Sycamore Canyon; Santa Cruz County, Arizona.
Map of Unit 45 follows:



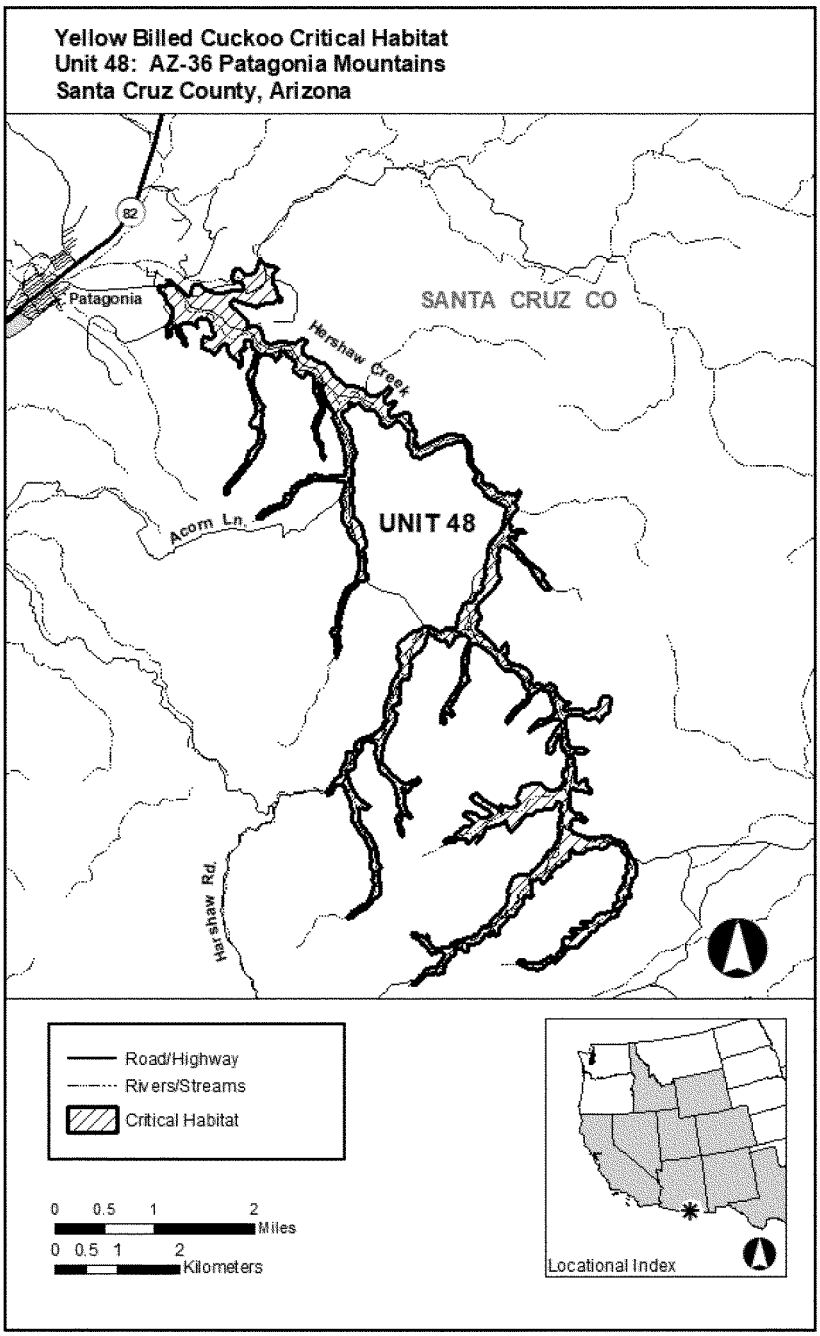
(50) Unit 46: AZ–34, Madera Canyon; Pima and Santa Cruz Counties, Arizona.
Map of Unit 46 follows:



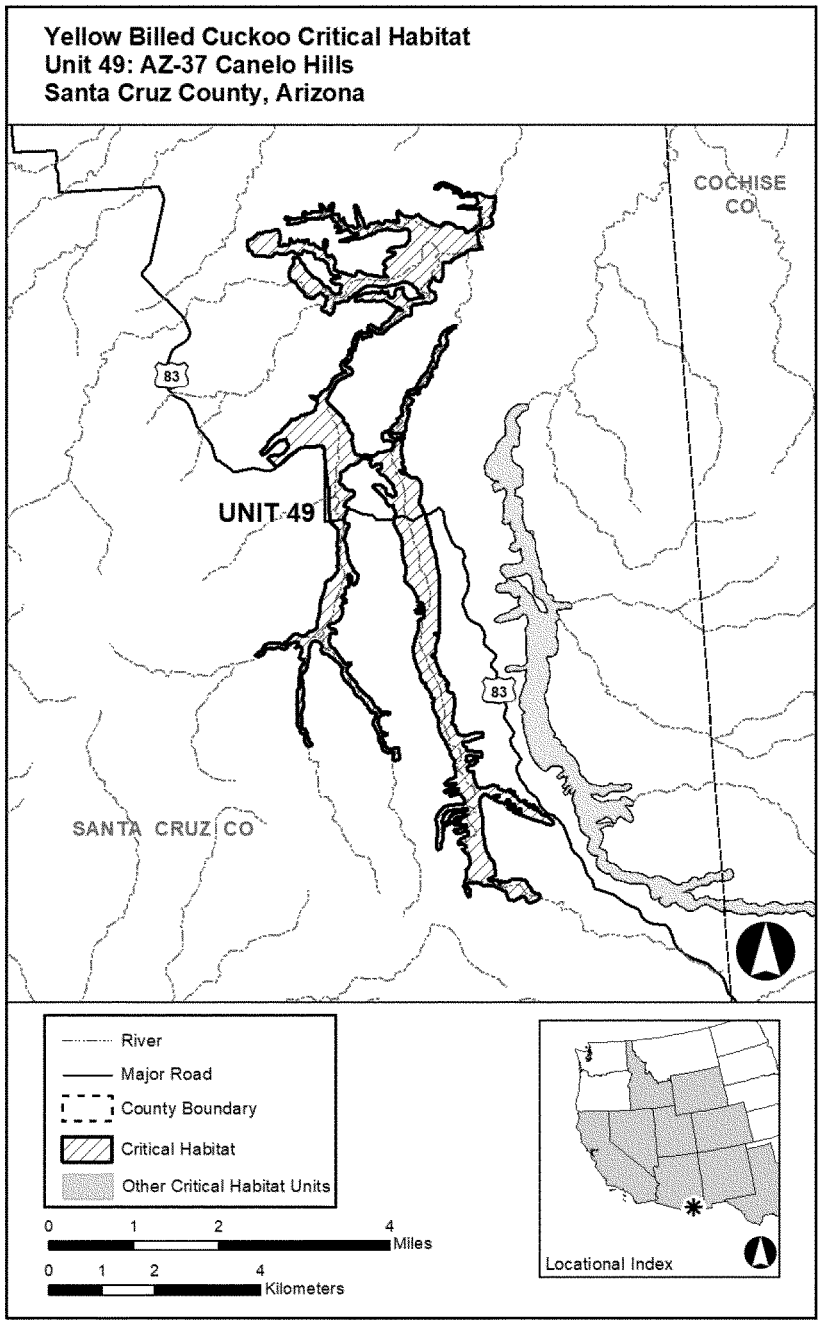
(51) Unit 47: AZ–35, Montosa Canyon; Santa Cruz County, Arizona.
Map of Unit 47 follows:



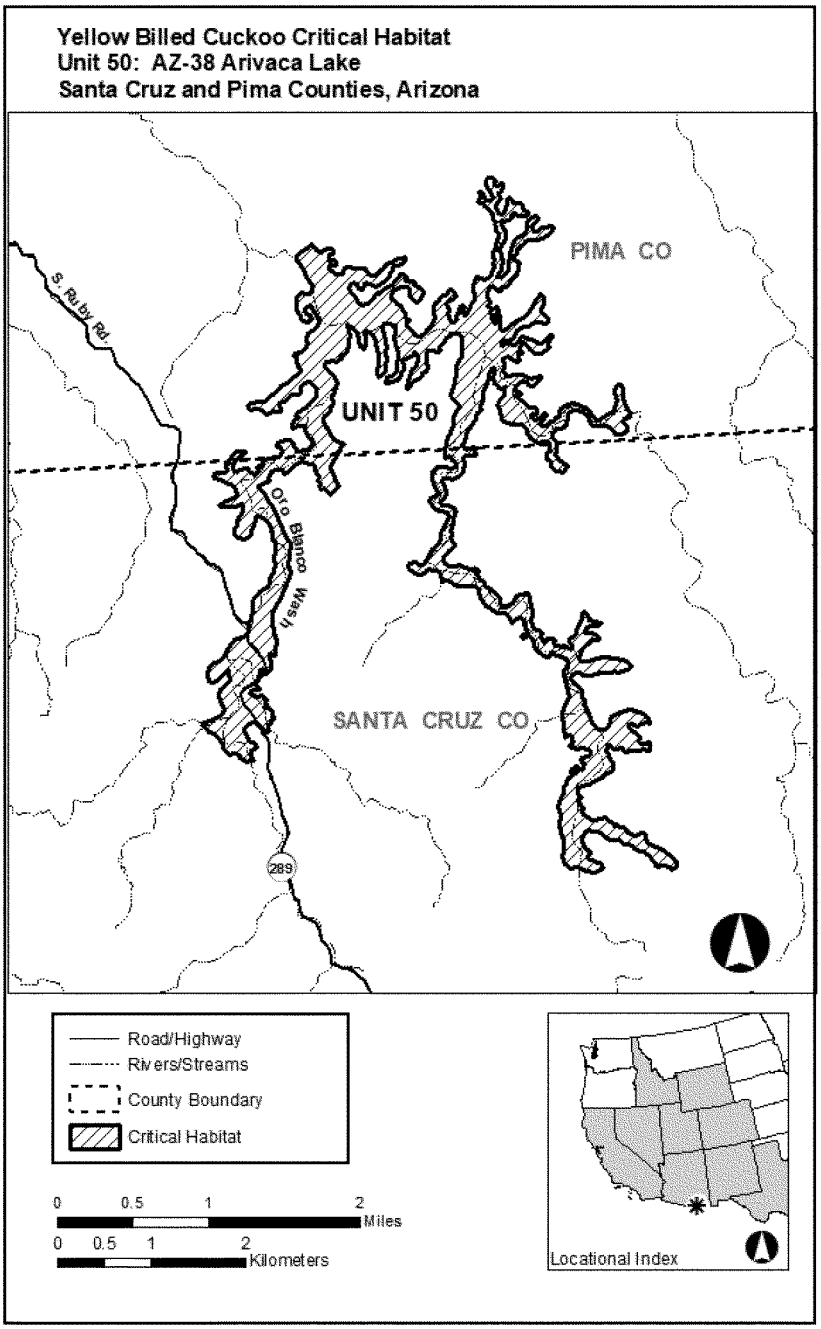
(52) Unit 48: AZ–36, Patagonia Mountains; Santa Cruz County, Arizona.
Map of Unit 48 follows:



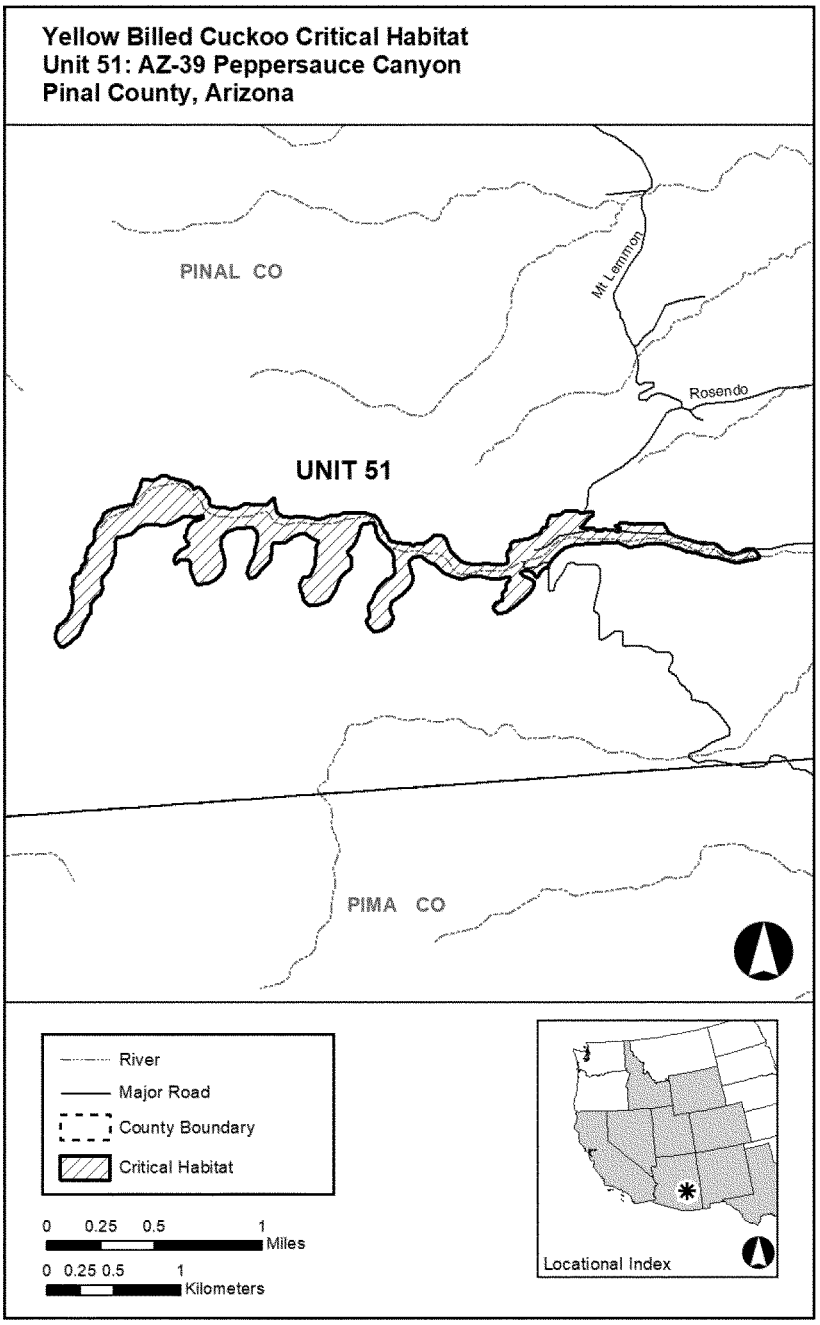
(53) Unit 49: AZ–37, Canelo Hills; Santa Cruz County, Arizona. Map of Unit 49 follows:



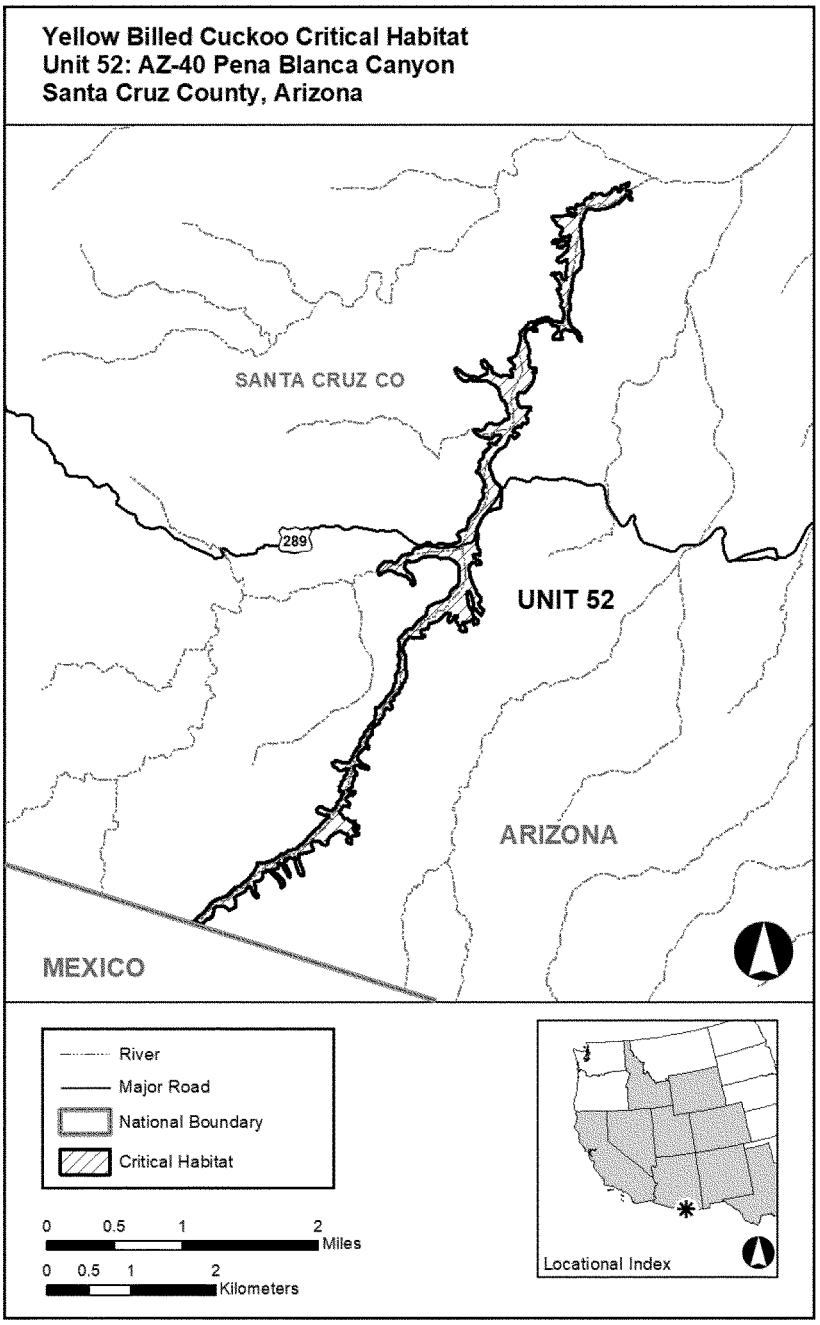
(54) Unit 50: AZ–38, Arivaca Lake;
Pima and Santa Cruz Counties, Arizona.
Map of Unit 50 follows:



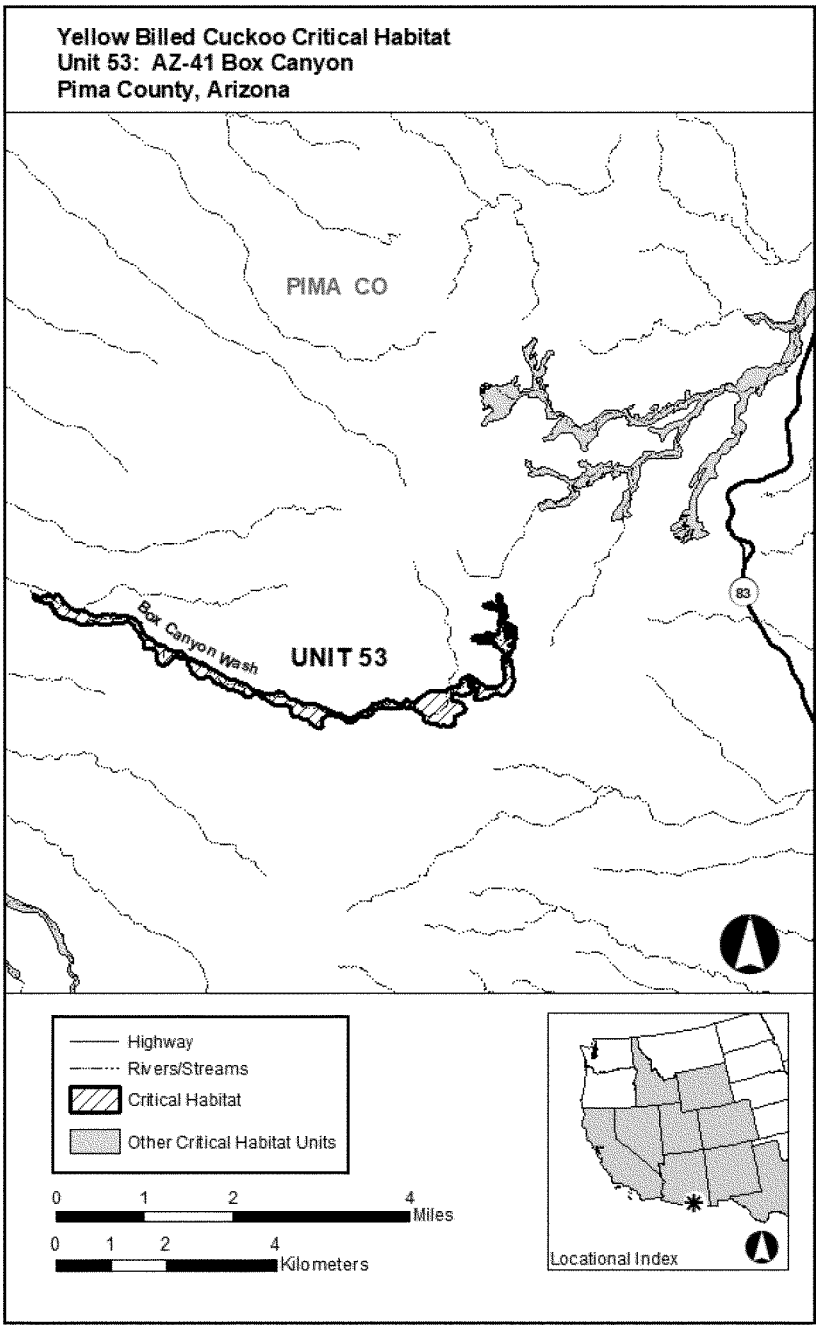
(55) Unit 51: AZ–39, Peppersauce Canyon; Pinal County, Arizona. Map of Unit 51 follows:



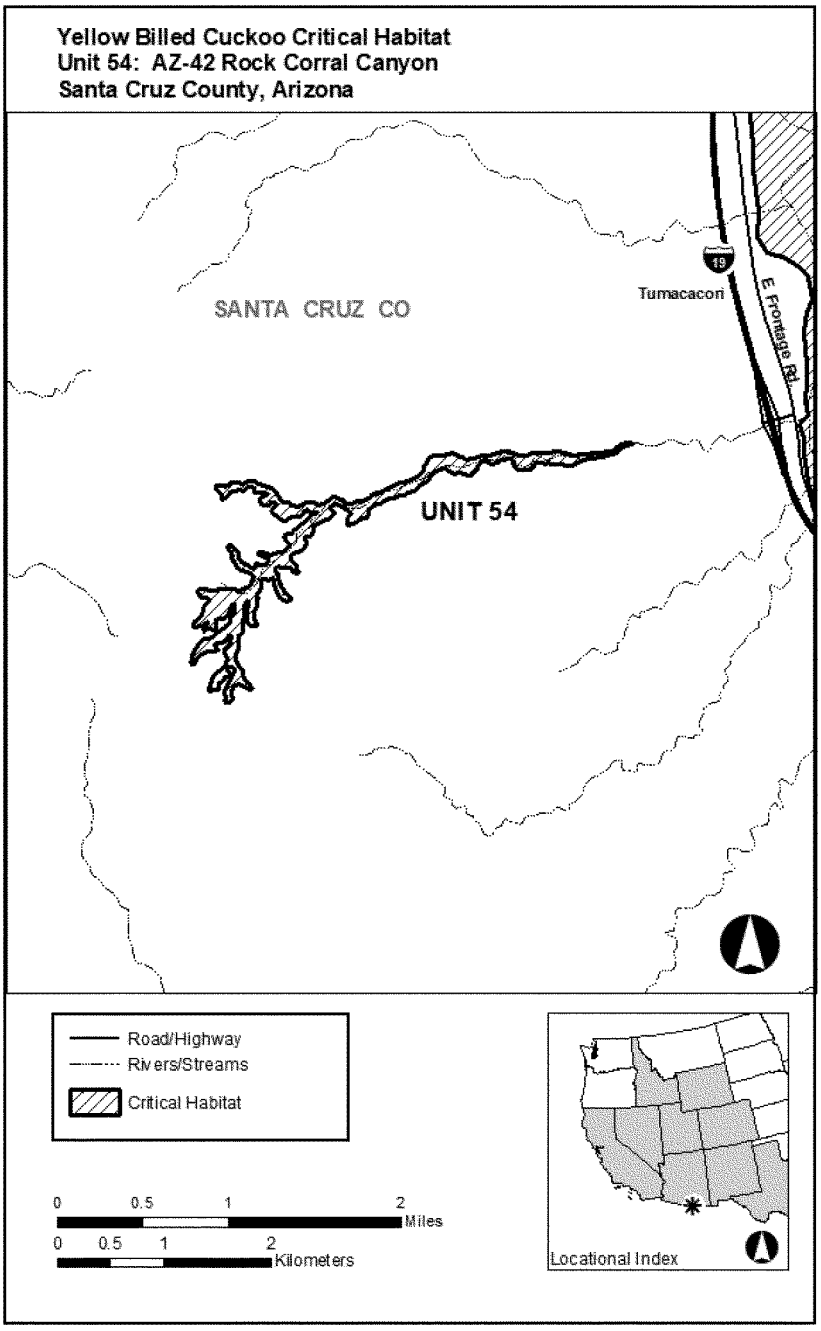
(56) Unit 52: AZ–40, Pena Blanca Canyon; Santa Cruz County, Arizona.
Map of Unit 52 follows:



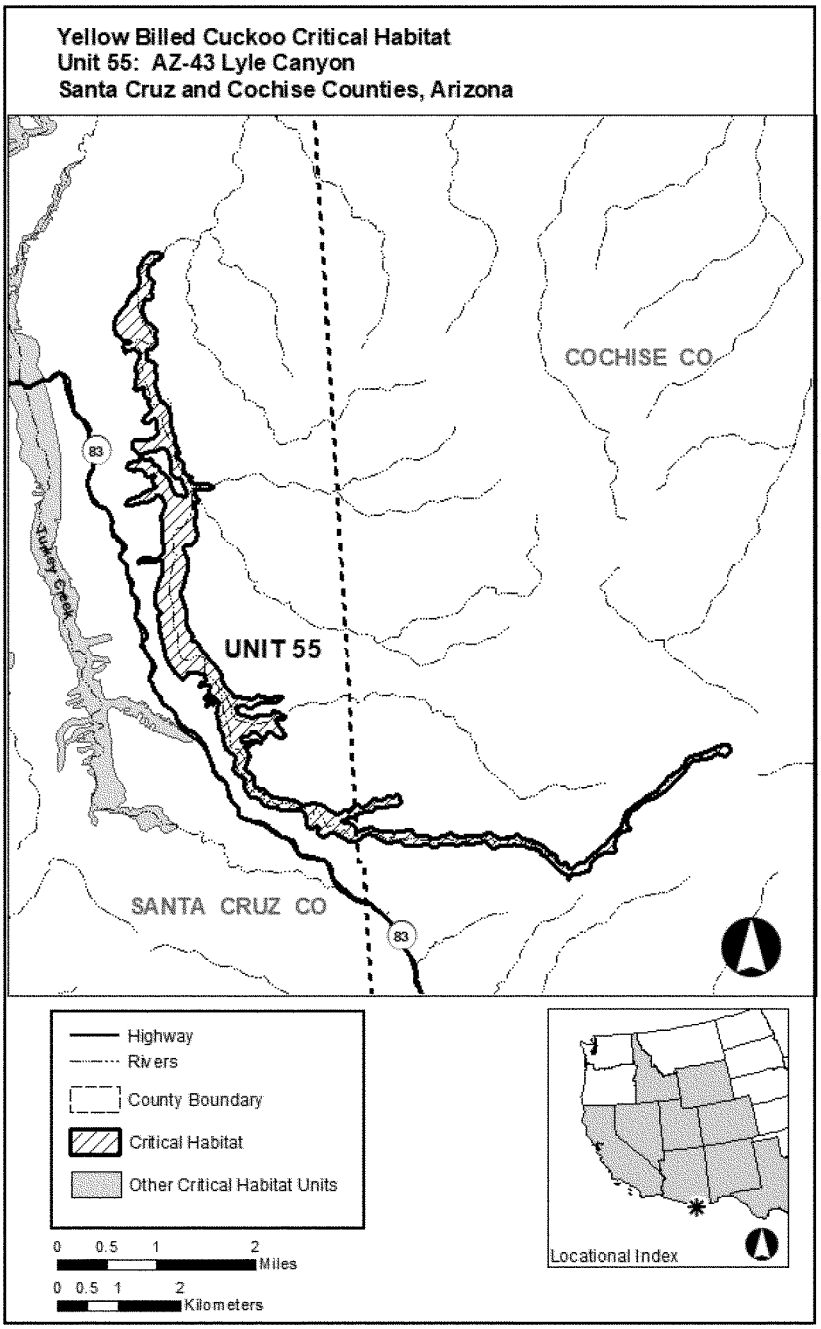
(57) Unit 53: AZ–41, Box Canyon; Pima County, Arizona. Map of Unit 53 follows:



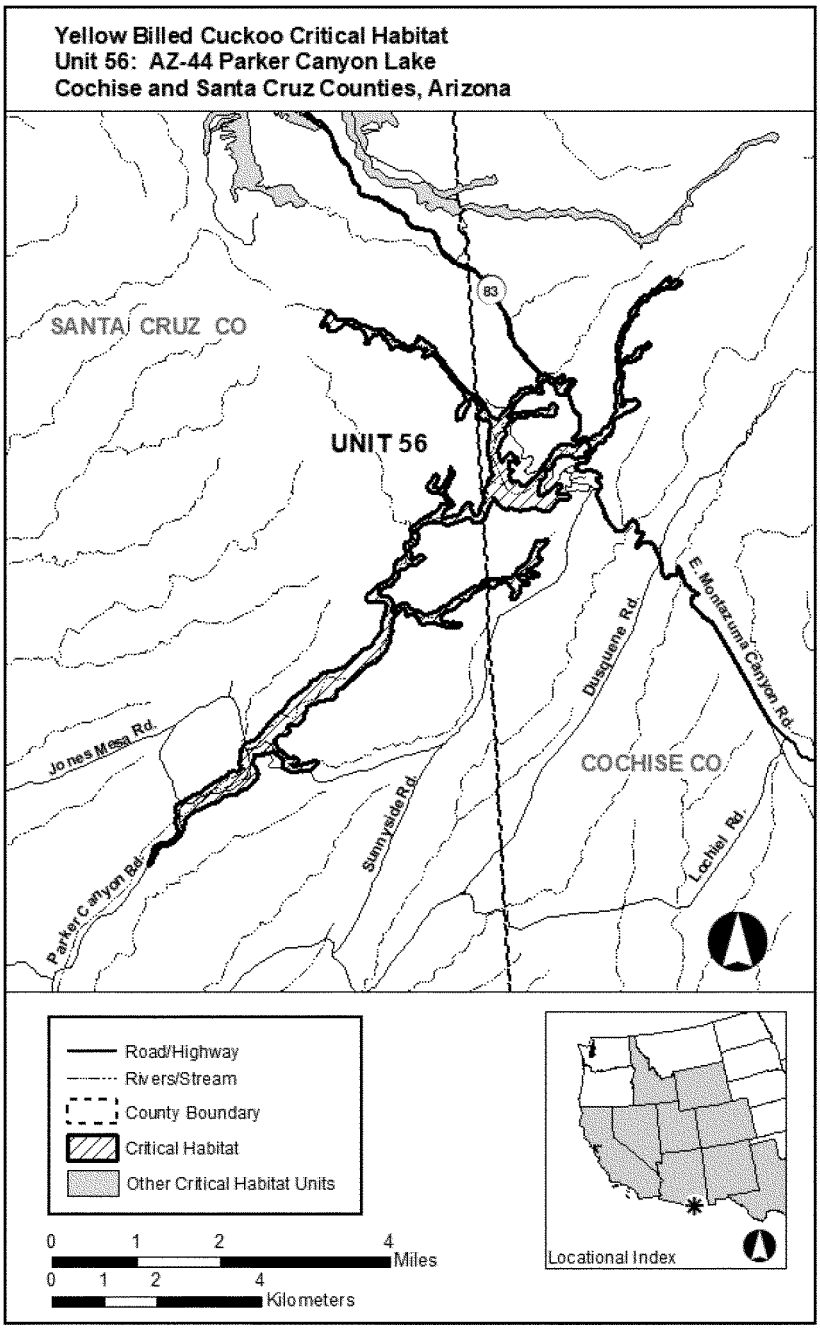
(58) Unit 54: AZ–42, Rock Corral Canyon; Santa Cruz County, Arizona. Map of Unit 54 follows:



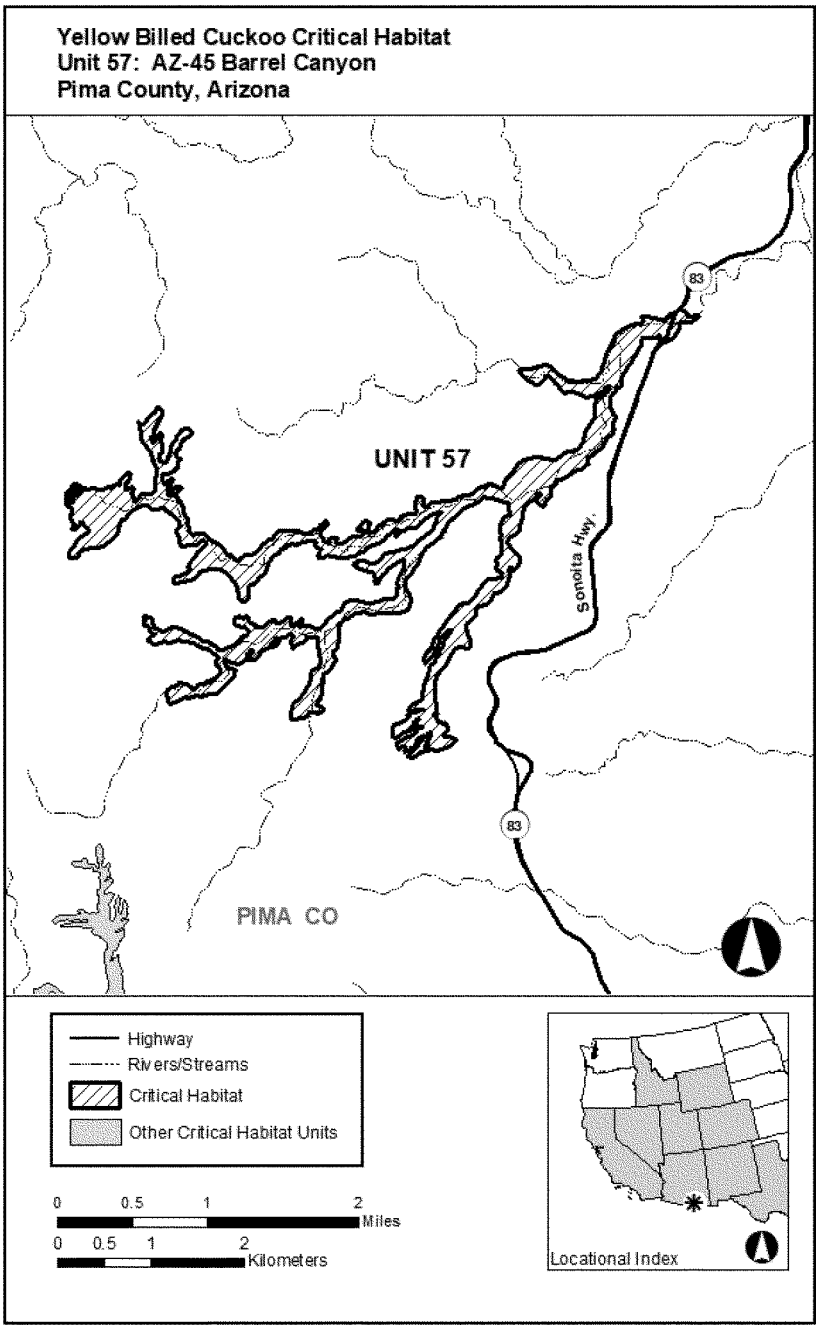
(59) Unit 55: AZ–43, Lyle Canyon; Santa Cruz and Cochise Counties, Arizona. Map of Unit 55 follows:



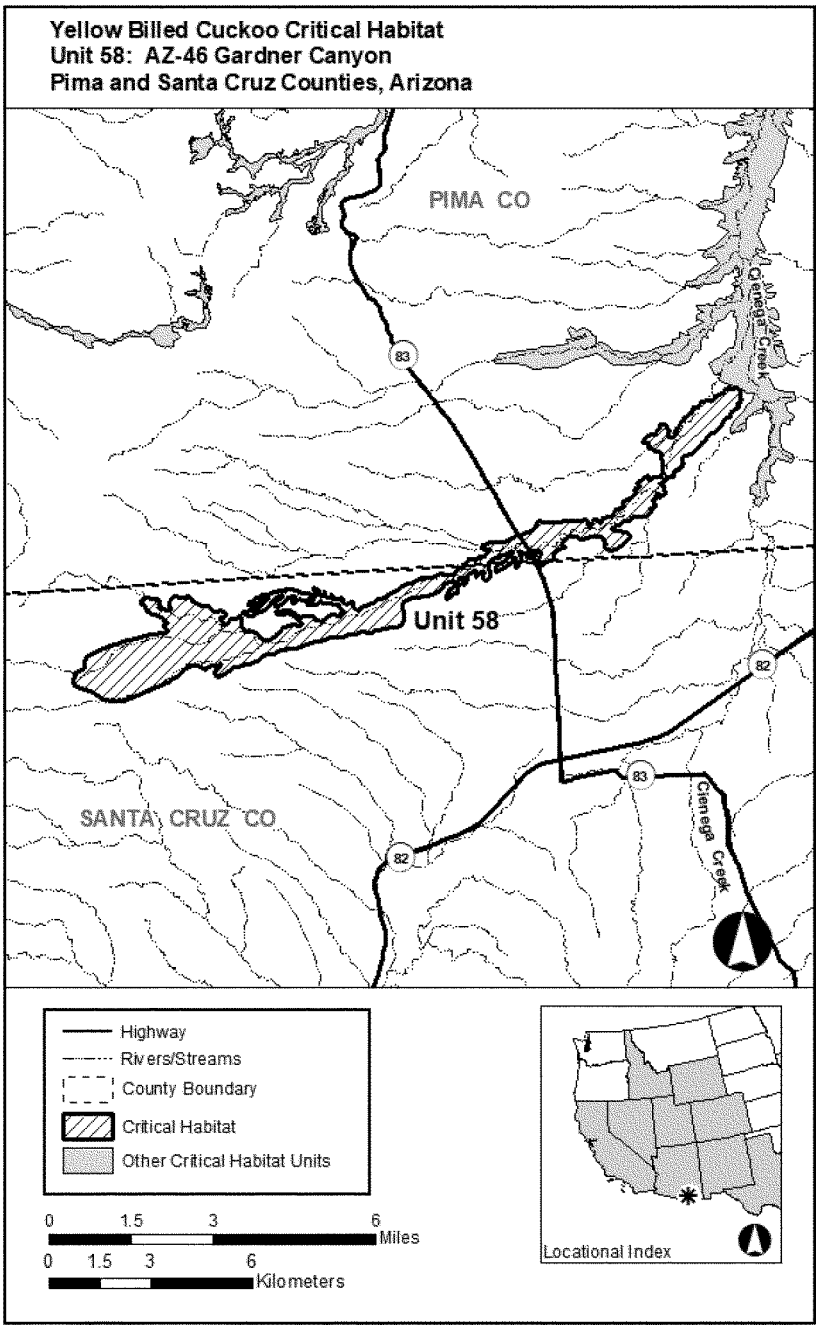
(60) Unit 56: AZ–44, Parker Canyon Lake; Santa Cruz and Cochise Counties, Arizona. Map of Unit 56 follows:



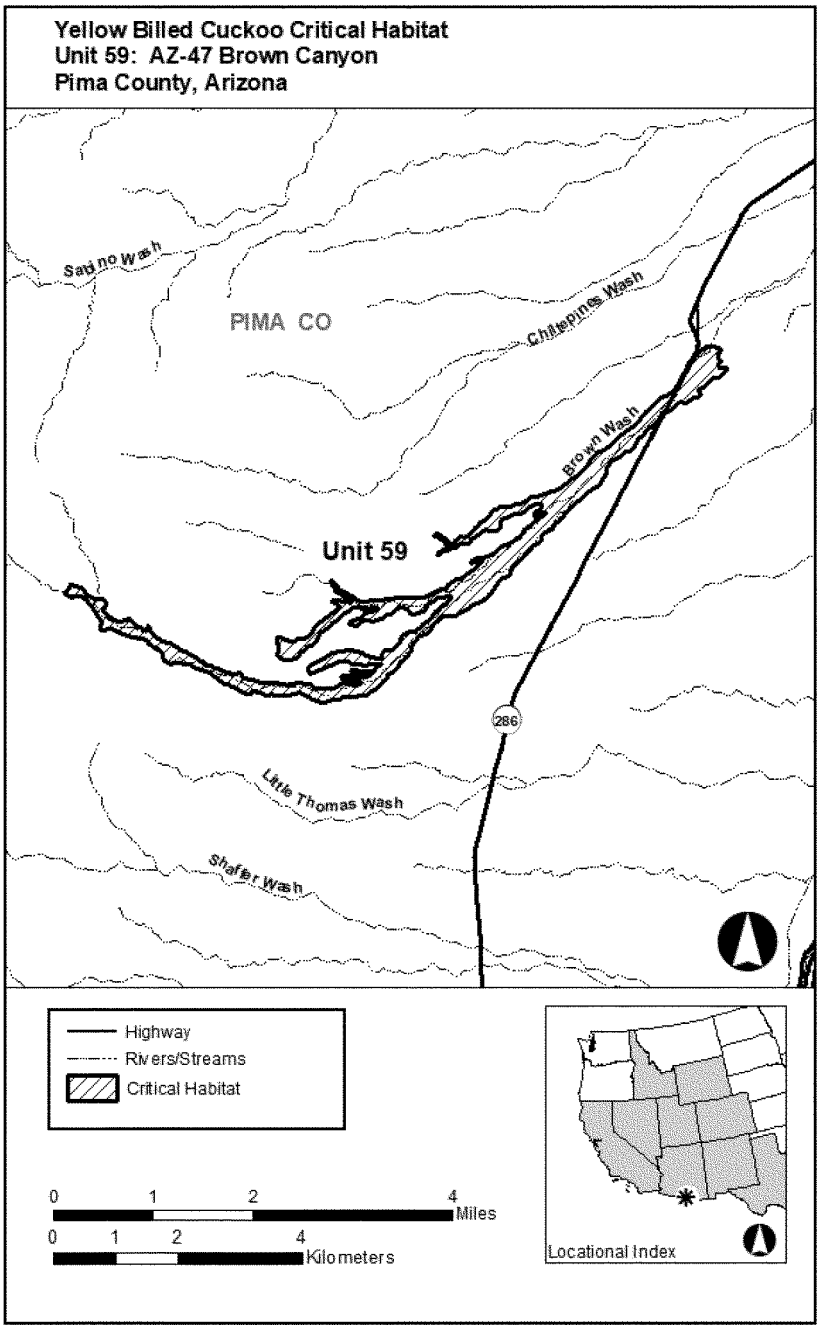
(61) Unit 57: AZ–45, Barrel Canyon; Pima County, Arizona. Map of Unit 57 follows:



(62) Unit 58: AZ–46, Gardner Canyon; Pima and Santa Cruz Counties, Arizona.
Map of Unit 58 follows:



(63) Unit 59: AZ–47, Brown Canyon; Pima County, Arizona. Map of Unit 59 follows:



(64) Unit 60: AZ–48, Sycamore Canyon; Santa Cruz County, Arizona.
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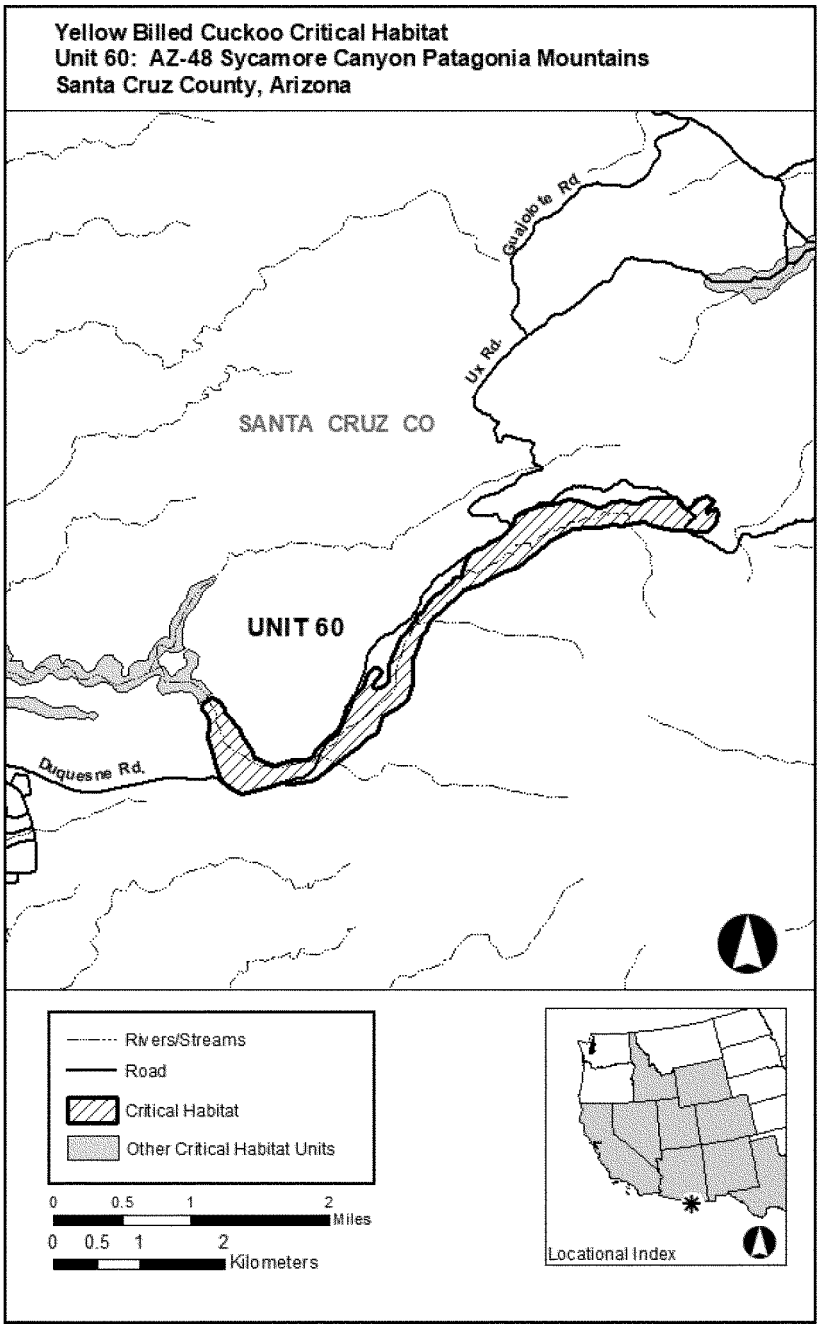
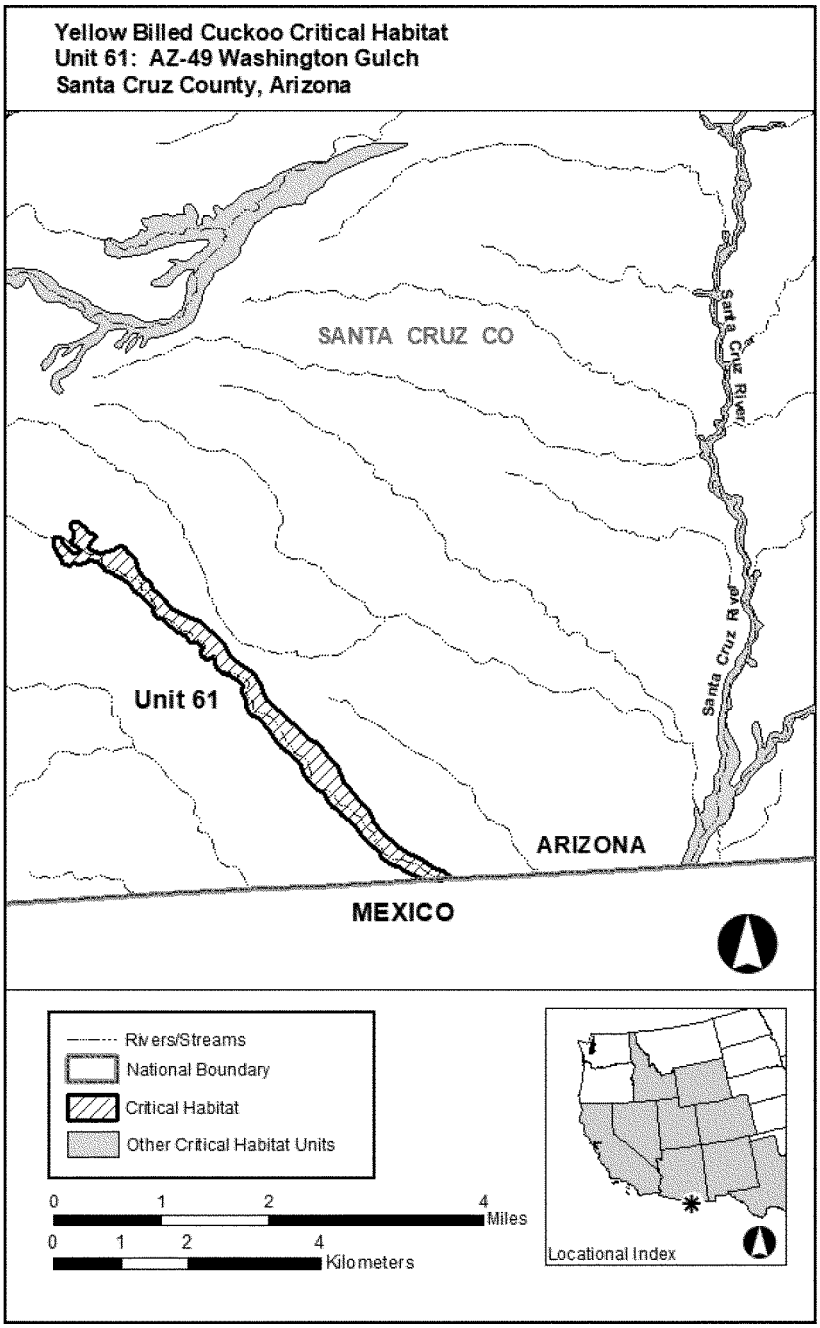
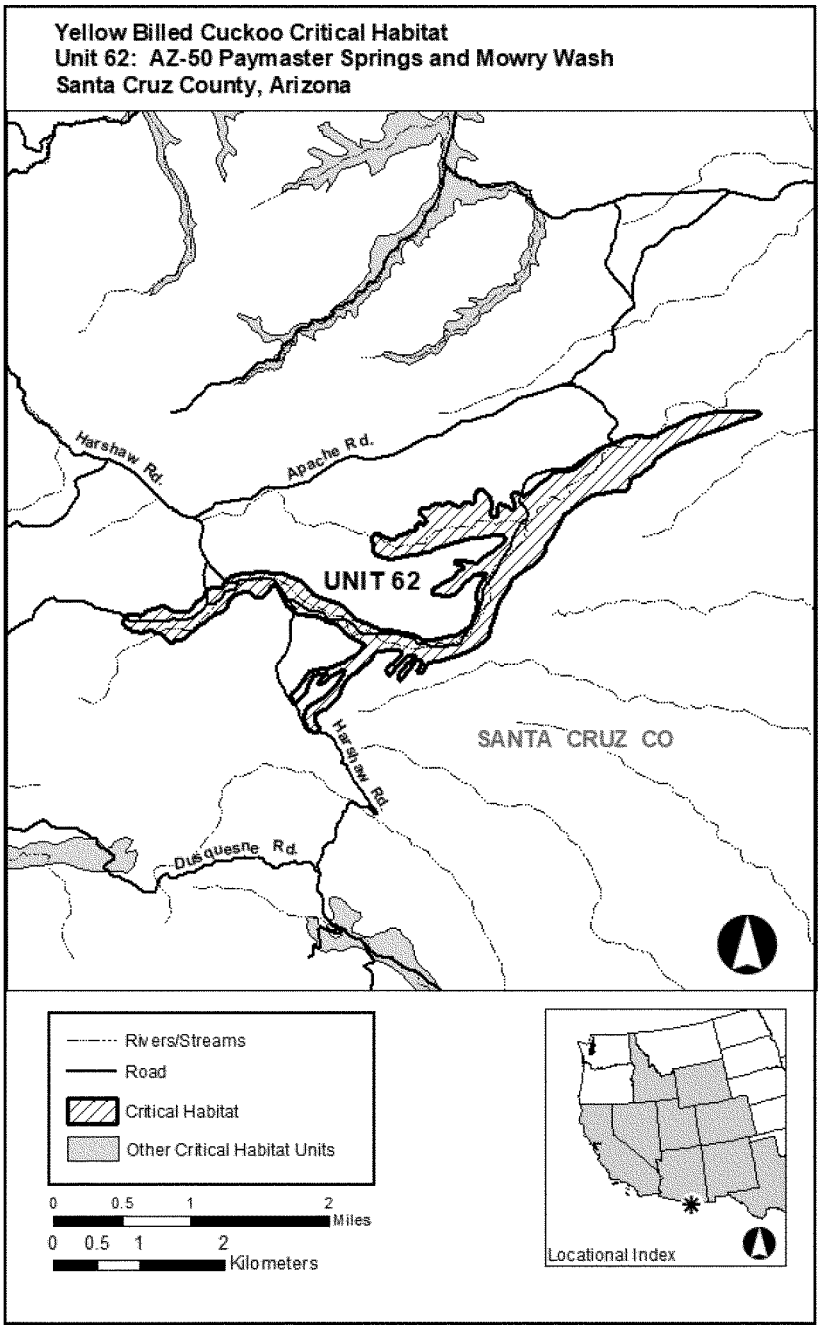


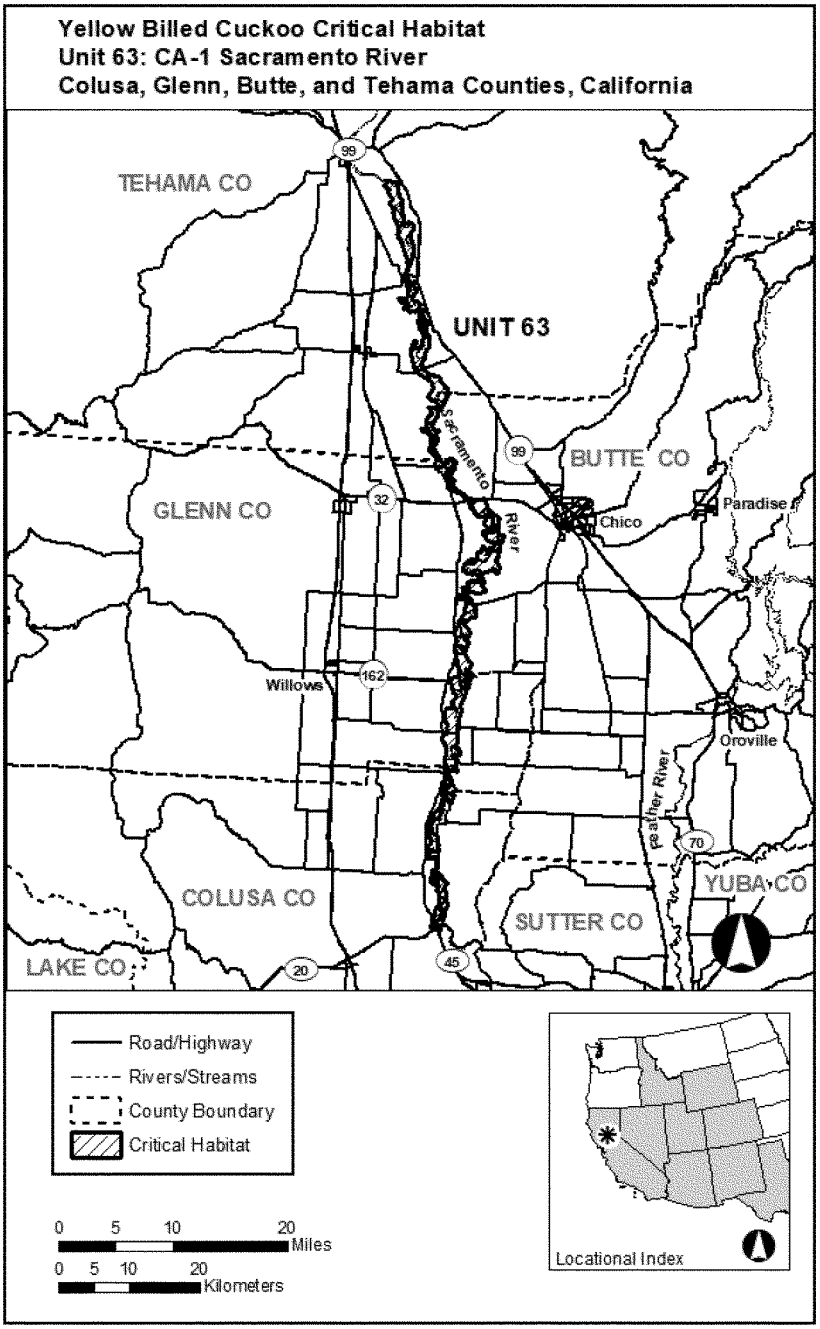
(65) Unit 61: AZ–49, Washington Gulch; Santa Cruz County, Arizona. Map of Unit 61 follows:



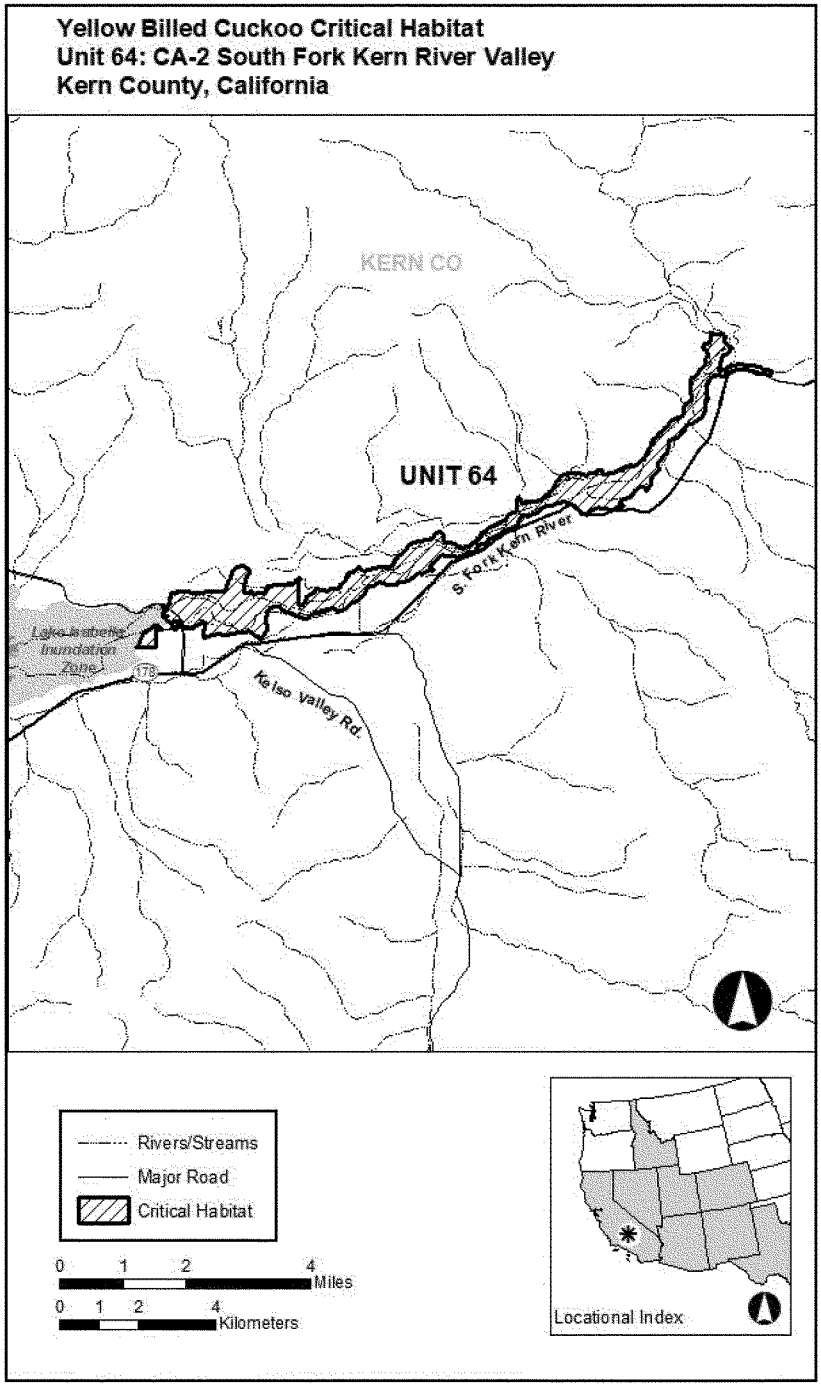
(66) Unit 62: AZ–50, Paymaster Spring and Mowry Wash; Santa Cruz County, Arizona. Map of Unit 62 follows:



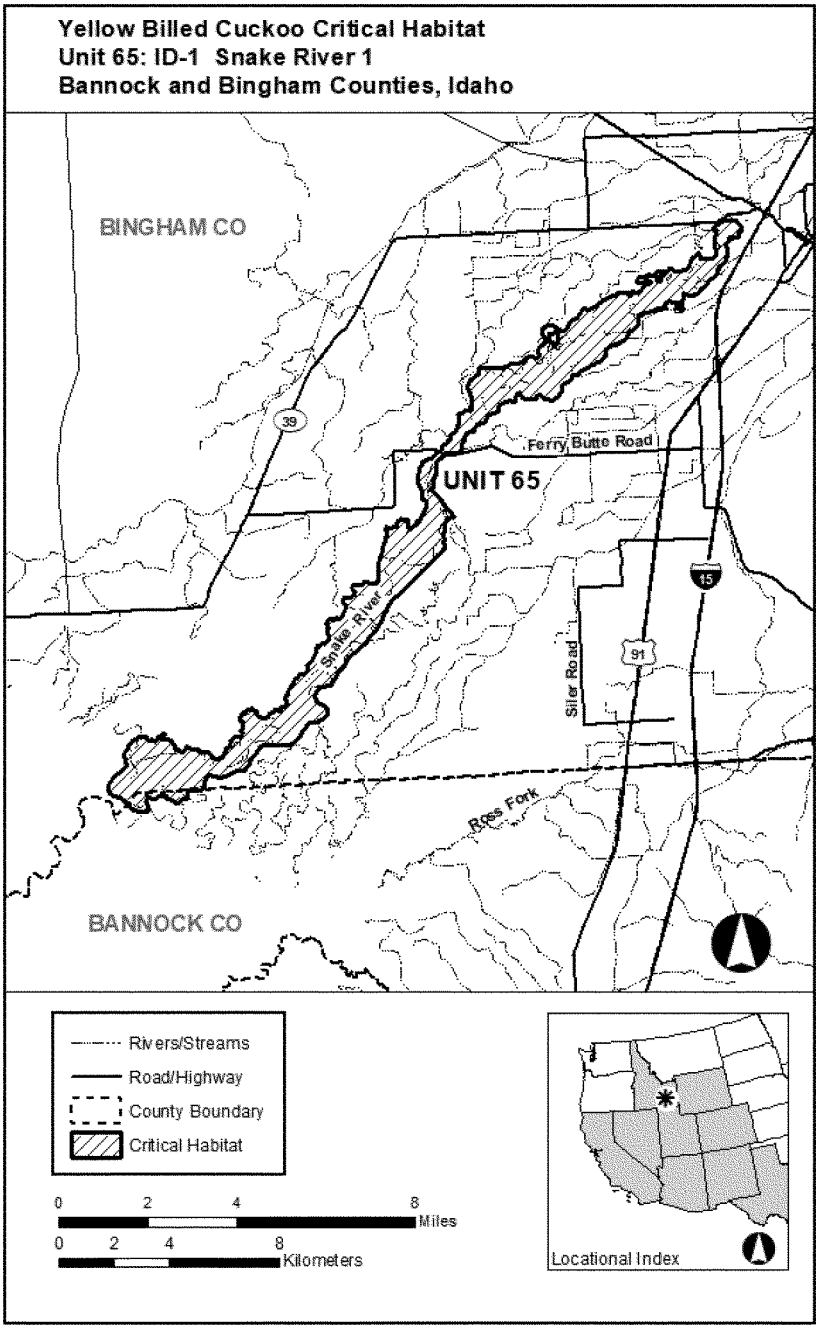
(67) Unit 63: CA–1, Sacramento River, Colusa, Glenn, Butte, and Tehama Counties, California. Map of Unit 63 follows:



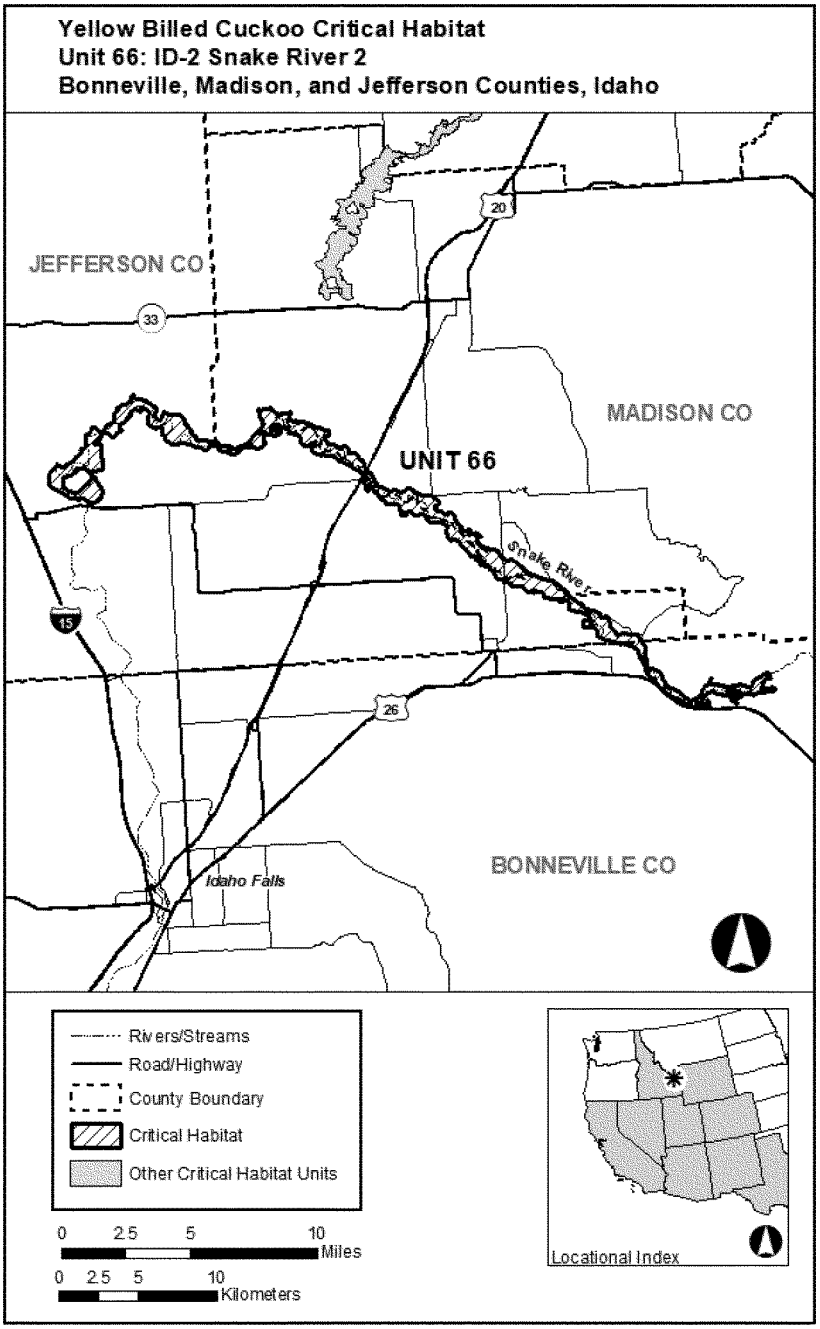
(68) Unit 64: CA–2, South Fork Kern River Valley; Kern County, California.
Map of Unit 64 follows:



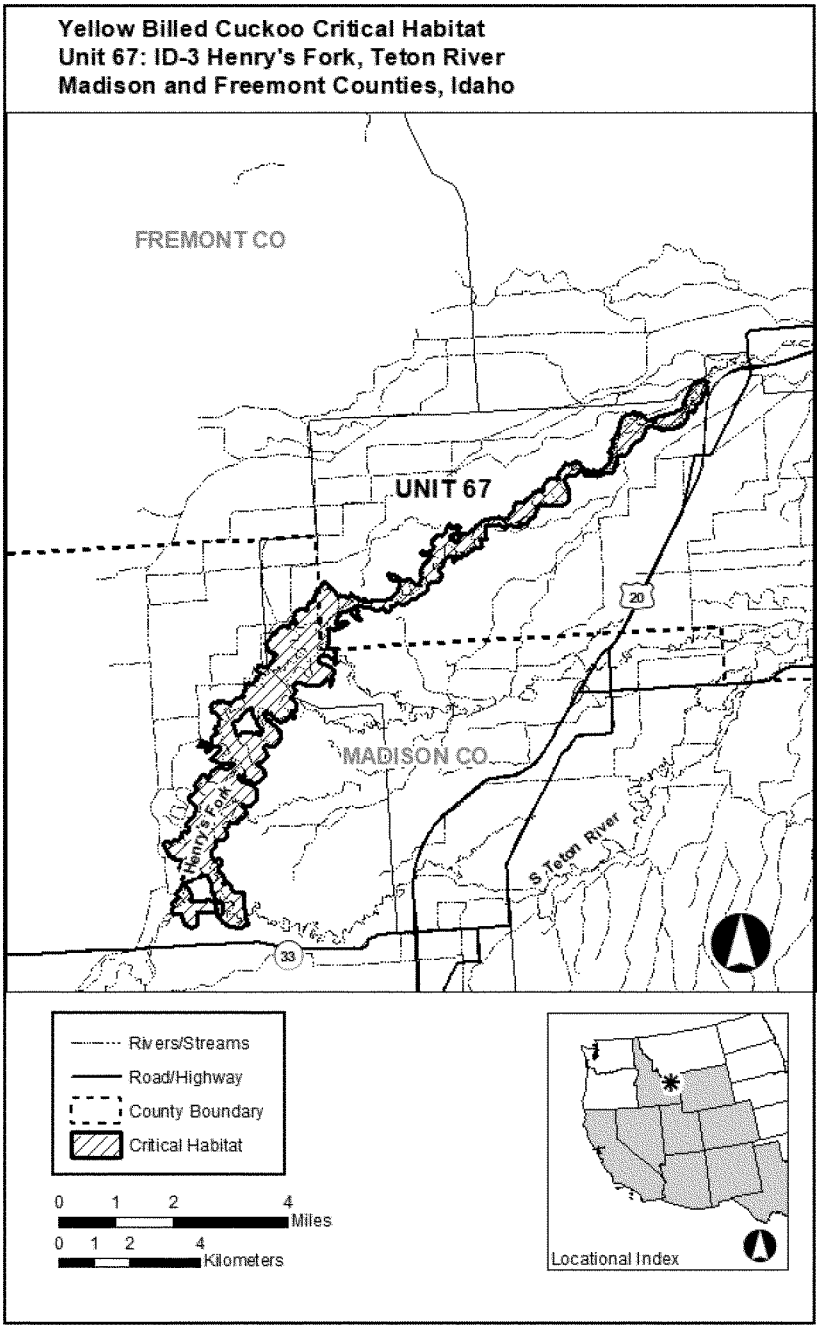
(69) Unit 65: ID–1, Snake River 1; Bannock and Bingham Counties, Idaho.
Map of Unit 65 follows:



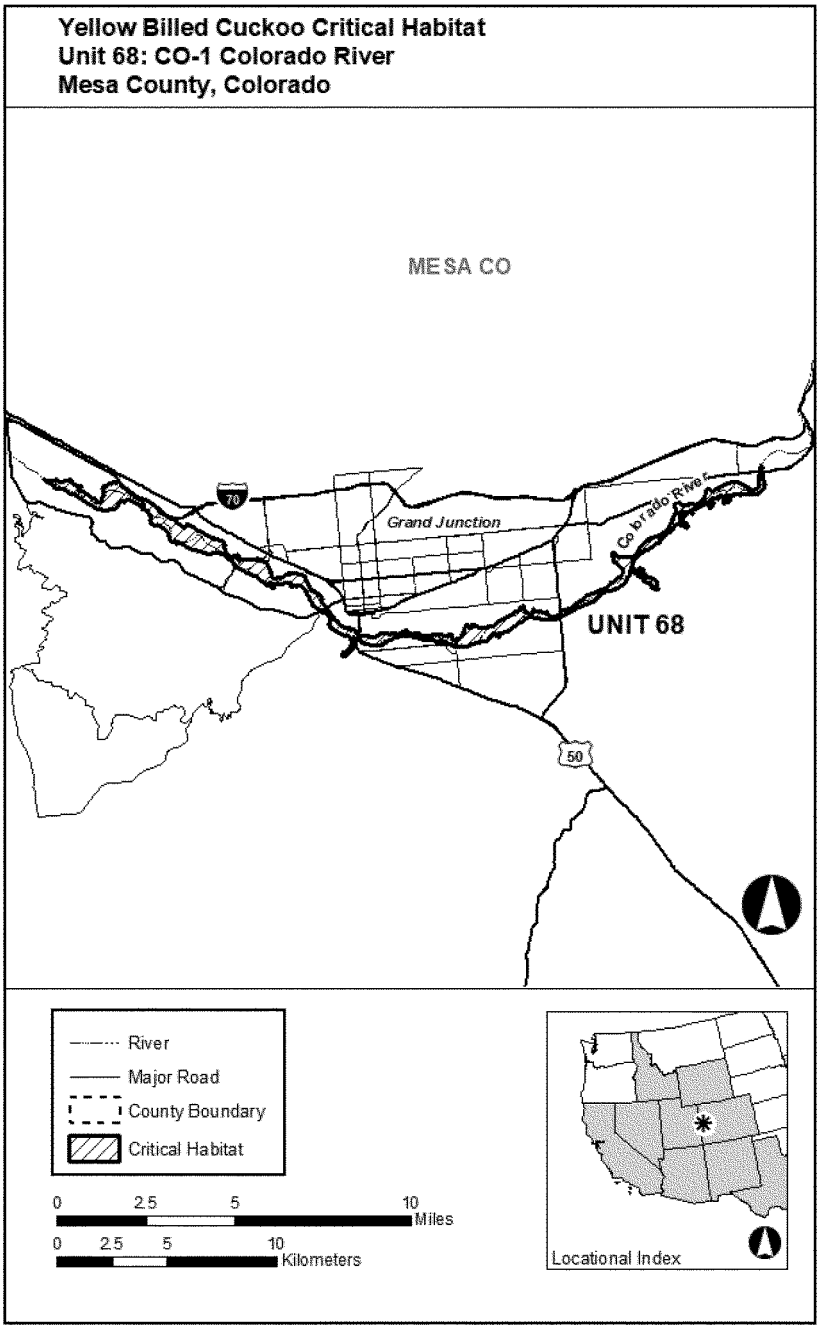
(70) Unit 66: ID–2, Snake River 2; Bonneville, Madison, and Jefferson Counties, Idaho. Map of Unit 66 follows:



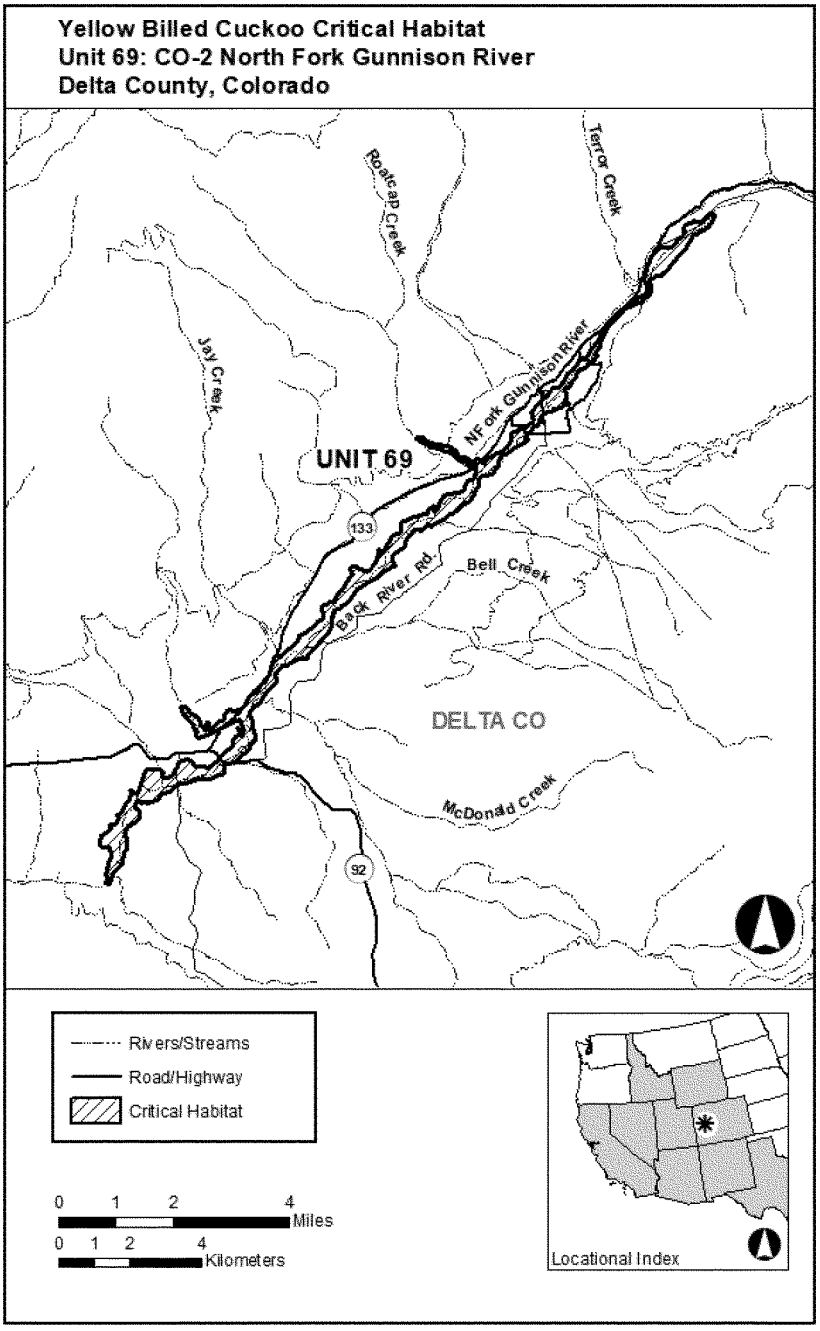
(71) Unit 67: ID–3, Henry's Fork and Teton Rivers; Madison and Fremont Counties, Idaho. Map of Unit 67 follows:



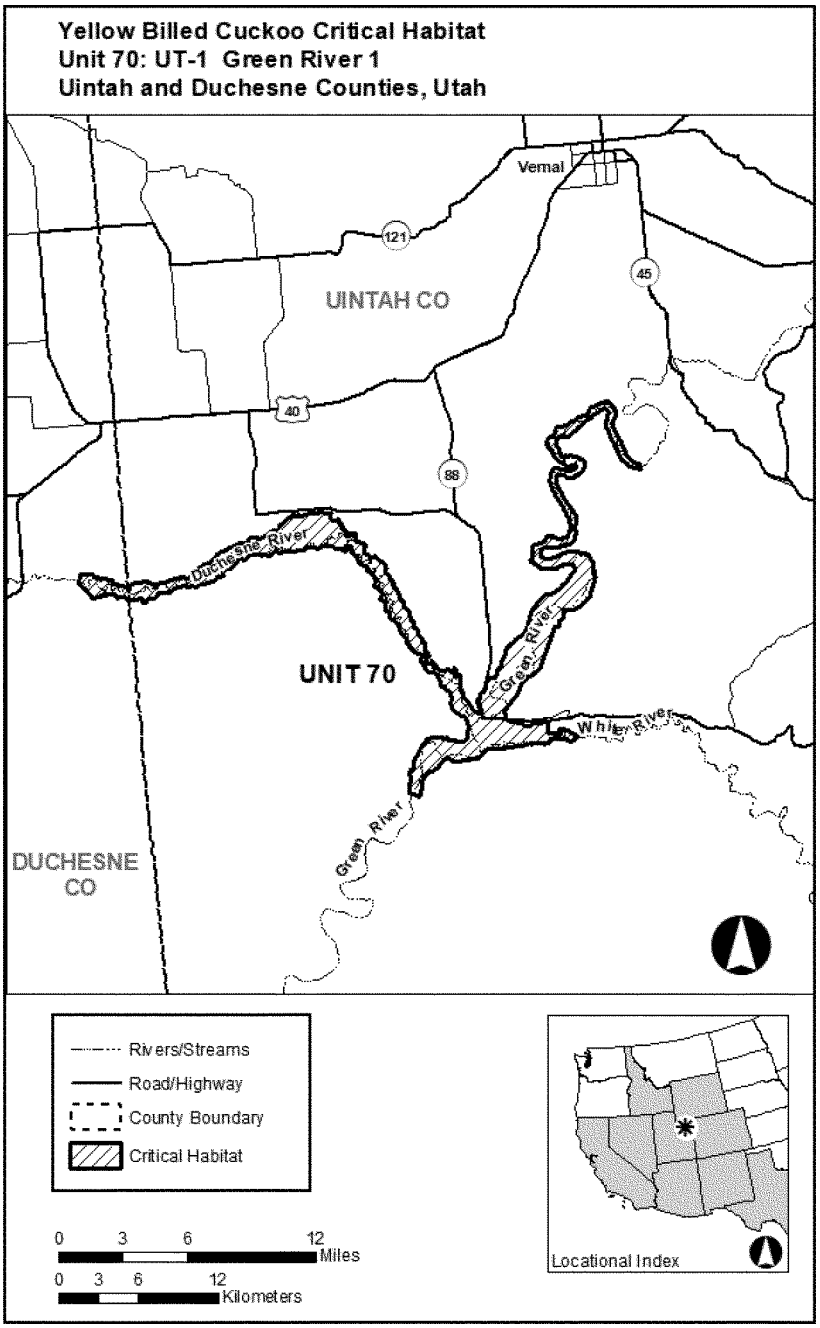
(72) Unit 68: CO–1, Colorado River; Mesa County, Colorado. Map of Unit 68 follows:



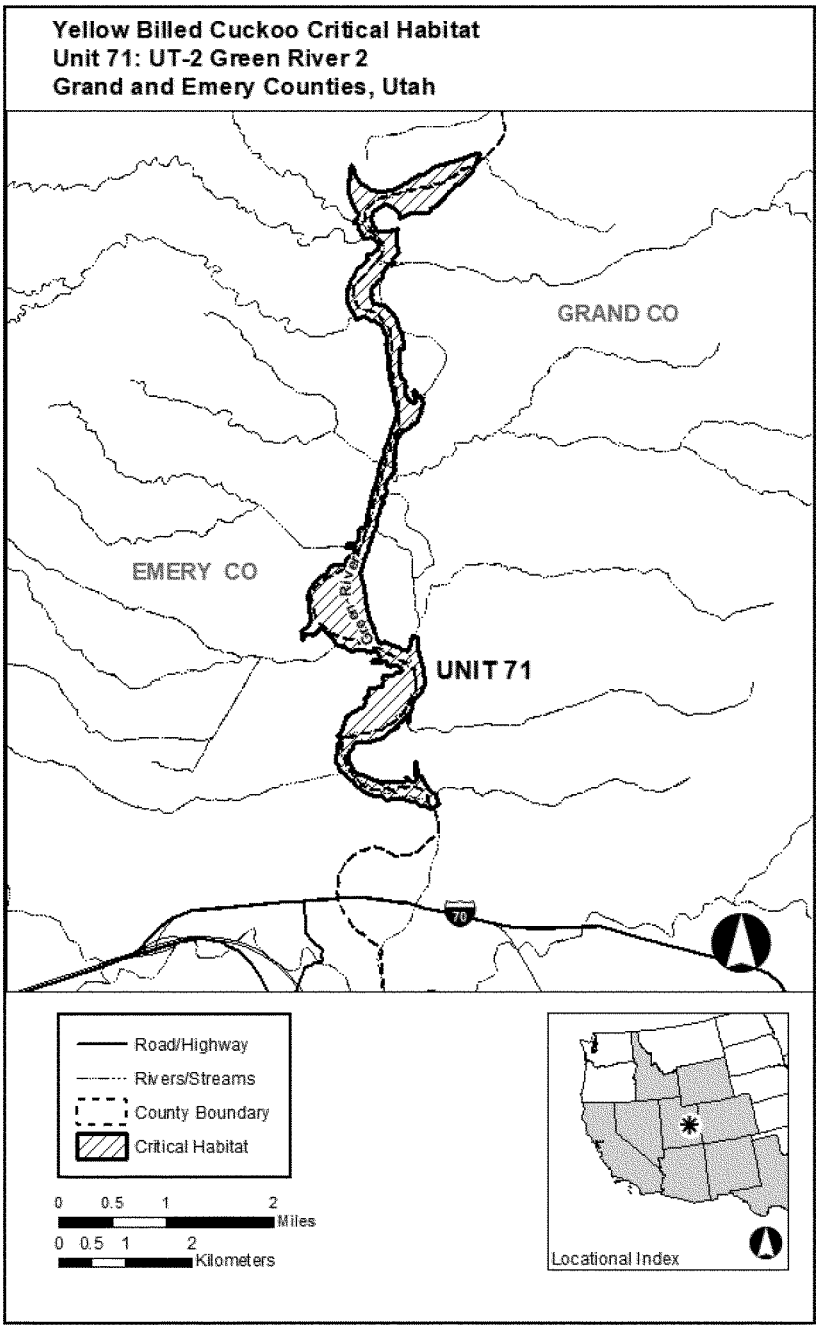
(73) Unit 69: CO–2, North Fork Gunnison River; Delta County, Colorado. Map of Unit 69 follows:



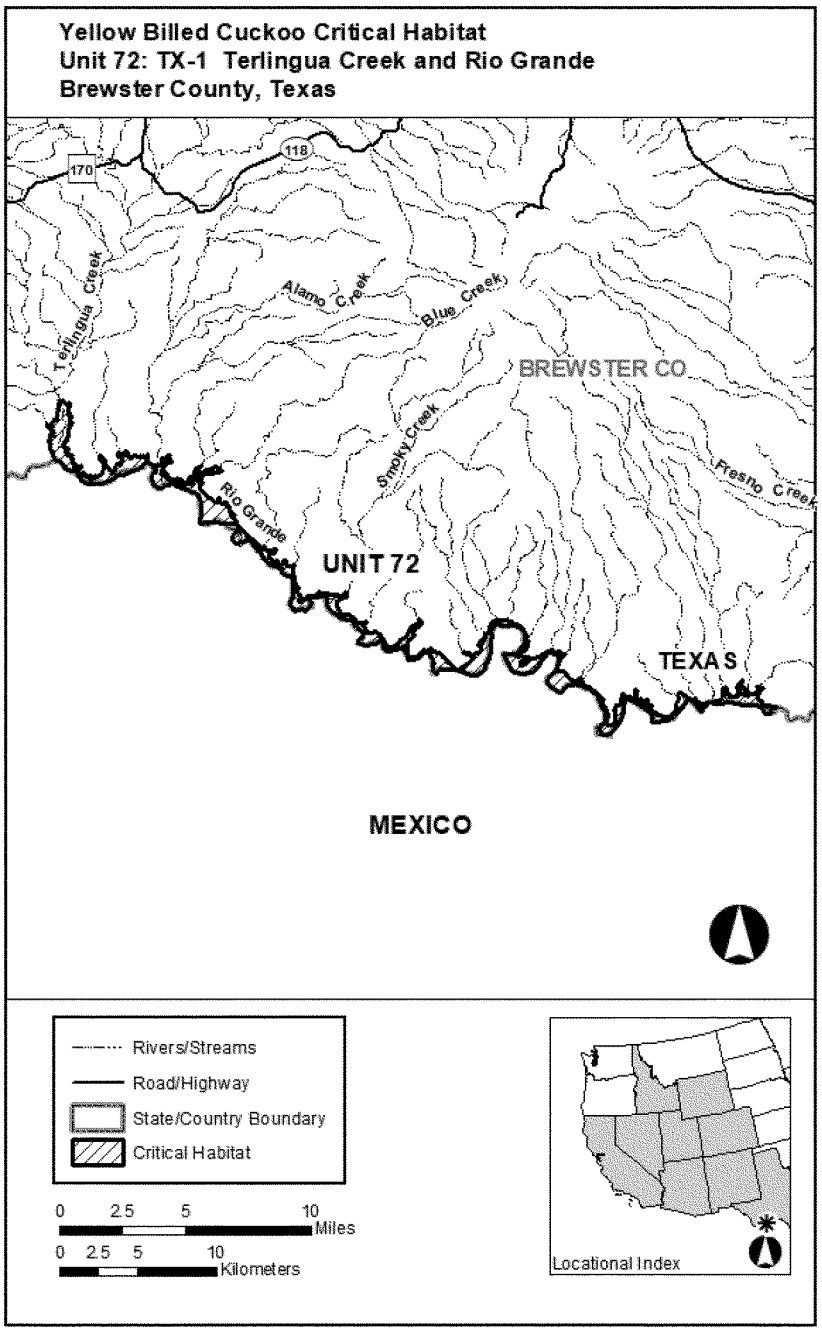
(74) Unit 70: UT–1, Green River 1; Uintah and Duchesne Counties, Utah.
Map of Unit 70 follows:



(75) Unit 71: UT–2, Green River 2; Emery and Grand Counties, Utah. Map of Unit 71 follows:



(76) Unit 72: TX–1, Terlingua Creek and Rio Grande; Brewster County, Texas. Map of Unit 72 follows:



* * * * *

Dated: November 21, 2019.

Margaret Everson,

Principal Deputy Director, U.S. Fish and Wildlife Service, Exercising the Authority of the Director, U.S. Fish and Wildlife Service.

[FR Doc. 2020–02642 Filed 2–26–20; 8:45 am]

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Part III

Commodity Futures Trading Commission

17 CFR Parts 1, 15, 17, *et al.*
Position Limits for Derivatives; Proposed Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 1, 15, 17, 19, 40, 140, 150, and 151

RIN 3038–AD99

Position Limits for Derivatives

AGENCY: Commodity Futures Trading Commission.

ACTION: Proposed rule.

SUMMARY: The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') is proposing amendments to regulations concerning speculative position limits to conform to the Wall Street Transparency and Accountability Act of 2010 (''Dodd-Frank Act'') amendments to the Commodity Exchange Act (''CEA'' or ''Act''). Among other amendments, the Commission proposes new and amended federal spot month limits for 25 physical commodity derivatives; amended single month and all-months-combined limits for most of the agricultural contracts currently subject to federal limits; new and amended definitions for use throughout the position limits regulations, including a revised definition of ''bona fide hedging transactions or positions'' and a new definition of ''economically equivalent swaps''; amended rules governing exchange-set limit levels and grants of exemptions therefrom; a new streamlined process for bona fide hedging recognitions for purposes of federal limits; new enumerated hedges; and amendments to certain regulatory provisions that would eliminate Form 204, enabling the Commission to leverage cash-market reporting submitted directly to the exchanges.

DATES: Comments must be received on or before April 29, 2020.

ADDRESSES: You may submit comments, identified by ''Position Limits for Derivatives'' and RIN 3038–AD99, by any of the following methods:

- *CFTC Comments Portal: https://comments.cftc.gov.* Select the ''Submit Comments'' link for this rulemaking and follow the instructions on the Public Comment Form.
- *Mail:* Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.
- *Hand Delivery/Courier:* Follow the same instructions as for Mail, above.

Please submit your comments using only one of these methods. To avoid possible delays with mail or in-person deliveries, submissions through the CFTC Comments Portal are encouraged.

All comments must be submitted in English, or if not, be accompanied by an English translation. Comments will be posted as received to *https://comments.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act (''FOIA''), a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.[1]

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse, or remove any or all submissions from *https://www.comments.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under FOIA.

FOR FURTHER INFORMATION CONTACT: Aaron Brodsky, Senior Special Counsel, (202) 418–5349, *abrodsky@cftc.gov;* Steven Benton, Industry Economist, (202) 418–5617, *sbenton@cftc.gov;* Jeanette Curtis, Special Counsel, (202) 418–5669, *jcurtis@cftc.gov;* Steven Haidar, Special Counsel, (202) 418–5611, *shaidar@cftc.gov;* Harold Hild, Policy Advisor, 202–418–5376, *hhild@cftc.gov;* or Lillian Cardona, Special Counsel, (202) 418–5012, *lcardona@cftc.gov;* Division of Market Oversight, in each case at the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

A. Introduction

The Commission has long established and enforced speculative position limits for futures and options on futures contracts on various agricultural commodities as authorized by the CEA.[2] The existing part 150 position limits regulations[3] include three components: (1) The level of the limits, which currently apply to nine agricultural commodity derivatives contracts and set a maximum that restricts the number of speculative positions that a person may hold in the spot month, individual month, and all-months-combined;[4] (2) exemptions for positions that constitute bona fide hedges and for certain other types of transactions;[5] and (3) regulations to determine which accounts and positions a person must aggregate for the purpose of determining compliance with the position limit levels.[6] The existing federal speculative position limits function in parallel to exchange-set limits required by

[1] 17 CFR 145.9.

[2] 7 U.S.C. 1 *et seq.*

[3] 17 CFR part 150. Part 150 of the Commission's regulations establishes federal position limits (that is, position limits established by the Commission, as opposed to exchange-set limits) on nine agricultural contracts. Agricultural contracts refers to the list of commodities contained in the definition of ''commodity'' in CEA section 1a; 7 U.S.C. 1a. This list of agricultural contracts currently includes nine contracts: CBOT Corn (and Mini-Corn) (C), CBOT Oats (O), CBOT Soybeans (and Mini-Soybeans) (S), CBOT Wheat (and Mini-Wheat) (W), CBOT Soybean Oil (SO), CBOT Soybean Meal (SM), MGEX Hard Red Spring Wheat (MWE), CBOT KC Hard Red Winter Wheat (KW), and ICE Cotton No. 2 (CT). *See* 17 CFR 150.2. The position limits on these agricultural contracts are referred to as ''legacy'' limits because these contracts have been subject to federal position limits for decades.

[4] *See* 17 CFR 150.2.

[5] *See* 17 CFR 150.3.

[6] *See* 17 CFR 150.4.

designated contract market (''DCM'') Core Principle 5.[7] Certain contracts are thus subject to both federal and DCM-set limits, whereas others are subject only to DCM-set limits and/or position accountability.

As part of the Dodd-Frank Act, Congress amended the CEA's position limits provisions, which, since 1936, have authorized the Commission (and its predecessor) to impose limits on speculative positions to prevent the harms caused by excessive speculation. As discussed below, the Commission interprets these amendments as, among other things, tasking the Commission with establishing such position limits as it finds are ''necessary'' for the purpose of ''diminishing, eliminating, or preventing'' ''[e]xcessive speculation . . . causing sudden or unreasonable fluctuations or unwarranted changes in . . . price . . .'' [8] The Commission also interprets these amendments as tasking the Commission with establishing position limits on any ''economically equivalent'' swaps.[9]

The Commission previously issued proposed and final rules in 2011 to implement the provisions of the Dodd-Frank Act regarding position limits and the bona fide hedge definition.[10] A September 28, 2012 order of the U.S. District Court for the District of Columbia vacated the 2011 Final Rulemaking, with the exception of the rule's amendments to 17 CFR 150.2.[11]

Subsequently, the Commission proposed position limits regulations in 2013 (''2013 Proposal''), June of 2016 (''2016 Supplemental Proposal''), and again in December of 2016 (''2016 Reproposal'').[12] The 2016 Reproposal would have amended part 150 to, among other things: establish federal position limits for 25 physical commodity futures contracts and for ''economically equivalent'' futures, options on futures, and swaps; revise the existing exemptions from such limits, including for bona fide hedges; and establish a framework for exchanges [13] to recognize certain positions as bona fide hedges, and thus exempt from position limits.

To date, the Commission has not issued any final rulemaking based on the 2013 Proposal, 2016 Supplemental Proposal, or 2016 Reproposal. The 2016 Reproposal generally addressed comments received in response to those prior rulemakings. In a companion proposed rulemaking, the CFTC also proposed, and later adopted in 2016, amendments to rules governing aggregation of positions for purposes of compliance with federal position limits.[14] These aggregation rules currently apply only to the nine agricultural contracts subject to existing federal limits, and going forward would apply to the commodities that would be subject to federal limits under this release.

After reconsidering the prior proposals, including reviewing the comments responding thereto, the Commission is withdrawing from further consideration the 2013 Proposal, the 2016 Supplemental Proposal, and the 2016 Reproposal.[15]

Instead, the Commission is now issuing a new proposal (''2020 Proposal''). The 2020 Proposal is intended to (1) recognize differences across commodities and contracts, including differences in commercial hedging and cash-market reporting practices; (2) focus on derivatives contracts that are critical to price discovery and distribution of the underlying commodity such that the burden of excessive speculation in the derivatives contract may have a particularly acute impact on interstate commerce for that commodity; and (3) reduce duplication and inefficiency by leveraging existing expertise and processes at DCMs. For these general reasons, discussed in turn below, the Commission proposes new regulations, rather than finalizing the 2016 Reproposal.[16]

First, the Commission preliminarily believes that any position limits regime must take into account differences across commodity and contract types. The existing federal position limits regulations apply only to nine contracts, all of which are physically-settled futures on agricultural commodities. Limits on these commodities have been in place for decades, as have the federal program for exemptions from these limits and the federal rules governing DCM-set limits on such commodities. The existing framework is largely a historical remnant of an approach that predates cash-settled futures contracts, let alone swaps, institutional-investor interest in commodity indexes, and highly liquid energy markets. Congress has tasked the Commission with: Establishing such limits as it finds are ''necessary'' for the purpose of preventing the burdens associated with excessive speculation causing sudden or unreasonable fluctuations or unwarranted changes in price; and establishing limits on swaps that are ''economically equivalent'' to certain futures contracts. The Commission has preliminarily determined that an approach that is flexible enough to accommodate potential future, unpredictable developments in commercial hedging practices would be well-suited for the current derivatives markets by accommodating differences in commodity types, contract specifications, hedging practices, cash-market trading practices, organizational structures of hedging participants, and liquidity profiles of individual markets.

The Commission proposes to build this flexibility into several parts of the proposed regulations, including: Exchange-set limits and/or accountability, rather than federal limits, outside of the spot month for referenced contracts based on commodities other than the nine legacy agricultural commodities; the ability for exchanges to use more than one formula when setting their own limit levels; an updated formula for federal non-spot month levels on the nine legacy agricultural contracts that is calibrated to recently observed trading activity; a bona fide hedging definition that is broad enough to accommodate common commercial hedging practices, including anticipatory hedging practices such as anticipatory merchandising; a broader range of exchange-granted recognitions for purposes of federal and

[7] 7 U.S.C. 7(d)(5); 17 CFR 38.300.

[8] 7 U.S.C. 6a(a)(1); *see infra* Section III.F. (discussion of the necessity finding).

[9] 7 U.S.C. 6a(a)(5).

[10] Position Limits for Derivatives, 76 FR 4752 (Jan. 26, 2011); Position Limits for Futures and Swaps, 76 FR 71626 (Nov. 18, 2011) (''2011 Final Rulemaking'').

[11] *Int'l Swaps & Derivatives Ass'n* v. *U.S. Commodity Futures Trading Comm'n,* 887 F. Supp. 2d 259 (D.D.C. 2012) (''*ISDA*'').

[12] Position Limits for Derivatives, 78 FR 75680 (Dec. 12, 2013) (2013 Proposal); Position Limits for Derivatives: Certain Exemptions and Guidance, 81 FR 38458 (June 13, 2016) (2016 Supplemental Proposal); and Position Limits for Derivatives, 81 FR 96704 (Dec. 30, 2016) (2016 Reproposal).

[13] Unless indicated otherwise, the use of the term ''exchanges'' throughout this proposal refers to DCMs and Swap Execution Facilities.

[14] Aggregation of Positions, 81 FR 91454 (Dec. 16, 2016) (''Final Aggregation Rulemaking''); *see* 17 CFR 150.4. Under the Final Aggregation Rulemaking, unless an exemption applies, a person's positions must be aggregated with positions for which the person controls trading or for which the person holds a 10 percent or greater ownership interest. The Division of Market Oversight has issued time-limited no-action relief from some of the aggregation requirements contained in that rulemaking. *See* CFTC Letter No. 19–19 (July 31, 2019), *available at https://www.cftc.gov/csl/19-19/download.*

[15] Because the earlier proposals are withdrawn, comments on them will not be part of the administrative record with respect to the current proposal, except where expressly referenced herein. Commenters should resubmit comments relevant to the subject proposal; commenters who wish to reference prior comment letters should cite those prior comment letters as specifically as possible.

[16] The specific proposed new regulations are discussed in detail later in this release.

exchange-set limits that are in line with common commercial hedging practices; the elimination of a restriction for purposes of federal limits on holding positions during the last trading days of the spot month; and broader discretion for market participants to measure risk in the manner most suitable for their business.

Second, the proposal establishes limits on a limited set of commodities for which the Commission preliminarily finds that speculative position limits are necessary.[17] As described below, this necessity finding is based on a combination of factors including: The particular importance of these contracts in the price discovery process for their respective underlying commodities, the fact that they require physical delivery of the underlying commodity, and, in some cases, the commodities' particular importance to the national economy and especially acute economic burdens on interstate commerce that would arise from excessive speculation causing sudden or unreasonable fluctuations or unwarranted changes in the price of the commodities underlying these contracts.[18]

Third, the Commission preliminarily believes that there is an opportunity for greater collaboration between the Commission and the exchanges within the statutorily created parallel federal and exchange-set position limit regimes. Given the exchanges' self-regulatory responsibilities, resources, deep knowledge of their markets and trading practices, close interactions with market participants, existing programs for addressing exemption requests, and ability to generally act more quickly than the Commission, the Commission preliminarily believes that cooperation between the Commission and the exchanges on position limits should not only be continued, but enhanced. For example, exchanges are particularly well-positioned to provide the Commission with estimates of deliverable supply, to recommend limit levels for the Commission's consideration, and to help administer the program for recognizing bona fide hedges. Further, given that the Commission is proposing to require exchanges to collect, and provide to the Commission upon request, cash-market information from market participants requesting bona fide hedges, the Commission also proposes to eliminate Form 204, which market participants with bona fide hedging positions in excess of limits currently file each month with the Commission to demonstrate cash-market positions justifying such overages. The Commission preliminarily believes that enhanced collaboration will maintain the Commission's access to information and result in a more efficient administrative process, in part by reducing duplication of efforts. The Commission invites comments on all aspects of this rulemaking.

B. Executive Summary

This executive summary provides an overview of the key components of this proposal. The summary only highlights certain aspects of the proposed regulations and generally uses shorthand to summarize complex topics. The executive summary is neither intended to be a comprehensive recitation of the proposal nor intended to supplement, modify, or replace any interpretive or other language contained herein. Section II of this release includes a more detailed and comprehensive discussion of all of the proposed regulations, and Section V includes the actual regulations.

1. Contracts Subject to Federal Speculative Position Limits

Federal speculative position limits would apply to ''referenced contracts,'' which include: (a) 25 ''core referenced futures contracts;'' (b) futures and options directly or indirectly linked to a core referenced futures contract; and (c) ''economically equivalent swaps.''

a. Core Referenced Futures Contracts

Federal speculative position limits would apply to the following 25 physically-settled core referenced futures contracts:

Legacy agricultural (federal limits during and outside the spot month)	Non-legacy agricultural (federal limits only during the spot month) [19]	Metals (federal limits only during the spot month)
CBOT Corn (C)	CBOT Rough Rice (RR)	COMEX Gold (GC).
CBOT Oats (O)	ICE Cocoa (CC)	COMEX Silver (SI)
CBOT Soybeans (S)	ICE Coffee C (KC)	COMEX Copper (HG).
CBOT Wheat (W)	ICE FCOJ–A (OJ)	NYMEX Platinum (PL).
CBOT Soybean Oil (SO)	ICE U.S. Sugar No. 11 (SB)	NYMEX Palladium (PA).
CBOT Soybean Meal (SM)	ICE U.S. Sugar No. 16 (SF)	Energy (federal limits only during the spot month)
MGEX Hard Red Spring Wheat (MWE)	CME Live Cattle (LC)	NYMEX Henry Hub Natural Gas (NG).
ICE Cotton No. 2 (CT)		NYMEX Light Sweet Crude Oil (CL).
CBOT KC Hard Red Winter Wheat (KW)		NYMEX New York Harbor ULSD Heating Oil (HO).
		NYMEX New York Harbor RBOB Gasoline (RB).

b. Futures and Options on Futures Linked to a Core Referenced Futures Contract

Referenced contracts would also include futures and options on futures that are directly or indirectly linked to the price of a core referenced futures contract or to the same commodity underlying the applicable core referenced futures contract for delivery at the same location as specified in that core referenced futures contract. Referenced contracts, however, would not include location basis contracts, commodity index contracts, swap guarantees, and trade options that meet certain requirements.

[17] *See infra* Section III.F.

[18] *See infra* Section III.F.1.

[19] While the Commission is proposing federal non-spot month limits only for the nine legacy agricultural core referenced futures contracts, exchanges would be required to establish, consistent with Commission standards set forth in this proposal, exchange-set position limits and/or position accountability levels in the non-spot months for the non-legacy agricultural, metals, and energy core referenced futures contracts.

c. Economically Equivalent Swaps

Referenced contracts would also include economically equivalent swaps, which would be defined as swaps with ''identical material'' contractual specifications, terms, and conditions to a referenced contract. Swaps in commodities other than natural gas that have identical material specifications, terms, and conditions to a referenced contract, but differences in lot size specifications, notional amounts, or delivery dates diverging by less than *one* calendar day, would still be deemed economically equivalent swaps. Natural gas swaps that have identical material specifications, terms, and conditions to a referenced contract, but differences in lot size specifications, notional amounts, or delivery dates diverging by less than *two* calendar days, would still be deemed economically equivalent swaps.

2. Federal Limit Levels During the Spot Month

Federal spot month limits would apply to referenced contracts on all 25 core referenced futures contracts. The following proposed spot month limit levels, summarized in the table below, are set at or below 25 percent of deliverable supply, as estimated using recent data provided by the DCM listing the core referenced futures contract, and verified by the Commission. The proposed spot month limits would apply on a futures-equivalent basis based on the size of the unit of trading of the relevant core referenced futures contract, and would apply ''separately'' to physically-settled and cash-settled referenced contracts. Therefore, a market participant could net positions across physically-settled referenced contracts, and separately could net positions across cash-settled referenced contracts, but would not be permitted to net cash-settled referenced contracts with physically-settled referenced contracts.

Core referenced futures contract	2020 Proposed spot month limit	Existing federal spot month limit	Existing exchange-set spot month limit
Legacy Agricultural Contracts			
CBOT Corn (C)	1,200	600	600
CBOT Oats (O)	600	600	600
CBOT Soybeans (S)	1,200	600	600
CBOT Soybean Meal (SM)	1,500	720	720
CBOT Soybean Oil (SO)	1,100	540	540
CBOT Wheat (W)	1,200	600	600/500/400/300/220
CBOT KC Hard Red Winter Wheat (KW)	1,200	600	600
MGEX Hard Red Spring Wheat (MWE)	1,200	600	600
ICE Cotton No. 2 (CT)	1,800	300	300
Other Agricultural Contracts			
CME Live Cattle (LC)	[20] 600/300/200	n/a	450/300/200
CBOT Rough Rice (RR)	800	n/a	600/200/250
ICE Cocoa (CC)	4,900	n/a	1,000
ICE Coffee C (KC)	1,700	n/a	500
ICE FCOJ–A (OJ)	2,200	n/a	300
ICE U.S. Sugar No. 11 (SB)	25,800	n/a	5,000
ICE U.S. Sugar No. 16 (SF)	6,400	n/a	n/a
Metals Contracts			
COMEX Gold (GC)	6,000	n/a	3,000
COMEX Silver (SI)	3,000	n/a	1,500
COMEX Copper (HG)	1,000	n/a	1,500
NYMEX Platinum (PL)	500	n/a	500
NYMEX Palladium (PA)	50	n/a	50
Energy Contracts			
NYMEX Henry Hub Natural Gas (NG)	2,000	n/a	1,000
NYMEX Light Sweet Crude Oil (CL)	[21] 6,000/5,000/4,000	n/a	3,000
NYMEX New York Harbor ULSD Heating Oil (HO)	2,000	n/a	1,000
NYMEX New York Harbor RBOB Gasoline (RB)	2,000	n/a	1,000

3. Federal Limit Levels Outside of the Spot Month

Federal limits outside of the spot month would apply only to referenced contracts based on the nine legacy agricultural commodities subject to existing federal limits. All other referenced contracts subject to federal limits would be subject to federal limits only during the spot month, as specified above, and otherwise would only be subject to exchange-set limits and/or position accountability levels outside of the spot month.

[20] The proposed federal spot month limit for Live Cattle would feature a step-down limit similar to the CME's existing Live Cattle step-down exchange set limit. The proposed federal spot month step-down limit is: (1) 600 at the close of trading on the first business day following the first Friday of the contract month; (2) 300 at the close of trading on the business day prior to the last five trading days of the contract month; and (3) 200 at the close of trading on the business day prior to the last two trading days of the contract month.

[21] The proposed federal spot month limit for Light Sweet Crude Oil would feature the following step-down limit: (1) 6,000 contracts as of the close of trading three business days prior to the last trading day of the contract; (2) 5,000 contracts as of the close of trading two business days prior to the last trading day of the contract; and (3) 4,000 contracts as of the close of trading one business day prior to the last trading day of the contract.

The following proposed non-spot month limit levels, summarized in the table below, are set at 10 percent of open interest for the first 50,000 contracts, with an incremental increase of 2.5 percent of open interest thereafter, and would apply on a futures-equivalent basis based on the size of the unit of trading of the relevant core referenced futures contract:

Core referenced futures contract	2020 Proposed single month and all-months combined limit	Existing federal single month and all-months-combined limit	Existing exchange-set single month and all-months-combined limit
CBOT Corn (C)	57,800	33,000	33,000
CBOT Oats (O)	2,000	2,000	2,000
CBOT Soybean (S)	27,300	15,000	15,000
CBOT Soybean Meal (SM)	16,900	6,500	6,500
CBOT Soybean Oil (SO)	17,400	8,000	8,000
CBOT Wheat (W)	19,300	12,000	12,000
CBOT KC HRW Wheat (KW)	12,000	12,000	12,000
MGEX HRS Wheat (MWE)	12,000	12,000	12,000
ICE Cotton No. 2 (CT)	11,900	5,000	5,000

4. Exchange-Set Limits and Exemptions Therefrom

a. Contracts Subject to Federal Limits

An exchange that lists a contract subject to federal limits, as specified above, would be required to set its own limits for such contracts at a level that is no higher than the federal level. Exchanges would be allowed to grant exemptions from their own limits, provided the exemption does not subvert the federal limits framework.[22]

b. Physical Commodity Contracts Not Subject to Federal Limits

For physical commodity contracts not subject to federal limits, an exchange would generally be required to set spot month limits no greater than 25 percent of deliverable supply, but would have flexibility to submit other approaches for review by the Commission, provided the approach results in spot month levels that are ''necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index'' and complies with all other applicable regulations.

Outside of the spot month, such an exchange would have additional flexibility to set either position limits or position accountability levels, provided the levels are ''necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index.'' Non-exclusive Acceptable Practices would provide several examples of formulas that the Commission has determined would meet this standard, but an exchange would have the flexibility to develop other approaches.

Exchanges would be provided flexibility to grant a variety of exemption types, provided that the exchange must take into account whether the exemption would result in a position that would not be in accord with ''sound commercial practices'' in the market for which the exchange is considering the application, and/or would ''exceed an amount that may be established and liquidated in an orderly fashion in that market.''

5. Limits on ''Pre-Existing Positions''

Certain ''Pre-Existing Positions'' that were entered into prior to the effective date of final position limits rules would not be subject to federal limits. Both ''Pre-Enactment Swaps,'' which are swaps entered into prior to the Dodd-Frank Act whose terms have not expired, and ''Transition Period Swaps,'' which are swaps entered into between July 22, 2010 and 60 days after the publication of final position limits rules, would not be subject to federal limits. All other ''Pre-Existing Positions'' that are acquired in good faith prior to the effective date of final position limits rules would be subject to federal limits during, but not outside, the spot month.

6. Substantive Standards for Exemptions From Federal Limits

a. Bona Fide Hedge Recognition

Hedging transactions or positions may continue to exceed federal limits if they satisfy all three elements of the ''general'' bona fide hedging definition: (1) The hedge represents a substitute for transactions or positions made at a later time in a physical marketing channel (''temporary substitute test''); (2) the hedge is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise (''economically appropriate test''); and (3) the hedge arises from the potential change in value of actual or anticipated assets, liabilities, or services (''change in value requirement''). The Commission proposes several changes to the existing bona fide hedging definition, including those described immediately below, and also proposes a streamlined process for granting bona fide hedge recognitions, described further below.

First, for referenced contracts based on the 25 core referenced futures contracts listed in § 150.2(d), the Commission would expand the current list of enumerated bona fide hedges to cover additional hedging practices included in the 2016 Reproposal, as well as hedges of anticipated merchandising.[23] Persons who hold a bona fide hedging transaction or position in accordance with § 150.1 in referenced contracts based on one of the 25 core referenced futures contracts and whose hedging practice is included in the list of enumerated hedges in Appendix A of part 150 would not be required to request prior approval from

[22] In addition, as explained further below, exchanges may choose to participate in the Commission's new proposed streamlined process for reviewing bona fide hedge exemption applications for purposes of federal limits.

[23] The existing definition of ''bona fide hedging transactions and positions'' enumerates the following hedging transactions: (1) Hedges of inventory and cash commodity fixed-price purchase contracts under 1.3(z)(2)(i)(A); (2) hedges of unsold anticipated production under 1.3(z)(2)(i)(B); (3) hedges of cash commodity fixed-price sales contracts under 1.3(z)(2)(ii)(A); (4) certain cross-commodity hedges under 1.3(z)(2)(ii)(B); (5) hedges of unfilled anticipated requirements under 1.3(z)(2)(ii)(C) and (6) hedges of offsetting unfixed price cash commodity sales and purchases under 1.3(z)(2)(iii). The following additional hedging practices are not enumerated in the existing regulation, but are included as enumerated hedges in the 2020 Proposal: (1) Hedges by agents; (2) hedges of anticipated royalties; (3) hedges of services; (4) offsets of commodity trade options; and (5) hedges of anticipated merchandising.

the Commission to hold such bona fide hedge position. That is, such exemptions would be self-effectuating for purposes of federal speculative position limits, so a person would only be required to request the bona fide hedge exemption from the relevant exchange for purposes of exchange-set limits. Transactions or positions that do not fit within one of the enumerated hedges could still be recognized as a bona fide hedge, provided the Commission, or an exchange subject to Commission oversight, recognizes the position as such using one of the processes described below. The Commission would be open to adopting additional enumerated hedges as it becomes more comfortable with evolving hedging practices, particularly in the energy space, and provided the practices comply with the general bona fide hedging definition.

Second, the Commission is clarifying its position on whether and when market participants may measure risk on a gross basis rather than on a net basis in order to provide market participants with greater flexibility. Instead of only being permitted to hedge on a ''net basis'' except in a narrow set of circumstances, market participants would also now be able to hedge positions on a ''gross basis'' in certain circumstances, provided that the participant has done so over time in a consistent manner and is not doing so to evade the federal limits.

Third, market participants would have additional leeway to hold bona fide hedging positions in excess of limits during the last five days of the spot period (or during the time period for the spot month if less than five days). The proposal would not include such a restriction for purposes of federal limits, and would make clear that exchanges continue to have the discretion to adopt such restrictions for purposes of exchange-set limits. The proposal would also include flexible guidance on the circumstances under which exchanges may waive any such limitation for purposes of their own limits.

Finally, the proposal would modify the ''temporary substitute test'' to require that a bona fide hedging transaction or position in a physical commodity must *always,* and not just *normally,* be connected to the production, sale, or use of a physical cash-market commodity. Therefore, a market participant would generally no longer be allowed to treat positions entered into for ''risk management purposes'' [24] as a bona fide hedge, unless the position qualifies as either (i) an offset of a pass-through swap, where the offset reduces price risk attendant to a pass-through swap executed opposite a counterparty for whom the swap qualifies as a bona fide hedge; or (ii) a ''swap offset,'' where the offset is used by a counterparty to reduce price risk attendant to a swap that qualifies as a bona fide hedge and that was previously entered into by that counterparty.

b. Spread Exemption

Transactions or positions may also continue to exceed federal limits if they qualify as a ''spread transaction,'' which includes the following common types of spreads: Calendar spreads, inter-commodity spreads, quality differential spreads, processing spreads (such as energy ''crack'' or soybean ''crush'' spreads), product or by-product differential spreads, or futures-option spreads. Spread exemptions may be granted using the process described below.

c. Financial Distress Exemption

This exemption would allow a market participant to exceed federal limits if necessary to take on the positions and associated risk of another market participant during a potential default or bankruptcy situation. This exemption would be available on a case-by-case basis, depending on the facts and circumstances involved.

d. Conditional Spot Month Limit Exemption in Natural Gas

The rules would allow market participants with cash-settled positions in natural gas to exceed the proposed 2,000 contract spot month limit, provided that the participant exits its spot month positions in the New York Mercantile Exchange (''NYMEX'') Henry Hub (NG) physically-settled natural gas contracts, and provided further that the participant's position in cash-settled natural gas contracts does not exceed 10,000 NYMEX Henry Hub Natural Gas (NG) equivalent-size natural gas contracts per DCM that lists a natural gas referenced contract. Such market participants would be permitted to hold an additional 10,000 contracts in cash-settled natural gas economically equivalent swaps.

[24] The phrase ''risk management'' as used in this instance refers to derivatives positions, typically held by a swap dealer, used to offset a swap position, such as a commodity index swap, with another entity for which that swap is not a bona fide hedge.

7. Process for Requesting Bona Fide Hedge Recognitions and Spread Exemptions

a. Self-Effectuating Enumerated Bona Fide Hedges

For referenced contracts based on any core referenced futures contract listed in § 150.2(d), bona fide hedge recognitions for positions that fall within one of the proposed enumerated hedges, including the proposed anticipatory enumerated hedges, would be self-effectuating for purposes of federal limits, provided the market participant separately applies to the relevant exchange for an exemption from exchange-set limits. Such market participants would no longer be required to file Form 204/304 with the Commission on a monthly basis to demonstrate cash-market positions justifying position limit overages. Instead, the Commission would have access to cash-market information such market participants submit as part of their application to an exchange for an exemption from exchanges-set limits, typically filed on an annual basis.

b. Bona Fide Hedges That Are Not Self-Effectuating

The Commission will consider adding to the proposed list of enumerated hedges at a later time once the Commission becomes more familiar with common commercial hedging practices for referenced contracts subject to federal position limits. Until that time, all bona fide hedging recognitions that are not enumerated in Appendix A of part 150 would be granted pursuant to one of the proposed processes for requesting a non-enumerated bona fide hedge recognition, as explained below.

A market participant seeking to exceed federal limits for a non-enumerated bona fide hedging transaction or position would be able to choose whether to apply directly to the Commission or, alternatively, apply to the applicable exchange using a new proposed streamlined process. If applying directly to the Commission, the market participant would also have to separately apply to the relevant exchange for relief from exchange-set position limits. If applying to an exchange using the new proposed streamlined process, a market participant would be able to file an application with an exchange, generally at least annually, which would be valid both for purposes of federal and exchange-set limits. Under this streamlined process, if the exchange determines to grant a non-enumerated bona fide hedge recognition for purposes of its exchange-set limits, the

exchange must notify the Commission and the applicant simultaneously. Then, 10 business days (or two business days in the case of sudden or unforeseen bona fide hedging needs) after the exchange issues such a determination, the market participant could rely on the exchange's determination for purposes of federal limits unless the Commission (and not staff) notifies the market participant otherwise. After the 10 business days expire, the bona fide hedge exemption would be valid both for purposes of federal and exchange position limits and the market participant would be able to take on a position that exceeds federal position limits. Under this streamlined process, during the 10 business day review period, any rejection of an exchange determination would require Commission action. Further, if, for purposes of federal position limits, the Commission determines to reject an application for exemption, the applicant would not be subject to any position limits violation during the period of the Commission's review nor once the Commission has issued its rejection, provided the person reduces the position within a commercially reasonable amount of time, as applicable.

Under the proposal, positions that do not fall within one of the enumerated hedges could thus still be recognized as bona fide hedges, provided the exchange deems the position to comply with the general bona fide hedging definition, and provided that the Commission does not object to such a hedge within the ten-day (or two-day, as appropriate) window.

Requests and approvals to exceed limits would generally have to be obtained in advance of taking on the position, but the proposed rule would allow market participants with sudden or unforeseen hedging needs to file a request for a bona fide hedge exemption within five business days of exceeding the limit. If the Commission rejects the application, the market participant would not be subject to a position limit violation, provided the participant reduces its position within a commercially reasonable amount of time.

Among other changes, market participants would also no longer be required to file Form 204/304 with the Commission on a monthly basis to demonstrate cash-market positions justifying position limit overages.

c. Spread Exemptions

For referenced contracts on any commodity, spread exemptions would be self-effectuating for purposes of federal limits, provided that the position: Falls within one of the categories set forth in the proposed ''spread transaction'' definition,[25] and provided further that the market participant separately applies to the applicable exchange for an exemption from exchange-set limits.

Market participants with a spread position that does not fit within the ''spread transaction'' definition with respect to any of the commodities subject to the proposed federal limits may apply directly to the Commission, and must also separately apply to the applicable exchange.

8. Comment Period and Compliance Date

The public may comment on these rules during a 90-day period that starts after this proposal has been approved by the Commission. Market participants and exchanges would be required to comply with any position limit rules finalized from herein no later than 365 days after publication in the **Federal Register**.

C. Summary of Proposed Amendments

The Commission is proposing revisions to §§ 150.1, 150.2, 150.3, 150.5, and 150.6 and to parts 1, 15, 17, 19, 40, and 140, as well as the addition of §§ 150.8, 150.9, and Appendices A–F to part 150.[26] Most noteworthy, the Commission proposes the following amendments to the foregoing rule sections, each of which, along with all other proposed changes, is discussed in greater detail in Section II of this release. The following summary is not intended to provide a substantive overview of this proposal, but rather is intended to provide a guide to the rule sections that address each topic. Please see the executive summary above for an overview of this proposal organized by topic, rather than by section number.

- The Commission preliminarily finds that federal speculative position limits are necessary for 25 core referenced futures contracts and proposes federal limits on physically-settled and linked cash-settled futures, options on futures, and ''economically equivalent'' swaps for such commodities. The 25 core referenced futures contracts would include the nine ''legacy'' agricultural contracts currently subject to federal limits and 16 additional non-legacy contracts, which would include: seven additional agricultural contracts, four energy contracts, and five metals contracts.[27] Federal spot and non-spot month limits would apply to the nine ''legacy'' agricultural contracts currently subject to federal limits,[28] and only federal spot month limits would apply to the additional 16 non-legacy contracts. Outside of the spot month, these 16 non-legacy contracts would be subject to exchange-set limits and/or accountability levels if listed on an exchange.
- Amendments to § 150.1 would add or revise several definitions for use throughout part 150, including: new definitions of the terms ''core referenced futures contract'' (pertaining to the 25 physically-settled futures contracts explicitly listed in the regulations) and ''referenced contract'' (pertaining to contracts that have certain direct and/or indirect linkages to the core referenced futures contracts, and to ''economically equivalent swaps'') to be used as shorthand to refer to contracts subject to federal limits; a ''spread transaction'' definition; and a definition of ''bona fide hedging transactions or positions'' that is broad enough to accommodate hedging practices in a variety of contract types, including hedging practices that may develop over time.
- Amendments to § 150.2 would list the 25 core referenced futures contracts which, along with any associated referenced contracts, would be subject

[25] The categories are: Calendar spreads, inter-commodity spreads, quality differential spreads, processing spreads (such as energy ''crack'' or soybean ''crush'' spreads), product or by-product differential spreads, and futures-option spreads.

[26] This 2020 Proposal does not propose to amend current § 150.4 dealing with aggregation of positions for purposes of compliance with federal position limits. Section 150.4 was amended in 2016 in a prior rulemaking. *See* Final Aggregation Rulemaking, 81 FR at 91454.

[27] The seven additional agricultural contracts that would be subject to federal spot month limits are CME Live Cattle (LC), CBOT Rough Rice (RR), ICE Cocoa (CC), ICE Coffee C (KC), ICE FCOJ–A (OJ), ICE U.S. Sugar No. 11 (SB), and ICE U.S. Sugar No. 16 (SF). The four energy contracts that would be subject to federal spot month limits are: NYMEX Light Sweet Crude Oil (CL), NYMEX New York Harbor ULSD Heating Oil (HO), NYMEX New York Harbor RBOB Gasoline (RB), and NYMEX Henry Hub Natural Gas (NG). The five metals contracts that would be subject to federal spot month limits are: COMEX Gold (GC), COMEX Silver (SI), COMEX Copper (HG), NYMEX Palladium (PA), and NYMEX Platinum (PL). As discussed below, any contracts for which the Commission is proposing federal limits only during the spot month would be subject to exchange-set limits and/or accountability outside of the spot month.

[28] The Commission currently sets and enforces speculative position limits with respect to certain enumerated agricultural products. The ''enumerated'' agricultural products refer to the list of commodities contained in the definition of ''commodity'' in CEA section 1a; 7 U.S.C. 1a. These agricultural products consist of the following nine currently traded contracts: CBOT Corn (and Mini-Corn) (C), CBOT Oats (O), CBOT Soybeans (and Mini-Soybeans) (S), CBOT Wheat (and Mini-Wheat) (W), CBOT Soybean Oil (SO), CBOT Soybean Meal (SM), MGEX HRS Wheat (MWE), CBOT KC HRW Wheat (KW), and ICE Cotton No. 2 (CT). *See* 17 CFR 150.2.

to federal limits; and specify the proposed federal spot and non-spot month limit levels. Federal spot month limit levels would be set at or below 25 percent of deliverable supply, whereas federal non-spot month limit levels would be set at 10 percent of open interest for the first 50,000 contracts of open interest, with an incremental increase of 2.5 percent of open interest thereafter.

- Amendments to § 150.3 would specify the types of positions for which exemptions from federal position limit requirements may be granted, and would set forth and/or reference the processes for requesting such exemptions, including recognitions of bona fide hedges and exemptions for spread positions, financial distress positions, certain natural gas positions held during the spot month, and pre-enactment and transition period swaps. For all contracts subject to federal limits, bona fide hedge exemptions listed in Appendix A to part 150 as an enumerated bona fide hedge would be self-effectuating for purposes of federal limits. For non-enumerated hedges, market participants must request approval in advance of taking a position that exceeds the federal position limit, except in the case of sudden or unforeseen hedging needs.
- Amendments to § 150.5 would refine the process, and establish non-exclusive methodologies, by which exchanges may set exchange-level limits and grant exemptions therefrom with respect to futures and options on futures, including separate methodologies for contracts subject to federal limits and physical commodity derivatives not subject to federal limits.[29] While the Commission will oversee compliance with federal position limits on swaps, amended § 150.5 would not apply to exchanges with respect to swaps until a later time once exchanges have access to sufficient data to monitor compliance with limits on swaps across exchanges.
- New § 150.9 would establish a streamlined process for addressing requests for bona fide hedging recognitions for purposes of federal limits, leveraging off exchange expertise and resources while affording the Commission an opportunity to intervene as-needed. This process would be used by market participants with non-enumerated positions. Under the proposed rule, market participants could provide one application for a bona fide hedge to a designated contract market or swap execution facility, as applicable, and receive approval of such request for purposes of both exchange-set limits and federal limits.
- New Appendix A to part 150 would contain enumerated hedges, some of which appear in the definition of bona fide hedging transactions and positions in current § 1.3, which would be examples of positions that would comply with the proposed bona fide hedging definition. As the enumerated hedges would be examples of bona fide hedging positions, positions that do not fall within any of the enumerated hedges could still potentially be recognized as bona fide hedging positions, provided the position otherwise complies with the proposed bona fide hedging definition and all other applicable requirements.
- Amendments to part 19 and related provisions would eliminate Form 204, enabling the Commission to leverage cash-market reporting submitted directly to the exchanges under §§ 150.5 and 150.9.

D. The Commission Preliminarily Construes CEA Section 4a(a) To Require the Commission To Make a Necessity Finding Before Establishing Position Limits for Physical Commodities Other Than Excluded Commodities

The Commission is required by *ISDA* to determine whether CEA section 4a(a)(2)(A) requires the Commission to find, before establishing a position limit, that such limit is ''necessary.'' [30] The provision states in relevant part that ''the Commission shall'' establish position limits ''as appropriate'' for contracts in physical commodities other than excluded commodities ''[i]n accordance with the standards set forth in'' the preexisting section 4a(a)(1).[31] That preexisting provision requires the Commission to establish position limits as it ''finds are necessary to diminish, eliminate, or prevent'' certain enumerated burdens on interstate commerce.[32] In the 2011 Final Rulemaking, the Commission interpreted this language as an unambiguous mandate to establish position limits without first finding that such limits are necessary, but with discretion to determine the ''appropriate'' levels for each.[33] In *ISDA,* the U.S. District Court for the District of Columbia disagreed and held that section 4a(a)(2)(A) is ambiguous as to whether the ''standards set forth in paragraph (1)'' include the requirement of an antecedent finding that a position limit is necessary.[34] The court vacated the 2011 Final Rulemaking and directed the Commission to apply its experience and expertise to resolve that ambiguity.[35] The Commission has done so and preliminarily determines that section 4a(a)(2)(A) should be interpreted to require that before establishing position limits, the Commission must determine that limits are necessary.[36] A full legal analysis is set forth *infra* at Section III.F.

The Commission preliminarily finds that position limits are necessary for the 25 core referenced futures contracts, and any associated referenced contracts. This preliminary finding is based on a combination of factors including: The particular importance of these contracts in the price discovery process for their respective underlying commodities, the fact that they require physical delivery of the underlying commodity, and, in some cases, the commodities' particular importance to the national economy and especially acute economic burdens that would arise from excessive speculation causing sudden or unreasonable fluctuations or unwarranted changes in the price of the commodities underlying these contracts.

II. Proposed Rules

A. § 150.1—Definitions

Definitions relevant to the existing position limits regime currently appear in both §§ 1.3 and 150.1 of the Commission's regulations.[37] The Commission proposes to update and supplement the definitions in § 150.1, including by moving a revised definition of ''bona fide hedging transactions and positions'' from § 1.3 into § 150.1. The proposed changes are intended, among other things, to conform the definitions to the Dodd-Frank Act amendments to the CEA.[38]

[29] Proposed § 150.5 addresses exchange-set position limits and exemptions therefrom, whereas proposed § 150.3 addresses exemptions from federal limits, and proposed § 150.9 addresses federal limits and acceptance of exchange-granted bona fide hedging recognitions for purposes of federal limits. Exchange rules typically refer to ''exemptions'' in connection with bona fide hedging and spread positions, whereas the Commission uses the nomenclature ''recognition'' with respect to bona fide hedges, and ''exemption'' with respect to spreads.

[30] *ISDA,* 887 F.Supp.2d at 259, 281.

[31] 7 U.S.C. 6a(a)(2)(A).

[32] 7 U.S.C. 6a(a)(1).

[33] 2011 Final Rulemaking, 76 FR at 71626, 71627.

[34] *ISDA,* 887 F.Supp.2d at 279–280.

[35] *Id.* at 281.

[36] *See infra* Section III.F.

[37] 17 CFR 1.3 and 150.1, respectively.

[38] In addition to the amendments described below, the Commission proposes to re-order the defined terms so that they appear in alphabetical order, rather than in a lettered list, so that terms can be more quickly located. Moving forward, any new defined terms would be inserted in alphabetical order, as recommended by the Office of the Federal Register. *See Document Drafting Handbook,* Office of the Federal Register, National Archives and Records Administration, 2–31 (Revision 5, Oct. 2,

Continued

Each proposed defined term is discussed in alphabetical order below.

1. ''Bona Fide Hedging Transactions or Positions''

a. Background

Under CEA section 4a(c)(1), position limits shall not apply to transactions or positions that are ''shown to be bona fide hedging transactions or positions, as such terms shall be defined by the Commission . . . .'' [39] The Dodd-Frank Act directed the Commission, for purposes of implementing CEA section 4a(a)(2), to adopt a definition consistent with CEA section 4a(c)(2).[40] The current definition of ''bona fide hedging transactions and positions,'' which first appeared in § 1.3 of the Commission's regulations in the 1970s,[41] is inconsistent, in certain ways described below, with the revised statutory definition in CEA section 4a(c)(2).

Accordingly, and for the reasons outlined below, the Commission proposes to remove the current bona fide hedging definition from § 1.3 and replace it with an updated bona fide hedging definition that would appear alongside all of the other position limits related definitions in proposed § 150.1.[42] This definition would be applied in determining whether a position is a bona fide hedge that may exceed the proposed federal limits set forth in § 150.2. The Commission's current bona fide hedging definition is described immediately below, followed by a discussion of the proposed new definition. This section of the release describes the substantive standards for bona fide hedges. The process for granting bona fide hedge recognitions is discussed later in this release in connection with proposed §§ 150.3 and 150.9.[43]

b. The Commission's Existing Bona Fide Hedging Definition in § 1.3

Paragraph (1) of the current bona fide hedging definition in § 1.3 contains what is currently labeled the ''general'' bona fide hedging definition, which has five key elements and requires that the position must: (1) ''normally'' represent a substitute for transactions or positions made at a later time in a physical marketing channel (''temporary substitute test''); (2) be economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise (''economically appropriate test''); (3) arise from the potential change in value of actual or anticipated assets, liabilities, or services (''change in value requirement''); (4) have a purpose to offset price risks incidental to commercial cash or spot operations (''incidental test''); and (5) be established and liquidated in an orderly manner (''orderly trading requirement'').[44]

Additionally, paragraph (2) currently sets forth a non-exclusive list of four categories of ''enumerated'' hedging transactions that are included in the general bona fide hedging definition in paragraph (1). Market participants thus need not seek recognition from the Commission of such positions as bona fide hedges prior to exceeding limits for such positions; rather, market participants must simply report any such positions on the monthly Form 204, as required by part 19 of the Commission's regulations.[45] The four existing categories of enumerated hedges are: (1) Hedges of ownership or fixed-price cash commodity purchases and hedges of unsold anticipated production; (2) hedges of fixed-price cash commodity sales and hedges of unfilled anticipated requirements; (3) hedges of offsetting unfixed-price cash commodity sales and purchases; and (4) cross-commodity hedges.[46]

Paragraph (3) of the current bona fide hedging definition states that the Commission may recognize non-enumerated bona fide hedging transactions and positions pursuant to a specific request by a market participant using the process described in § 1.47 of the Commission's regulations.[47]

c. Proposed Replacement of the Bona Fide Hedging Definition in § 1.3 With a New Bona Fide Hedging Definition in § 150.1

i. Background

The list of enumerated hedges found in paragraph (2) of the current bona fide hedging definition in § 1.3 was developed at a time when only agricultural commodities were subject to federal limits, has not been updated since 1987,[48] and is likely too narrow to reflect common commercial hedging practices, including for metal and energy contracts. Numerous market and regulatory developments have taken place since then, including, among other things, increased futures trading in the metals and energy markets, the development of the swaps markets, and the shift in trading from pits to electronic platforms. In addition, the CFMA [49] and Dodd-Frank Act introduced various regulatory reforms, including the enactment of position limits core principles.[50] The Commission is thus proposing to update its bona fide hedging definition to better conform to the current state of the law

2017) (stating, ''[i]n sections or paragraphs containing only definitions, we recommend that you do not use paragraph designations if you list the terms in alphabetical order. Begin the definition paragraph with the term that you are defining.'').

[39] 7 U.S.C. 6a(c)(1). While portions of the CEA and proposed § 150.1 respectively refer, and would refer, to the phrase ''bona fide hedging transactions or positions,'' the Commission may use the phrases ''bona fide hedging position,'' ''bona fide hedging definition,'' and ''bona fide hedge'' throughout this section of the release as shorthand to refer to the same.

[40] 7 U.S.C. 6a(c)(2).

[41] *See, e.g.,* Definition of Bona Fide Hedging and Related Reporting Requirements, 42 FR 42748 (Aug. 24, 1977). Previously, the Secretary of Agriculture, pursuant to section 404 of the Commodity Futures Trading Commission Act of 1974 (Pub. L. 93–463), promulgated a definition of bona fide hedging transactions and positions. Hedging Definition, Reports, and Conforming Amendments, 40 FR 11560 (Mar. 12, 1975). That definition, largely reflecting the statutory definition previously in effect, remained in effect until the newly-established Commission defined that term. *Id.*

[42] In a 2018 rulemaking, the Commission amended § 1.3 to replace the sub-paragraphs that had for years been identified with an alphabetic designation for each defined term with an alphabetized list. *See* Definitions, 83 FR 7979 (Feb. 23, 2018). The bona fide hedging definition, therefore, is now a paragraph, located in alphabetical order, in § 1.3, rather than in § 1.3(z). Accordingly, for purposes of clarity and ease of discussion, when discussing the Commission's current version of the bona fide hedging definition, this release will refer to the bona fide hedging definition in § 1.3.

Further, the version of § 1.3 that appears in the Code of Federal Regulations applies only to excluded commodities and is not the version of the bona fide hedging definition currently in effect. The version currently in effect, the substance of which remains as it was amended in 1987, applies to all commodities, not just to excluded commodities. *See* Revision of Federal Speculative Position Limits, 52 FR 38914 (Oct. 20, 1987). While the 2011 Final Rulemaking amended the § 1.3 bona fide hedging definition to apply only to excluded commodities, that rulemaking was vacated, as noted previously, by a September 28, 2012 order of the U.S. District Court for the District of Columbia, with the exception of the rule's amendments to 17 CFR 150.2. Although the 2011 Final Rulemaking was vacated, the 2011 version of the bona fide hedging definition in § 1.3, which applied only to excluded commodities, has not yet been formally removed from the Code of Federal Regulations. The currently-in-effect version of the Commission's bona fide hedging definition thus does not currently appear in the Code of Federal Regulations. The closest to a ''current'' version of the definition is the 2010 version of § 1.3, which, while substantively current, still includes the ''(z)'' denomination that was removed in 2018. The Commission proposes to address the need to formally remove the incorrect version of the bona fide hedging definition as part of this rulemaking.

[43] *See infra* Section II.C.2. (discussion of proposed § 150.3) and Section II.G.3. (discussion of proposed § 150.9).

[44] 17 CFR 1.3.

[45] 17 CFR part 19.

[46] 17 CFR 1.3.

[47] *Id.*

[48] *See* Revision of Federal Speculative Position Limits, 52 FR 38914 (Oct. 20, 1987).

[49] Commodity Futures Modernization Act of 2000, Public Law 106–554, 114 Stat. 2763 (Dec. 21, 2000).

[50] *See* 7 U.S.C. 7(d)(5) and 7 U.S.C. 7b–3(f)(6).

and to better reflect market developments over time.

While one option for doing so could be to expand the list of enumerated hedges to encompass a larger array of hedging strategies, the Commission does not view this alone to be a practical solution. It would be difficult to maintain a list that captures all hedging activity across commodity types, and any list would inherently fail to take into account future changes in industry practices and other developments. The Commission proposes to create a new bona fide hedging definition in proposed § 150.1 that would work in connection with limits on a variety of commodity types and accommodate changing hedging practices over time. The Commission proposes to couple this updated definition with an expanded list of enumerated hedges. While positions that fall within the proposed enumerated hedges, discussed below, would be examples of positions that comply with the bona fide hedging definition, they would certainly not be the only types of positions that could be bona fide hedges. The proposed enumerated hedges are intended to ensure that the framework proposed herein does not reduce any clarity inherent in the existing framework; the proposed enumerated hedges are in no way intended to limit the universe of hedging practices that could otherwise be recognized as bona fide.

The Commission anticipates these proposed modifications would provide a significant degree of flexibility to market participants in terms of how they hedge, and to exchanges in terms of how they evaluate transactions and positions for purposes of their position limit programs, without sacrificing any of the clarity provided by the existing bona fide hedging definition. Further, as described in detail in connection with the discussion of proposed § 150.9 later in this release, the Commission anticipates that allowing the exchanges to process applications for bona fide hedges for purposes of federal limits would be significantly more efficient than the existing processes for exchanges and the Commission.[51] The Commission discusses each element of the proposed bona fide hedging definition below, followed by a discussion of the proposed enumerated hedges. The Commission's intent with this proposal is to acknowledge to the greatest extent possible, consistent with the statutory language, existing bona fide hedging exemptions provided by exchanges.

ii. Proposed Bona Fide Hedging Definition for Physical Commodities

The Commission proposes to maintain the general elements currently found in the bona fide hedging definition in § 1.3 that conform to the revised statutory bona fide hedging definition in CEA section 4a(c)(2), and proposes to eliminate the elements that do not. In particular, the Commission proposes to include the updated versions of the temporary substitute test, economically appropriate test, and change in value requirements that are described below, and eliminate the incidental test and orderly trading requirement, which are not included in the revised statutory text. Each of these proposed changes is described below.[52]

(1) Temporary Substitute Test

The language of the temporary substitute test that appears in the Commission's existing bona fide hedging definition is inconsistent in some ways with the language of the temporary substitute test that currently appears in the statute. In particular, the bona fide hedging definition in section 4a(c)(2)(A)(i) of the CEA currently provides, among other things, that a bona fide hedging position ''represents a substitute for transactions made or to be made or positions taken or to be taken at a later time in a physical marketing channel.'' [53] The Commission's definition currently provides that a bona fide hedging position ''*normally* represent[s] a substitute for transactions to be made or positions to be taken at a later time in a physical marketing channel'' (emphasis added).[54] The Dodd-Frank Act amended the temporary substitute language that previously appeared in the statute by removing the word ''normally'' from the phrase ''normally represents a substitute for transactions made or to be made or positions taken or to be taken at a later time in a physical marketing channel. . . .'' [55] The Commission preliminarily interprets this change as reflecting Congressional direction that a bona fide hedging position in physical commodities must *always* (and not just ''normally'') be in connection with the production, sale, or use of a physical cash-market commodity.[56]

Accordingly, the Commission preliminarily interprets this change to signal that the Commission should cease to recognize ''risk management'' positions as bona fide hedges for physical commodities, unless the position satisfies the pass-through swap/swap offset requirements in section 4a(c)(2)(B) of the CEA, discussed further below.[57] In order to implement that statutory change, the Commission proposes a narrower bona fide hedging definition for physical commodities in proposed § 150.1 that does not include the word ''normally'' currently found in the temporary substitute language in paragraph (1) of the existing § 1.3 bona fide hedging definition.

The practical effect of conforming the temporary substitute test in the regulation to the amended statutory provision would be to prevent market participants from treating positions entered into for risk management purposes as bona fide hedges for contracts subject to federal limits, unless the position qualifies under the pass-through swap provision in CEA section 4a(c)(2)(B).[58] As noted above,

[51] In this rulemaking, the Commission proposes to allow qualifying exchanges to process requests for non-enumerated bona fide hedge recognitions for purposes of federal limits. *See infra* Section II.G.3. (discussion of proposed § 150.9).

[52] Bona fide hedge recognition is determined based on the particular circumstances of a position or transaction and is not conferred on the basis of the involved market participant alone. Accordingly, while a particular position may qualify as a bona fide hedge for a given market participant, another position held by that same participant may not. Similarly, if a participant holds positions that are recognized as bona fide hedges, and holds other positions that are speculative, only the speculative positions would be subject to position limits.

[53] 7 U.S.C. 6a(c)(2)(A)(i).

[54] 17 CFR 1.3.

[55] 7 U.S.C. 6a(c)(2)(A)(i).

[56] Previously, the Commission stated that, among other things, the inclusion of the word ''normally'' in connection with the pre-Dodd-Frank Act version of the temporary substitute language indicated that the bona fide hedging definition should not be construed to apply only to firms using futures to reduce their exposures to risks in the cash market, and that to qualify as a bona fide hedge, a transaction in the futures market did not necessarily need to be a temporary substitute for a later transaction in the cash market. *See* Clarification of Certain Aspects of the Hedging Definition, 52 FR 27195, 27196 (July 20, 1987). In other words, that 1987 interpretation took the view that a futures position could still qualify as a bona fide hedging position even if it was not in connection with the production, sale, or use of a physical commodity.

[57] 7 U.S.C. 6a(c)(2)(B). In connection with physical commodities, the phrase ''risk management exemption'' has historically been used by Commission staff to refer to non-enumerated bona fide hedge recognitions granted under § 1.47 to allow swap dealers and others to hold agricultural futures positions outside of the spot month in excess of federal limits in order to offset commodity index swap or related exposure, typically opposite an institutional investor for which the swap was not a bona fide hedge. As described below, due to differences in statutory language, the phrase ''risk management exemption'' often has a broader meaning in connection with excluded commodities than with physical commodities. *See infra* Section II.A.1.c.v. (discussion of proposed pass-through language).

[58] 7 U.S.C. 6a(c)(2)(B). *See infra* Section II.A.1.c.v. (discussion of proposed pass-through language). Excluded commodities, as described in further detail below, are not subject to the statutory bona fide hedging definition. Accordingly, the statutory

Continued

the Commission previously viewed positions in physical commodities, entered into for risk management purposes to offset the risk of swaps and other financial instruments and not as substitutes for transactions or positions to be taken in a physical marketing channel, as bona fide hedges. However, given the statutory change, positions that reduce the risk of such swaps and financial instruments would no longer meet the requirements for a bona fide hedging position under CEA section 4a(c)(2) and under proposed § 150.1. As discussed below, any such previously-granted risk management exemptions would generally no longer apply after the effective date of the speculative position limits proposed herein.[59] Further, retaining such exemptions for swap intermediaries, without regard to the purpose of their counterparty's swap, would be inconsistent with the statutory restrictions on pass-through swap offsets, which require that the swap position being offset qualify as a bona fide hedging position.[60] Aside from this change, the Commission is not proposing any other modifications to its existing temporary substitute test.

While the Commission preliminarily interprets the Dodd-Frank amendments to the CEA as constraining the Commission from recognizing as bona fide hedges risk management positions involving physical commodities, the Commission has in part addressed the hedging needs of persons seeking to offset the risk from swap books by proposing the pass-through swap and pass-through swap offset provisions discussed below.

The Commission observes that while ''risk management'' positions would not qualify as bona fide hedges, some other provisions in this proposal may provide flexibility for existing and prospective risk management exemption holders in a manner that comports with the statute. In particular, the Commission anticipates that the proposal to limit the applicability of federal non-spot month limits to the nine legacy agricultural contracts,[61] coupled with the proposed adjustment to non-spot limit levels based on updated open interest numbers for the nine legacy agricultural contracts currently subject to federal limits,[62] may accommodate risk management activity that remains below the proposed levels in a manner that comports with the CEA. Further, to the extent that such activity would be opposite a counterparty for whom the swap is a bona fide hedge, the Commission would encourage intermediaries to consider whether they would qualify under the bona fide hedging position definition for the proposed pass-through swap treatment, which is explicitly authorized by the CEA and discussed in greater detail below.[63] Moreover, while positions entered into for risk management purposes may no longer qualify as bona fide hedges, some may satisfy the proposed requirements for spread exemptions. Finally, consistent with existing industry practice, exchanges may continue to recognize risk management positions for contracts that are not subject to federal limits, including for excluded commodities.

(2) Economically Appropriate Test

The bona fide hedging definitions in section 4a(c)(2)(A)(ii) of the CEA and in existing § 1.3 of the Commission's regulations both provide that a bona fide hedging position must be ''economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise.'' [64] The Commission proposes to replicate this standard in the new definition in § 150.1, with one clarification: Consistent with the Commission's longstanding practice regarding what types of risk may be offset by bona fide hedging positions in excess of federal limits,[65] the Commission proposes to make explicit that the word ''risks'' refers to, and is limited to, ''price risk.'' This proposed clarification does not reflect any change in policy, as the Commission has, when defining bona fide hedging, historically focused on transactions that offset price risk.[66]

Commenters have previously requested flexibility for hedges of non-price risk.[67] However, re-interpreting ''risk'' to mean something other than ''price risk'' would make determining whether a particular position is economically appropriate to the reduction of risk too subjective to effectively evaluate. While the Commission or an exchange's staff can objectively evaluate whether a particular derivatives position is an economically appropriate hedge of a price risk arising from an underlying cash-market transaction, including by assessing the correlations between the risk and the derivatives position, it would be more difficult, if not impossible, to objectively determine whether an offset of non-price risk is economically appropriate for the underlying risk. For example, for any given non-price risk, such as political risk, there could be multiple commodities, directions, and contract months which a particular market participant may view as an economically appropriate offset for that risk, and multiple market participants might take different views on which offset is the most effective. Re-interpreting ''risk'' to mean something other than ''price risk'' would introduce an element of subjectivity that would make a federal position limit framework difficult, if not impossible, to administer.

The Commission remains open to receiving new product submissions, and should those submissions include contracts or strategies that are used to hedge something other than price risk, the Commission could at that point evaluate whether to propose regulations that would recognize hedges of risks other than price risk as bona fide hedges.

(3) Change in Value Requirement

The Commission proposes to retain the substance of the change in value requirement in existing § 1.3, with some non-substantive technical modifications, including modifications to correct a typographical error.[68] Aside

restrictions on risk management exemptions that apply to physical commodities subject to federal limits do not apply to excluded commodities.

[59] *See infra* Section II.C.2.g. (discussion of revoking existing risk management exemptions).

[60] *See* 7 U.S.C. 6a(c)(2)(B)(i). The pass-through swap offset language in the proposed bona fide hedging definition is discussed in greater detail below.

[61] *See infra* Section II.B.2.d. (discussion of non-spot month limit levels).

[62] The proposed non-spot month levels for the nine legacy agricultural contracts were calculated using a methodology that, with the exception of CBOT Oats (O), CBOT KC HRW Wheat (KW), and MGEX HRS Wheat (MWE), would result in higher levels than under existing rules and prior proposals. *See infra* Section II.B.2.d (discussion of proposed non-spot month limit levels).

[63] *See infra* Section II.A.1.c.v. (discussion of proposed pass-through language).

[64] 7 U.S.C. 6a(c)(2)(A)(ii) and 17 CFR 1.3.

[65] *See, e.g.,* 2013 Proposal, 78 FR at 75709, 75710.

[66] For example, in promulgating existing § 1.3, the Commission explained that a bona fide hedging position must, among other things, ''be economically appropriate to risk reduction, such risks must arise from operation of a commercial enterprise, and the price fluctuations of the futures contracts used in the transaction must be substantially related to fluctuations of the cash market value of the assets, liabilities or services being hedged.'' Bona Fide Hedging Transactions or Positions, 42 FR 14832, 14833 (Mar. 16, 1977). ''Value'' is generally understood to mean price times quantity. Dodd-Frank added CEA section 4a(c)(2), which copied the economically appropriate test from the Commission's definition in § 1.3. *See also* 2013 Proposal, 78 FR at 75702, 75703 (stating that the ''core of the Commission's approach to defining bona fide hedging over the years has focused on transactions that offset a recognized physical price risk'').

[67] *See, e.g.,* 2016 Reproposal, 81 FR at 96847.

[68] The Commission proposes to replace the phrase ''liabilities which a person owns,'' which appears in the statute erroneously, with ''liabilities which

from the typographical error, the proposed § 150.1 change in value requirement mirrors the Dodd-Frank Act's change in value requirement in CEA section 4a(c)(2)(A)(iii).[69]

(4) Incidental Test and Orderly Trading Requirement

While the Commission proposes to maintain the substance of the three core elements of the existing bona fide hedging definition described above, with some modifications, the Commission also proposes to eliminate two elements contained in the existing § 1.3 definition: The incidental test and orderly trading requirement that currently appear in paragraph (1)(iii) of the § 1.3 bona fide hedging definition.[70]

Notably, Congress eliminated the incidental test from the statutory bona fide hedging definition in CEA section 4a(c)(2).[71] Further, the Commission views the incidental test as redundant because the Commission is proposing to maintain the change in value requirement (value is generally understood to mean price per unit times quantity of units), and the economically appropriate test, which includes the concept of the offset of price risks in the conduct and management of (*i.e.,* incidental to) a commercial enterprise.

The Commission does not view the proposed elimination of the incidental test in the definition that appears in the regulations as a change in policy. The proposed elimination would not result in any changes to the Commission's interpretation of the bona fide hedging definition for physical commodities.

The Commission also preliminarily believes that the orderly trading requirement should be deleted from the definition in the Commission's regulations because the statutory bona fide hedging definition does not include an orderly trading requirement,[72] and because the meaning of ''orderly trading'' is unclear in the context of the over-the counter (''OTC'') swap market and in the context of permitted off-exchange transactions, such as exchange for physicals. The proposed elimination of the orderly trading requirement would also have no bearing on an exchange's ability to impose its own orderly trading requirement. Further, in proposing to eliminate the orderly trading requirement from the definition in the regulations, the Commission is not proposing any amendments or modified interpretations to any other related requirements, including to any of the anti-disruptive trading prohibitions in CEA section 4c(a)(5),[73] or to any other statutory or regulatory provisions.

Taken together, the proposed retention of the updated temporary substitute test, economically appropriate test, and change in value requirement, coupled with the proposed elimination of the incidental test and orderly trading requirement, should reduce uncertainty by eliminating provisions that do not appear in the statute, and by clarifying the language of the remaining provisions. By reducing uncertainty surrounding some parts of the bona fide hedging definition for physical commodities, the Commission anticipates that, as described in greater detail elsewhere in this release, it would be easier going forward for the Commission, exchanges, and market participants to address whether novel trading practices or strategies may qualify as bona fide hedges.

iii. Proposed Enumerated Bona Fide Hedges for Physical Commodities

Federal position limits currently only apply to referenced contracts based on nine legacy agricultural commodities, and, as mentioned above, the bona fide hedging definition in existing § 1.3 includes a list of four categories of enumerated hedges that may be exempt from federal position limits.[74] So as not to reduce any of the clarity provided by the current list of enumerated hedges, the Commission proposes to maintain the existing enumerated hedges, some with modification, and, for the reasons described below, to expand this list. Such enumerated bona fide hedges would be self-effectuating for purposes of federal limits.[75] The Commission also proposes to move the expanded list to proposed Appendix A to part 150 of the Commission's regulations. The Commission preliminarily believes that the list of enumerated hedges should appear in an appendix, rather than be included in the definition, because each enumerated hedge represents just one way, but not the only way, to satisfy the proposed bona fide hedging definition and § 150.3(a)(1).[76] In some places, as described below, the Commission proposes to modify and/or re-organize the language of the current enumerated hedges; such proposed changes are intended only to provide clarifications, and, unless indicated otherwise, are not intended to substantively modify the types of practices currently listed as enumerated hedges. In other places, however, the Commission proposes substantive changes to the existing enumerated hedges, including the elimination of the five-day rule for purposes of federal limits, while allowing exchanges to impose a five-day rule, or similar restrictions, for purposes of exchange-set limits. With the exception of risk management positions previously recognized as bona fide hedges, and assuming all regulatory requirements continue to be satisfied, bona fide hedging recognitions that are currently in effect under the Commission's existing rules, either by virtue of § 1.47 or one of the enumerated hedges currently listed in § 1.3, would be grandfathered once the rules proposed herein are adopted.

When first proposed, the Commission viewed the enumerated bona fide hedges as conforming to the general definition of bona fide hedging ''without further consideration as to the particulars of the case.'' [77] Similarly, the proposed enumerated hedges would reflect fact patterns for which the Commission has preliminarily determined, based on experience over time, that no case-by-case determination, or review of additional details, by the Commission is needed to determine that the position or transaction is a bona fide hedge. This proposal would in no way foreclose the recognition of other hedging practices as bona fide hedges.

The Commission would be open, on a case-by-case basis, to recognizing as bona fide hedges positions or transactions that may fall outside the bounds of these enumerated hedges, but that nevertheless satisfy the proposed

a person owes,'' which the Commission believes was the intended wording. The Commission interprets the word ''owns'' to be a typographical error. A person may owe on a liability, and may anticipate incurring a liability. If a person ''owns'' a liability, such as a debt instrument issued by another, then such person owns an asset. The fact that assets are included in CEA section 4a(c)(2)(A)(iii)(I) further reinforces the Commission's interpretation that the reference to ''owns'' means ''owes.'' The Commission also proposes several other non-substantive modifications in sentence structure to improve clarity.

[69] 7 U.S.C. 6a(c)(2)(A)(iii).

[70] 17 CFR 1.3.

[71] 7 U.S.C. 6a(c)(2).

[72] The orderly trading requirement has been a part of the regulatory definition of bona fide hedging since 1975; *see* Hedging Definition, Reports, and Conforming Amendments, 40 FR 11560 (Mar. 12, 1975). Prior to 1974, the orderly trading requirement was found in the statutory definition of bona fide hedging position; changes to the CEA in 1974 removed the statutory definition from CEA section 4a(3).

[73] 7 U.S.C. 6c(a)(5).

[74] 17 CFR 1.3.

[75] *See infra* Section II.C.2. (discussion of proposed § 150.3) and Section II.G.3. (discussion of proposed § 150.9).

[76] As discussed below, proposed § 150.3(a)(1) would allow a person to exceed position limits for bona fide hedging transactions or positions, as defined in proposed § 150.1.

[77] Bona Fide Hedging Transactions or Positions, 42 FR 14832 (Mar. 16, 1977).

bona fide hedging definition and section 4a(c)(2) of the CEA.[78]

The Commission does not anticipate that moving the list of enumerated hedges from the bona fide hedging definition to an appendix per se would have a substantial impact on market participants who seek clarity regarding bona fide hedges. However, the Commission is open to feedback on this point.

Positions in referenced contracts subject to position limits that meet any of the proposed enumerated hedges would, for purposes of federal limits, meet the bona fide hedging definition in CEA section 4a(c)(2)(A), as well as the Commission's proposed bona fide hedging definition in § 150.1. Any such recognitions would be self-effectuating for purposes of federal limits, provided the market participant separately requests an exemption from the applicable exchange-set limit established pursuant to proposed § 150.5(a). The proposed enumerated hedges are each described below, followed by a discussion of the proposal's treatment of the five-day rule.

(1) Hedges of Unsold Anticipated Production

This hedge is currently enumerated in paragraph (2)(i)(B) of the bona fide hedging definition in § 1.3, and is subject to the five-day rule. The Commission proposes to maintain it as an enumerated hedge, with the modification described below. This enumerated hedge would allow a market participant who anticipates production, but who has not yet produced anything, to enter into a short derivatives position in excess of limits to hedge the anticipated production.

While existing paragraph (2)(i)(B) limits this enumerated hedge to twelve-months' unsold anticipated production, the Commission proposes to remove the twelve-month limitation. The twelve-month limitation may be unsuitable in connection with additional contracts based on agricultural and energy commodities covered by this release, which may have longer growth and/or production cycles than the nine legacy agricultural commodities. Commenters have also previously recommended removing the twelve-month limitation on agricultural production, stating that it is unnecessarily short in comparison to the expected life of investment in production facilities.[79] The Commission preliminarily agrees.

(2) Hedges of Offsetting Unfixed Price Cash Commodity Sales and Purchases

This hedge is currently enumerated in paragraph (2)(iii) of the bona fide hedging definition in § 1.3 and is subject to the five-day rule. The Commission proposes to maintain it as an enumerated hedge, with one proposed modification described below. This enumerated hedge allows a market participant to use commodity derivatives in excess of limits to offset an unfixed price cash commodity purchase coupled with an unfixed price cash commodity sale.

Currently, under paragraph (2)(iii), the cash commodity must be bought and sold at unfixed prices at a basis to different delivery months, meaning the offsetting derivatives transaction would be used to reduce the risk arising from a time differential in the unfixed-price purchase and sale contracts.[80] The Commission proposes to expand this provision to also permit the cash commodity to be bought and sold at unfixed prices at a basis to different commodity derivative contracts in the same commodity, even if the commodity derivative contracts are in the same calendar month. The Commission is proposing this change to allow a commercial enterprise to enter into the described derivatives transactions to reduce the risk arising from either (or both) a location differential[81] or a time differential in unfixed-price purchase and sale contracts in the same cash commodity.

Both an unfixed-price cash commodity purchase and an offsetting unfixed-price cash commodity sale must be in hand in order to be eligible for this enumerated hedge, because having both the unfixed-price sale and purchase in hand would allow for an objective evaluation of the hedge.[82] Absent either the unfixed-price purchase or the unfixed-price sale (or absent both), it would be less clear how the transaction could be classified as a bona fide hedge, that is, a transaction that reduces price risk.[83]

This is not to say that an unfixed-price cash commodity purchase alone, or an unfixed-price cash commodity sale alone, could never be recognized as a bona fide hedge. Rather, an additional facts and circumstances analysis would be warranted in such cases.

Further, upon fixing the price of, or taking delivery on, the purchase contract, the owner of the cash commodity may hold the short derivative leg of the spread as a hedge against a fixed-price purchase or inventory. However, the long derivative leg of the spread would no longer qualify as a bona fide hedging position, since the commercial entity has fixed the price or taken delivery on the purchase contract. Similarly, if the commercial entity first fixed the price of the sales contract, the long derivative leg of the spread may be held as a hedge against a fixed-price sale, but the short derivative leg of the spread would no longer qualify as a bona fide hedging position. Commercial entities in these circumstances thus may have to consider reducing certain positions in order to comply with the regulations proposed herein.

(3) Short Hedges of Anticipated Mineral Royalties

The Commission is proposing a new acceptable practice that is not currently enumerated in § 1.3 for short hedges of anticipated mineral royalties. The Commission previously adopted a similar provision as an enumerated hedge in part 151 in response to a request from commenters.[84] The proposed provision would permit an owner of rights to a future royalty to lock in the price of anticipated mineral production by entering into a short position in excess of limits in a commodity derivative contract to offset the anticipated change in value of mineral royalty rights that are owned by that person and arise out of the production of a mineral commodity

[78] *See infra* Section II.G.3. (discussion of proposed § 150.9).

[79] *See, e.g.,* 2016 Reproposal, 81 FR at 96752.

[80] The Commission stated when it proposed this enumerated hedge, ''[i]n particular, a cotton merchant may contract to purchase and sell cotton in the cash market in relation to the futures price in different delivery months for cotton, *i.e.,* a basis purchase and a basis sale. Prior to the time when the price is fixed for each leg of such a cash position, the merchant is subject to a variation in the two futures contracts utilized for price basing. This variation can be offset by purchasing the future on which the sales were based [and] selling the future on which [the] purchases were based.'' Revision of Federal Speculative Position Limits, 51 FR 31648, 31650 (Sept. 4, 1986).

[81] In the case of reducing the risk of a location differential, and where each of the underlying transactions in separate derivative contracts may be in the same contract month, a position in a basis contract would not be subject to position limits, as discussed in connection with paragraph (3) of the proposed definition of ''referenced contract.''

[82] For example, in the case of a calendar spread, having both the unfixed-price sale and purchase in hand would set the timeframe for the calendar month spread being used as the hedge.

[83] In 2013, the Commission provided an example regarding this enumerated hedge: ''The contemplated derivative positions will offset the risk that the difference in the expected delivery prices of the two unfixed-price cash contracts in the same commodity will change between the time the hedging transaction is entered and the time of fixing of the prices on the purchase and sales cash contracts. Therefore, the contemplated derivative positions are economically appropriate to the reduction of risk.'' 2013 Proposal, 78 FR at 75715.

[84] *See* 2011 Final Rulemaking, 76 FR at 71646. As noted above, part 151 was subsequently vacated.

(*e.g.,* oil and gas).[85] The Commission preliminarily believes that this remains a common hedging practice, and that positions that satisfy the requirements of this acceptable practice would conform to the general definition of bona fide hedging without further consideration as to the particulars of the case.

The Commission proposes to limit this acceptable practice to mineral royalties; the Commission preliminarily believes that while royalties have been paid for use of land in agricultural production, the Commission has not received any evidence of a need for a bona fide hedge recognition from owners of agricultural production royalties. The Commission requests comment on whether and why such an exemption might be needed for owners of agricultural production or other royalties.

(4) Hedges of Anticipated Services

The Commission is proposing a new enumerated hedge that is not currently enumerated in the § 1.3 bona fide hedging definition for hedges of anticipated services. The Commission previously adopted a similar provision as an enumerated hedge in part 151 in response to a request from commenters.[86] This enumerated hedge would recognize as a bona fide hedge a long or short derivatives position used to hedge the anticipated change in value of receipts or payments due or expected to be due under an executed contract for services arising out of the production, manufacturing, processing, use, or transportation of the commodity underlying the commodity derivative contract.[87] The Commission preliminarily believes that this remains a common hedging practice, and that positions that satisfy the requirements of this acceptable practice would conform to the general definition of bona fide hedging without further consideration as to the particulars of the case.

(5) Cross-Commodity Hedges

Paragraph (2)(iv) of the existing § 1.3 bona fide hedge definition enumerates the offset of cash purchases, sales, or purchases and sales with a commodity derivative other than the commodity that comprised the cash position(s).[88] The Commission proposes to include this hedge in the enumerated hedges and expand its application such that cross-commodity hedges could be used to establish compliance with: Each of the proposed enumerated hedges listed in Appendix A to part 150; [89] and hedges in the proposed pass-through provisions under paragraph (2) of the proposed bona fide hedging definition discussed further below; provided, in each case, that the position satisfies each element of the relevant acceptable practice.[90]

This enumerated hedge is conditioned on the fluctuations in value of the position in the commodity derivative contract or of the underlying cash commodity being ''substantially related'' [91] to the fluctuations in value of the actual or anticipated cash position or pass-through swap. To be ''substantially related,'' the derivative and cash market position, which may be in different commodities, should have a reasonable commercial relationship.[92] For example, there is a reasonable commercial relationship between grain sorghum, used as a food grain for humans or as animal feedstock, with corn underlying a derivative. There currently is not a futures contract for grain sorghum grown in the United States listed on a U.S. DCM, so corn represents a substantially related commodity to grain sorghum in the United States.[93] In contrast, there does not appear to be a reasonable commercial relationship between a physical commodity, say copper, and a broad-based stock price index, such as the S&P 500 Index, because these commodities are not reasonable substitutes for each other in that they have very different pricing drivers. That is, the price of a physical commodity is based on supply and demand, whereas the stock price index is based on various individual stock prices for different companies.

(6) Hedges of Inventory and Cash Commodity Fixed-Price Purchase Contracts

Hedges of inventory and cash-commodity fixed-price purchase contracts are included in paragraph (2)(i)(A) of the existing § 1.3 bona fide hedge definition, and the Commission proposes to include them as an enumerated hedge with minor modifications. This proposed enumerated hedge acknowledges that a commercial enterprise is exposed to price risk (*e.g.,* that the market price of the inventory could decrease) if it has obtained inventory in the normal course of business or has entered into a fixed-price spot or forward purchase contract calling for delivery in the physical marketing channel of a cash-market commodity (or a combination of the two), and has not offset that price risk. Any such inventory, or a fixed-price purchase contract, must be on hand, as opposed to a non-fixed purchase contract or an anticipated purchase. To satisfy the requirements of this particular enumerated hedge, a bona fide hedge would be to establish a short position in a commodity derivative contract to offset such price risk. An exchange may require such short position holders to demonstrate the ability to deliver against the short

[85] A short position fixes the price of the anticipated receipts, removing exposure to change in value of the person's share of the production revenue. A person who has issued a royalty, in contrast, has, by definition, agreed to make a payment in exchange for value received or to be received (*e.g.,* the right to extract a mineral). Upon extraction of a mineral and sale at the prevailing cash market price, the issuer of a royalty remits part of the proceeds in satisfaction of the royalty agreement. The issuer of a royalty, therefore, does not have price risk arising from that royalty agreement.

[86] *See* 2011 Final Rulemaking, 76 FR at 71646. As noted above, part 151 was subsequently vacated.

[87] As the Commission previously stated, regarding a proposed hedge for services, ''crop insurance providers and other agents that provide services in the physical marketing channel could qualify for a bona fide hedge of their contracts for services arising out of the production of the commodity underlying a [commodity derivative contract].'' 2013 Proposal, 78 FR at 75716.

[88] For example, existing paragraph (2)(iv) of the bona fide hedging definition recognizes as an enumerated hedge the offset of a cash-market position in one commodity, such as soybeans, through a derivatives position in a different commodity, such as soybean oil or soybean meal.

[89] Specifically, for: (i) Hedges of unsold anticipated production, (ii) hedges of offsetting unfixed-price cash commodity sales and purchases, (iii) hedges of anticipated mineral royalties, (iv) hedges of anticipated services, (v) hedges of inventory and cash commodity fixed-price purchase contracts, (vi) hedges of cash commodity fixed-price sales contracts, (vii) hedges by agents, and (viii) offsets of commodity trade options, a cross-commodity hedge could be used to offset risks arising from a commodity other than the cash commodity underlying the commodity derivatives contract.

[90] For example, an airline that wishes to hedge the price of jet fuel may enter into a swap with a swap dealer. In order to remain flat, the swap dealer may offset that swap with a futures position, for example, in ULSD. Subsequently, the airline may also offset the swap exposure using ULSD futures. In this example, under the pass-through swap language of proposed § 150.1, the airline would be acting as a bona fide hedging swap counterparty and the swap dealer would be acting as a pass-through swap counterparty. In this example, provided each element of the enumerated hedge in paragraph (a)(5) of Appendix A, the pass-through swap provision in § 150.1, and all other regulatory requirements are satisfied, the airline and swap dealer could each exceed limits in ULSD futures to offset their respective swap exposures to jet fuel. *See infra* Section II.A.1.c.v. (discussion of proposed pass-through language).

[91] *See* proposed Appendix A to part 150.

[92] *Id.*

[93] Grain sorghum was previously listed for trading on the Kansas City Board of Trade and Chicago Mercantile Exchange, but because of liquidity issues, grain buyers continued to use the more liquid corn futures contract, which suggests that the basis risk between corn futures and cash sorghum could be successfully managed with the corn futures contract.

position in order to demonstrate a legitimate purpose for holding a position deep into the spot month.[94]

(7) Hedges of Cash Commodity Fixed-Price Sales Contracts

This hedge is enumerated in paragraphs (2)(ii)(A) and (B) of the existing § 1.3 bona fide hedge definition, and the Commission proposes to maintain it as an enumerated hedge. This enumerated hedge acknowledges that a commercial enterprise is exposed to price risk (*i.e.,* that the market price of a commodity might be higher than the price of a fixed-price sales contract for that commodity) if it has entered into a spot or forward fixed-price sales contract calling for delivery in the physical marketing channel of a cash-market commodity, and has not offset that price risk. To satisfy the requirements of this particular enumerated hedge, a bona fide hedge would be to establish a long position in a commodity derivative contract to offset such price risk.

(8) Hedges by Agents

This proposed enumerated hedge is included in paragraph (3) of the existing § 1.3 bona fide hedge definition as an example of a potential non-enumerated bona fide hedge. The Commission proposes to include this example as an enumerated hedge, with non-substantive modifications,[95] because the Commission preliminarily believes that this is a common hedging practice, and that positions which satisfy the requirements of this enumerated hedge would conform to the general definition of bona fide hedging without further consideration as to the particulars of the case. This proposed provision would allow an agent who has the responsibility to trade cash commodities on behalf of another entity for which such positions would qualify as bona fide hedging positions to hedge those cash positions on a long or short basis. For example, an agent may trade on behalf of a farmer or a producer, or a government may wish to contract with a commercial firm to manage the government's cash wheat inventory; in such circumstances, the agent or the commercial firm would not take ownership of the commodity it trades on behalf of the farmer, producer, or government, but would be an agent eligible for an exemption to hedge the risks associated with such cash positions.

(9) Offsets of Commodity Trade Options

The Commission is proposing a new enumerated hedge to recognize certain offsets of commodity trade options as a bona fide hedge. Under this proposed enumerated hedge, a commodity trade option meeting the requirements of § 32.3 [96] of the Commission's regulations [97] may be deemed a cash commodity fixed-price purchase or cash commodity fixed-price sales contract, as the case may be, provided that such option is adjusted on a futures-equivalent basis.[98] Because the Commission proposes to include hedges of cash commodity fixed-price purchase contracts and hedges of cash commodity fixed-price sales contracts as enumerated hedges, the Commission also proposes to include hedges of commodity trade options as an enumerated hedge.

(10) Hedges of Unfilled Anticipated Requirements

This proposed enumerated hedge appears in paragraph (2)(ii)(C) of the existing § 1.3 bona fide hedge definition. The Commission proposes to include it as an enumerated hedge, with modification. To satisfy the requirements of this particular enumerated hedge, a bona fide hedge would be to establish a long position in a commodity derivative contract to offset the expected price risks associated with the anticipated future purchase of the cash-market commodity underlying the commodity derivative contract. Such unfilled anticipated requirements could include requirements for processing, manufacturing, use by that person, or resale by a utility to its customers.[99] Consistent with the existing provision, for purposes of exchange-set limits, exchanges may wish to consider adopting rules providing that during the lesser of the last five days of trading (or such time period for the spot month), such positions must not exceed the person's unfilled anticipated requirements of the underlying cash commodity for that month and for the next succeeding month.[100] Any such quantity limitation may help prevent the use of long futures to source large quantities of the underlying cash commodity. The Commission preliminarily believes that the two-month limitation would allow for an amount of activity that is in line with common commercial hedging practices, without jeopardizing any statutory objectives.

Although existing paragraph (2)(ii)(C) limits this enumerated hedge to twelve-months' unfilled anticipated requirements outside of the spot period, the Commission proposes to remove the twelve-month limitation because commenters have previously stated, and the Commission preliminarily believes, that there is a commercial need to hedge unfilled anticipated requirements for a time period longer than twelve months.[101]

(11) Hedges of Anticipated Merchandising

The Commission is proposing a new enumerated hedge to recognize certain offsets of anticipated purchases or sales as a bona fide hedge. Under this proposed enumerated hedge, a merchant may establish a long or short position in

[94] For example, it would not appear to be economically appropriate to hold a short position in the spot month of a commodity derivative contract against fixed-price purchase contracts that provide for deferred delivery in comparison to the delivery period for the spot month commodity derivative contract. This is because the commodity under the cash contract would not be available for delivery on the commodity derivative contract.

[95] For example, the Commission proposes to replace the phrase ''offsetting cash commodity'' with ''contract's underlying cash commodity'' to use language that is consistent with the other proposed enumerated hedges.

[96] 17 CFR 32.3. In order to qualify for the trade option exemption, § 32.3 requires, among other things, that: (1) The offeror is either (i) an eligible contract participant, as defined in section 1a(18) of the Act, or (ii) offering or entering into the commodity trade option solely for purposes related to its business as a ''producer, processor, or commercial user of, or a merchant handling the commodity that is the subject of the'' trade option; and (2) the offeree is offered or entering into the commodity trade option solely for purposes related to its business as ''a producer, processor, or commercial user of, or a merchant handling the commodity that is the subject'' of the commodity trade option.

[97] 17 CFR 32.3.

[98] It may not be possible to compute a futures-equivalent basis for a trade option that does not have a fixed strike price. Thus, under this enumerated hedge, a market participant may not use a trade option as a basis for a bona fide hedging position until a fixed strike price reasonably may be determined. For example, a commodity trade option with a fixed strike price may be converted to a futures-equivalent basis, and, on that futures-equivalent basis, deemed a cash commodity sale contract, in the case of a short call option or long put option, or a cash commodity purchase contract, in the case of a long call option or short put option.

[99] The proposed inclusion of unfilled anticipated requirements for resale by a utility to its customers does not appear in the existing § 1.3 bona fide hedging definition. This provision is analogous to the unfilled anticipated requirements provision of existing paragraph (2)(ii)(C) of the existing bona fide hedging definition, except the commodity is not for use by the same person (that is, the utility), but rather for anticipated use by the utility's customers. This would recognize a bona fide hedging position where a utility is required or encouraged by its public utility commission to hedge.

[100] This is essentially a less-restrictive version of the five-day rule, allowing a participant to hold a position during the end of the spot period if economically appropriate, but only up to two months' worth of anticipated requirements. The two-month quantity limitation has long-appeared in existing § 1.3 as a measure to prevent the sourcing of massive quantities of the underlying in a short time period. 17 CFR 1.3.

[101] *See, e.g.,* 2016 Reproposal, 81 FR at 96751.

a commodity derivative contract to offset the anticipated change in value of the underlying commodity that the merchant anticipates purchasing or selling in the future. To safeguard against misuse, the enumerated hedge would be subject to certain conditions. First, the commodity derivative position must not exceed in quantity twelve months' of purchase or sale requirements of the same commodity that is anticipated to be merchandised. This requirement is intended to ensure that merchants are hedging their anticipated merchandising exposure to the value change of the underlying commodity, while calibrating the anticipated need within a reasonable timeframe and the limitations in physical commodity markets, such as annual production or processing capacity. Unlike in the enumerated hedge for unsold anticipated production, where the Commission is proposing to eliminate the twelve-month limitation, the Commission has preliminarily determined that a twelve-month limitation for anticipatory merchandising is suitable in connection with contracts that are based on anticipated activity on yet-to-be established cash positions due to the uncertainty of forecasting such activity and, all else being equal, the increased risk of excessive speculation on the price of a commodity the longer the time period before the actual need arises.

Second, the Commission is proposing to limit this enumerated hedge to merchants who are in the business of purchasing and selling the underlying commodity that is anticipated to be merchandised, and who can demonstrate that it is their historical practice to do so. Such demonstrated history should include a history of making and taking delivery of the underlying commodity, and a demonstration of an ability to store and move the underlying commodity. The Commission has a longstanding practice of providing exemptive relief to commercial market participants to enable physical commodity markets to continue to be well-functioning markets. The proposed anticipatory merchandising hedge requires that the person be a merchant handling the underlying commodity that is subject to the anticipatory merchandising hedge and that such merchant is entering into the anticipatory merchandising hedge solely for purposes related to its merchandising business. A merchandiser that lacks the requisite history of anticipatory merchandising activity could still potentially receive bona fide hedge recognition under the proposed non-enumerated process, so long as the merchandiser can otherwise show activities in the physical marketing channel, including, for example, arrangements to take or make delivery of the underlying commodity.

The Commission preliminarily believes that anticipated merchandising is a hedging practice commonly used by some commodity market participants, and that merchandisers play an important role in the physical supply chain. Positions which satisfy the requirements of this acceptable practice would thus conform to the general definition of bona fide hedging.

While each of the proposed enumerated hedges described above would be self-effectuating for purposes of federal limits, the Commission and the exchanges would continue to exercise close oversight over such positions to confirm that market participants' claimed exemptions are consistent with their cash-market activity. In particular, because all contracts subject to federal limits would also be subject to exchange-set limits, all traders seeking to exceed federal position limits would have to request an exemption from the relevant exchange for purposes of the exchange limit, regardless of whether the position falls within one of the enumerated hedges. In other words, enumerated bona fide hedge recognitions that are self-effectuating for purposes of federal limits would not be self-effectuating for purposes of exchange limits.

Exchanges have well-established programs for granting exemptions, including, in some cases, experience granting exemptions for anticipatory merchandising for certain traders in markets not currently subject to federal limits. As discussed in greater detail below, proposed § 150.5 [102] would ensure that such programs require, among other things, that: Exemption applications filed with an exchange include sufficient information to enable the exchange to determine, and the Commission to verify, whether the exchange may grant the exemption, including an indication of whether the position qualifies as an enumerated hedge for purposes of federal limits and a description of the applicant's activity in the underlying cash markets; and that the exchange provides the Commission with a monthly report showing the disposition of all exemption applications, including cash market information justifying the exemption. The Commission expects exchanges will be thoughtful and deliberate in granting exemptions, including anticipatory exemptions.

The Commission and the exchanges also have a variety of other tools designed to help prevent misuse of self-effectuating exemptions. For example, market participants who submit an application to an exchange as required under § 150.5 would be subject to the Commission's false statements authority that carries with it substantial penalties under both the CEA and federal criminal statutes.[103] Similarly, the Commission can use surveillance tools, special call authority, rule enforcement reviews, and other formal and informal avenues for obtaining additional information from exchanges and market participants in order to distinguish between true hedging needs and speculative trading masquerading as a bona fide hedge.

In the 2013 Proposal, the Commission previously addressed a petition for exemptive relief for 10 transactions described as bona fide hedging transactions by the Working Group of Commercial Energy Firms (which has since reconstituted itself as the ''Commercial Energy Working Group'') (''BFH Petition'').[104] In the 2013 Proposal, the Commission included examples Nos. 1, 2, 6, 7 (scenario 1), and 8 as being permitted under the proposed definition of bona fide hedging.

With respect to the rules proposed herein, the Commission has preliminarily determined that example #4 (binding, irrevocable bids or offers) and #5 (timing of hedging physical transactions) from the BFH Petition potentially fit within the proposed Appendix A paragraph (a)(11) enumerated hedge of anticipatory merchandising, so long as the transaction complies with each condition of that proposed enumerated hedge.

In addition, as discussed further below, because the Commission is also proposing to eliminate the five-day rule from the enumerated hedges to which the five-day rule currently applies, the Commission has preliminarily determined that example #9 (holding a cross-commodity hedge using a physical delivery contract into the spot month) and #10 (holding a cross-commodity hedge using a physical delivery contract to meet unfilled anticipated

[102] *See infra* Section II.D.4. (discussion of proposed § 150.5).

[103] CEA section 6(c)(2), 7 U.S.C. 9(2); CEA section 9(a)(3), 7 U.S.C. 13(a)(3); CEA section 9(a)(4), 7 U.S.C. 13(a)(4); 18 U.S.C. 1001.

[104] The Working Group BFH Petition is available at *http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/wgbfhpetition012012.pdf.*

requirements) from the BFH Petition potentially fit within the proposed Appendix A paragraph (a)(5) enumerated hedge, so long as the transaction otherwise complies with the additional conditions of all applicable enumerated hedges and other requirements.

Regarding examples #3 (unpriced physical purchase or sale commitments) and #7 (scenario 2) (use of physical delivery referenced contracts to hedge physical transactions using calendar month average pricing), while the Commission has preliminarily determined that the positions described within those examples do not fit within any of the proposed enumerated hedges, market participants seeking bona fide hedge recognition for such positions may apply for a non-enumerated recognition under proposed §§ 150.3 or 150.9, and a facts and circumstances decision would be made.[105] As included in the request for comment on this section, the Commission requests additional information on the scenarios listed above, particularly for the positions that the Commission preliminarily views as falling outside the proposed list of enumerated hedges.

iv. Elimination of a Federal Five Day Rule

Under the existing bona fide hedging definition in § 1.3, to help protect orderly trading and the integrity of the physical-delivery process, certain enumerated hedging positions in physical-delivery contracts are not recognized as bona fide hedges that may exceed limits when the position is held during the last five days of trading during the spot month. The goal of the five-day rule is to help ensure that only those participants who actually intend to make or take delivery maintain positions toward the end of the spot period.[106] When the Commission adopted the five-day rule, it believed that, as a general matter, there is little commercial need to maintain such positions in the last five days.[107] However, persons wishing to exceed position limits during the five last trading days could submit materials supporting a classification of the position as a bona fide hedge, based on the particular facts and circumstances.[108]

The Commission has viewed the five-day rule as an important way to help ensure that futures and cash-market prices converge and to prevent excessive speculation as a physical-delivery contract nears expiration, thereby protecting the integrity of the delivery process and the price discovery function of the market, and deterring or preventing types of market manipulations such as corners and squeezes. The enumerated hedges currently subject to the five-day rule are either: (i) Anticipatory in nature; or (ii) involve a situation where there is no need to make or take delivery. The Commission has historically questioned the need for such positions in excess of limits to be held into the spot period if the participant has no immediate plans and/or need to make or take delivery in the few remaining days of the spot period.[109]

While the Commission continues to believe that the justifications described above for the existing five-day rule remain valid, the Commission has preliminarily determined that for contracts subject to federal limits, the exchanges, subject to Commission oversight, are better positioned to decide whether to apply the five-day rule in connection with their own exchange-set limits, or whether to apply other tools that may be equally effective. Accordingly, consistent with this proposal's focus on leveraging existing exchange practices and expertise when appropriate, the Commission proposes to eliminate the five-day rule from the enumerated hedges to which the five-day rule currently applies, and instead to afford exchanges with the discretion to apply, and when appropriate, waive the five-day rule (or similar restrictions) for purposes of their own limits.

Allowing for such discretion will afford exchanges flexibility to quickly impose, modify, or waive any such limitation as circumstances dictate. While a strict five day rule may be inappropriate in certain circumstances, including when applied to energy contracts that typically have a shorter spot period than agricultural contracts,[110] the flexible approach allowed for herein may allow for the development and implementation of additional solutions other than a five-day rule that protect convergence while minimizing the impact on market participants. The proposed approach would allow exchanges to design and tailor a variety of limitations to protect convergence during the spot period. For example, in certain circumstances, a smaller quantity restriction, rather than a complete restriction on holding positions in excess of limits during the spot period, may be effective at protecting convergence. Similarly, exchanges currently utilize other tools to achieve similar policy goals, such as by requiring market participants to ''step down'' the levels of their exemptions as they approach the spot period, or by establishing exchange-set speculative position limits that include a similar step down feature. As proposed § 150.5(a) would require that any exchange-set limits for contracts subject to federal limits must be less than or equal to the federal limit, any exchange application of the five day rule, or a similar restriction, would have the same effect as if administered by the Commission for purposes of federal speculative position limits.

The Commission expects that exchanges would closely scrutinize any participant who requests a recognition during the last five days of the spot period or in the time period for the spot month.

To assist exchanges that wish to establish a five-day rule, or a similar provision, the Commission proposes guidance in paragraph (b) of Appendix B that would set forth circumstances when a position held during the spot period may still qualify as a bona fide hedge. The guidance would provide that a position held during the spot period may still qualify as a bona fide hedging position, provided that, among other things: (1) The position complies with the bona fide hedging definition; and (2) there is an economically appropriate need to maintain such position in excess of federal speculative position limits during the spot period, and that need relates to the purchase or sale of a cash commodity.[111]

In addition, the guidance would provide that the person wishing to exceed federal position limits during the spot period: (1) Intends to make or take delivery during that period; (2) provides materials to the exchange supporting the waiver of the five-day rule; (3)

[105] Similarly, other examples of anticipatory merchandising that have been described to the Commission in response to request for comment on proposed rulemakings on position limits (*i.e.,* the storage hedge and hedges of assets owned or anticipated to be owned) would be the type of transactions that market participants may seek through one of the proposed processes for requesting a non-enumerated bona fide hedge recognition.

[106] Paragraphs (2)(i)(B), (ii)(C), (iii), and (iv) of the existing § 1.3 bona fide hedging definition are subject to some form of the five-day rule.

[107] Definition of Bona Fide Hedging and Related Reporting Requirements, 42 FR 42748, 42750 (Aug. 24, 1977).

[108] *Id.*

[109] *See, e.g.,* 42 FR at 42749.

[110] Energy contracts typically have a three-day spot period, whereas the spot period for agricultural contracts is typically two weeks.

[111] For example, an economically appropriate need for soybeans would mean obtaining soybeans from a reasonable source (considering the marketplace) that is the least expensive, at or near the location required for the purchaser, and that such sourcing does not cause market disruptions or prices to spike.

demonstrates supporting cash-market exposure in-hand that is verified by the exchange; (4) demonstrates that, for short positions, the delivery is feasible, meaning that the person has the ability to deliver against the short position; [112] and (5) demonstrates that, for long positions, the delivery is feasible, meaning that the person has the ability to take delivery at levels that are economically appropriate.[113] This proposed guidance is intended to include a non-exclusive list of considerations for determining whether to waive a five-day rule established at the discretion of an exchange.

v. Guidance on Measuring Risk

In prior proposals involving position limits, the Commission discussed the issue of whether the Commission may recognize as bona fide both ''gross hedging'' and ''net hedging.'' [114] Such attempts reflected the Commission's longstanding preference for net hedging, which, although not stated explicitly in prior releases, has been underpinned by a concern that unfettered recognition of gross hedging could potentially allow for the cherry picking of positions in a manner that subverts the position limits rules.[115]

In an effort to clarify its current view on this issue, the Commission proposes guidance in paragraph (a) to Appendix B. The Commission is of the preliminary view that there are myriad ways in which organizations are structured and engage in commercial hedging practices, including the use of multi-line business strategies in certain industries that would be subject to federal limits for the first time under this proposal. Accordingly, the Commission does not propose a one-size-fits-all approach to the manner in which risk is measured across an organization.

The proposed guidance reflects the Commission's historical practice of recognizing positions hedged on a net basis as bona fide; [116] however, as the Commission has also previously allowed, the proposed guidance also may in certain circumstances allow for the recognition of gross hedging as bona fide, provided that: (1) The manner in which the person measures risk is consistent over time and follows a person's regular, historical practice [117] (meaning the person is not switching between net hedging and gross hedging on a selective basis simply to justify an increase in the size of his/her derivatives positions); (2) the person is not measuring risk on a gross basis to evade the limits set forth in proposed § 150.2 and/or the aggregation rules currently set forth in § 150.4; (3) the person is able to demonstrate (1) and (2) to the Commission and/or an exchange upon request; and (4) an exchange that recognizes a particular gross hedging position as a bona fide hedge pursuant to proposed § 150.9 documents the justifications for doing so and maintains records of such justifications in accordance with proposed § 150.9(d).

The Commission continues to believe that a gross hedge may be a bona fide hedge in circumstances where net cash positions do not necessarily measure total risk exposure due to differences in the timing of cash commitments, the location of stocks, and differences in grades or types of the cash commodity.[118] However, the Commission clarifies that these may not be the only circumstances in which gross hedging may be recognized as bona fide. Like the analysis of whether a particular position satisfies the proposed bona fide hedge definition, the analysis of whether gross hedging may be utilized would involve a case-by-case determination made by the Commission and/or by an exchange using its expertise and knowledge of its participants as it considers applications under § 150.9, subject to Commission review and oversight.

The Commission believes that permitting market participants with bona fide hedges to use either or both gross or net hedging will help ensure that market participants are able to hedge efficiently. Large, complex entities may have hedging needs that cannot be efficiently and effectively met with either gross or net hedging. For instance, some firms may hedge on a global basis while others may hedge by trading desk or business line. Some risks that appear offsetting may in fact need to be treated separately where a difference in delivery location or date makes net hedging of those positions inappropriate.

To prevent ''cherry-picking'' when determining whether to gross or net hedge certain risks, hedging entities should have policies and procedures setting out when gross and net hedging is appropriate. Consistent usage of appropriate gross and/or net hedging in line with such policies and procedures can demonstrate compliance with the Commission's regulations. On the other hand, usage of gross or net hedging that is inconsistent with an entity's policies or a change from gross to net hedging (or vice versa) could be an indication that an entity is seeking to evade position limits regulations.

vi. Pass-Through Provisions

As the Commission has noted above, CEA section 4a(c)(2)(B) [119] further contemplates bona fide hedges that by themselves do not meet the criteria of CEA section 4a(c)(2)(A), but that are executed by a pass-through swap counterparty opposite a bona fide hedging swap counterparty, or used by a bona fide hedging swap counterparty to offset its swap exposure that does satisfy CEA section 4a(c)(2)(A).[120] The

[112] That is, the person has inventory on-hand in a deliverable location and in a condition in which the commodity can be used upon delivery.

[113] That is, the delivery comports with the person's demonstrated need for the commodity, and the contract is the cheapest source for that commodity.

[114] *Id.* at 96747.

[115] For example, using gross hedging, a market participant could potentially point to a large long cash position as justification for a bona fide hedge, even though the participant, or an entity with which the participant is required to aggregate, has an equally large short cash position that would result in the participant having no net price risk to hedge as the participant had no price risk exposure to the commodity prior to establishing such derivative position. Instead, the participant created price risk exposure to the commodity by establishing the derivative position.

[116] *See* 2016 Reproposal, 81 FR at 96747 (stating that gross hedging was economically appropriate in circumstances where ''net cash positions do not necessarily measure total risk exposure due to differences in the timing of cash commitments, the location of stocks, and differences in grades or the types of cash commodity.'') *See also* Bona Fide Hedging Transactions or Positions, 42 FR at 14832, 14834 (Mar. 16, 1977) and Definition of Bona Fide Hedging and Related Reporting Requirements, 42 FR 42748, 42750 (Aug. 24, 1977).

[117] This proposed guidance on measuring risk is consistent in many ways with the manner in which the exchanges require their participants to measure and report risk, which is consistent with the Commission's requirements with respect to the reporting of risk. For example, under § 17.00(d), futures commission merchants (''FCMs''), clearing members, and foreign brokers are required to report certain reportable net positions, while under § 17.00(e), such entities may report gross positions in certain circumstances, including if the positions are reported to an exchange or the clearinghouse on a gross basis. 17 CFR 17.00. The Commission's understanding is that certain exchanges generally prefer, but do not require, their participants to report positions on a net basis. For those participants that elect to report positions on a gross basis, such exchanges require such participants to continue reporting that way, particularly through the spot period. The Commission preliminarily believes that such consistency is a strong indicator that the participant is not measuring risk on a gross basis simply to evade regulatory requirements.

[118] *See, e.g.,* Bona Fide Hedging Transactions or Positions, 42 FR at 14834.

[119] 7 U.S.C. 6a(c)(2)(B).

[120] CEA section 4a(c)(2)(B)(i) recognizes as a bona fide hedging position a position that reduces risk attendant to a position resulting from a swap that was executed opposite a counterparty for which the transaction would qualify as a bona fide hedging transaction pursuant to 4a(c)(2)(A). 7 U.S.C. 6a(c)(2)(B)(i). CEA section 4a(c)(2)(B)(ii) further recognizes as bona fide positions that reduce risks attendant to a position resulting from a swap that meets the requirements of 4a(c)(2)(A). 7 U.S.C. 6a(c)(2)(B)(ii).

Commission preliminarily believes that, in affording bona fide hedging recognition to positions used to offset exposure opposite a bona fide hedging swap counterparty, Congress in CEA section 4a(c)(2)(B) intended: (1) To encourage the provision of liquidity to commercial entities that are hedging physical commodity price risk in a manner consistent with the bona fide hedging definition; but also (2) to prohibit risk management positions that are not opposite a bona fide hedging swap counterparty from being recognized as bona fide hedges.[121]

The Commission proposes to implement this pass-through swap language in paragraph (2) of the bona fide hedging definition for physical commodities in proposed § 150.1. Each component of the proposed pass-through swap provision is described in turn below.

Proposed paragraph (2)(i) of the bona fide hedging definition would address a situation where a particular swap qualifies as a bona fide hedge by satisfying the temporary substitute test, economically appropriate test, and change in value requirement under proposed paragraph (1) for one of the counterparties (the ''bona fide hedging swap counterparty''), but not for the other counterparty, and where those bona fides ''pass through'' from the bona fide hedging swap counterparty to the other counterparty (the ''pass-through swap counterparty''). The pass-through swap counterparty could be an entity such as a swap dealer, for example, that provides liquidity to the bona fide hedging swap counterparty.

Under the proposed rule, the pass-through of the bona fides from the bona fide hedging swap counterparty to the pass-through swap counterparty would be contingent on: (1) The pass-through swap counterparty's ability to demonstrate that the pass-through swap is a bona fide hedge upon request from the Commission and/or from an exchange; [122] and (2) the pass-through swap counterparty entering into a futures, option on a futures, or swap position in the same physical commodity as the pass-through swap to offset and reduce the price risk attendant to the pass-through swap.

If the two conditions above are satisfied, then the bona fides of the bona fide hedging swap counterparty ''pass through'' to the pass-through swap counterparty for purposes of recognizing as a bona fide hedge any futures, options on futures, or swap position entered into by the pass-through swap counterparty to offset the pass-through swap (*i.e.* to offset the swap opposite the bona fide hedging swap counterparty). The pass-through swap counterparty could thus exceed federal limits for the bona fide hedge swap opposite the bona fide hedging swap counterparty and for any offsetting futures, options on futures, or swap position in the same physical commodity, even though any such position on its own would not qualify as a bona fide hedge for the pass-through swap counterparty under proposed paragraph (1).

Proposed paragraph (2)(ii) of the bona fide hedging definition would address a situation where a participant who qualifies as a bona fide hedging swap counterparty (*i.e.,* a counterparty with a position in a previously-entered into swap that qualified, at the time the swap was entered into, as a bona fide hedge under paragraph (1)) seeks, at some later time, to offset that bona fide hedge swap position using futures, options on futures, or swaps in excess of limits. Such step might be taken, for example, to respond to a change in the bona fide hedging swap counterparty's risk exposure in the underlying commodity.[123] Proposed paragraph (2)(ii) would allow such a bona fide hedging swap counterparty to use futures, options on futures, or swaps in excess of federal limits to offset the price risk of the previously-entered into swap, even though the offsetting position itself does not qualify for that participant as a bona fide hedge under paragraph (1).

The proposed pass-through exemption under paragraph (2) would only apply to the pass-through swap counterparty's offset of the bona fide hedging swap, and/or to the bona fide hedging swap counterparty's offset of its bona fide hedging swap. Any further offsets would not be eligible for a pass-through exemption under (2) unless the offsets themselves meet the bona fide hedging definition. For instance, if Producer A enters into an OTC swap with Swap Dealer B, and the OTC swap qualifies as a bona fide hedge for Producer A, then Swap Dealer B could be eligible for a pass-through exemption to offset that swap in the futures market. However, if Swap Dealer B offsets its swap opposite Producer A using an OTC swap with Swap Dealer C, Swap Dealer C would not be eligible for a pass-through exemption.

As discussed more fully above, the pass-through swap provision may help mitigate some of the potential impact resulting from the removal of the ''risk management'' exemptions that are currently in effect.[124]

2. ''Commodity Derivative Contract''

The Commission proposes to create the defined term ''commodity derivative contract'' for use throughout part 150 of the Commission's regulations as shorthand for any futures contract, option on a futures contract, or swap in a commodity (other than a security futures product as defined in CEA section 1a(45)).

3. ''Core Referenced Futures Contract''

The Commission proposes to provide a list of 25 futures contracts in proposed § 150.2(d) to which proposed position limit rules would apply. The Commission proposes the term ''core referenced futures contract'' as a short-hand phrase to denote such contracts.[125] As per the ''referenced contract'' definition described below, position limits would also apply to any contract that is directly/indirectly linked to, or that has certain pricing relationships with, a core referenced futures contract.

4. ''Economically Equivalent Swap''

CEA section 4a(a)(5) requires that when the Commission imposes limits on futures and options on futures pursuant to CEA section 4a(a)(2), the Commission also establish limits simultaneously for ''economically equivalent'' swaps ''as appropriate.'' [126]

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[121] As described above, the Commission has preliminarily interpreted the revised statutory temporary substitute test as limiting its authority to recognize risk management positions as bona fide hedges unless the position is used to offset exposure opposite a bona fide hedging swap counterparty.

[122] While proposed paragraph (2)(i) of the bona fide hedging definition in § 150.1 would require the pass-through swap counterparty to be able to demonstrate the bona fides of the pass-through swap upon request, the proposed rule would not prescribe the manner by which the pass-through swap counterparty obtains the information needed to support such a demonstration. The pass-through swap counterparty could base such a demonstration on a representation made by the bona fide hedging swap counterparty, and such determination may be made at the time when the parties enter into the swap, or at some later point. For the bona fides to pass-through as described above, the swap position need only qualify as a bona fide hedging position at the time the swap was entered into.

[123] Examples of a change in the bona fide hedging swap counterparty's cash market price risk could include a change in the amount of the commodity that the hedger will be able to deliver due to drought, or conversely, higher than expected yield due to growing conditions.

[124] *See supra* Section II.A.1.c.ii.(1) (discussion of the temporary substitute test).

[125] The selection of the proposed core referenced futures contracts is explained below in the discussion of proposed § 150.2.

[126] CEA section 4a(a)(5); 7 U.S.C. 6a(a)(5). In addition, CEA section 4a(a)(4) separately authorizes, but does not require, the Commission to impose federal limits on swaps that meet certain statutory criteria qualifying them as ''significant price discovery function'' swaps. 7 U.S.C. 6a(a)(4). The Commission reiterates, for the avoidance of

As the statute does not define the term ''economically equivalent,'' the Commission must apply its expertise in construing such term, and, as discussed further below, must do so consistent with the policy goals articulated by Congress, including in CEA sections 4a(a)(2)(C) and 4a(a)(3).

Under the Commission's proposed definition of an ''economically equivalent swap,'' a swap on any referenced contract (including core referenced futures contracts), except for natural gas referenced contracts, would qualify as ''economically equivalent'' with respect to that referenced contract so long as the swap shares identical ''material'' contractual specifications, terms, and conditions with the referenced contract, disregarding any differences with respect to: (i) Lot size or notional amount, (ii) delivery dates diverging by less than one calendar day (if the swap and referenced contract are physically-settled), or (iii) post-trade risk management arrangements.[127] For reasons described further below, natural gas swaps would qualify as economically equivalent with respect to a particular referenced contract under the same circumstances, except that physically-settled swaps with delivery dates diverging by less than *two* calendar days, rather than one calendar day, could qualify as economically equivalent.

In promulgating the position limits framework, Congress instructed the Commission to consider several factors: First, CEA section 4a(a)(3) requires the Commission when establishing federal limits, to the maximum extent practicable, in its discretion, to (i) diminish, eliminate, or prevent excessive speculation; (ii) deter and prevent market manipulation, squeezes, and corners; (iii) ensure sufficient market liquidity for bona fide hedgers; and (iv) ensure that the price discovery function of the underlying market is not disrupted. Second, CEA section 4a(a)(2)(C) requires the Commission to strive to ensure that any limits imposed by the Commission will not cause price discovery in a commodity subject to federal limits to shift to trading on a foreign exchange.

Accordingly, any definition of ''economically equivalent swap'' must consider these statutory objectives. The Commission also recognizes that physical commodity swaps are largely bilaterally negotiated, traded off-exchange (*i.e.,* OTC), and potentially include customized (*i.e.,* ''bespoke'') terms, while futures contracts are exchange traded with standardized terms. As explained further below, due to these differences between swaps and exchange-traded futures and options, the Commission has preliminarily determined that Congress's underlying policy goals in CEA section 4a(a)(2)(C) and (3) are best achieved by proposing a narrow definition of ''economically equivalent swaps,'' compared to the broader definition of ''referenced contract'' the Commission is proposing to apply to look-alike futures and related options.[128]

The Commission's proposed ''referenced contract'' definition in § 150.1 would include ''economically equivalent swaps,'' meaning any economically equivalent swap would be subject to federal limits, and thus would be required to be added to, and could be netted against, as applicable, other referenced contracts in the same commodity for the purpose of determining one's aggregate positions for federal position limit levels.[129] Any swap that is not deemed economically equivalent would not be a referenced contract, and thus could not be netted with referenced contracts nor would be required to be aggregated with any referenced contract for federal position limits purposes. The proposed definition is based on a number of considerations.

First, the proposed definition would support the statutory objectives in CEA section 4a(a)(3)(i) and (ii) by helping to prevent excessive speculation and market manipulation, including corners and squeezes, by: (1) Focusing on swaps that are the most economically equivalent in every significant way to futures or options on futures for which the Commission deems position limits to be necessary;[130] and (2) simultaneously limiting the ability of speculators to obtain excessive positions through netting. Any swap that meets the proposed definition would offer identical risk sensitivity to its associated referenced futures or options on futures contract with respect to the underlying commodity, and thus could be used to effect a manipulation, benefit from a manipulation, or otherwise potentially distort prices in the same or similar manner as the associated futures or options on futures contract.

Because OTC swaps are bilaterally negotiated and customizable, the Commission has preliminarily determined not to propose a more inclusive ''economically equivalent swap'' definition that would encompass additional swaps because such definition could make it easier for market participants to inappropriately net down against their core referenced futures contracts by allowing market participants to structure swaps that do not necessarily offer identical risk or economic exposure or sensitivity. In contrast, the Commission preliminarily believes that this is less of a concern with exchange-traded futures and related options since these instruments have standardized terms and are subject to exchange rules and oversight. As a result, the proposal would generally allow market participants to net certain positions in referenced contracts in the same commodity across economically equivalent swaps, futures, and options on futures, but the proposed economically equivalent swap definition would focus on swaps with identical material terms and conditions in order to reduce the ability of market participants to accumulate large, speculative positions in excess of federal limits by using tangentially-related (*i.e.,* non-identical) swaps to net down such positions.

Second, the proposed definition would address statutory objectives by focusing federal limits on those swaps that pose the greatest threat for facilitating corners and squeezes—that is, those swaps with similar delivery

doubt, that the definitions of ''economically equivalent'' in CEA section 4a(a)(5) and ''significant price discovery function'' in CEA section 4a(a)(4) are separate concepts and that contracts can be economically equivalent without serving a significant price discovery function. *See* 2016 Reproposal, 81 FR at 96736 (the Commission noting that certain commenters may have been confusing the two definitions).

[127] The proposed ''economically equivalent'' language is distinct from the terms ''futures equivalent,'' ''economically appropriate,'' and other similar terms used in the Commission's regulations. For the avoidance of doubt, the Commission's proposed definition of ''economically equivalent swap'' for the purposes of CEA section 4a(a)(5) does not impact the application of any such other terms as they appear in part 20 of the Commission's regulations, in the Commission's proposed bona fide hedge definition, or elsewhere.

[128] The proposed definition of ''referenced contract'' would incorporate cash-settled look-alike futures contracts and related options that are either (i) directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of that particular core referenced futures contract; or (ii) directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of the same commodity underlying that particular core referenced futures contract for delivery at the same location or locations as specified in that particular core referenced futures contract. *See infra* Section II.A.16. (definition of ''referenced contract''). The proposed definition of ''economically equivalent swap'' would be included as a type of ''referenced contract,'' but, as discussed herein, would include a relatively narrower class of swaps compared to look-alike futures and options contracts, for the reasons discussed below.

[129] *See infra* Section II.B.2.k. (discussion of netting).

[130] *See infra* Section III.F. (necessity finding).

dates and identical material economic terms to futures and options on futures subject to federal limits—while also minimizing market impact and liquidity for bona fide hedgers by not unnecessarily subjecting other swaps to the new federal framework. For example, if the Commission were to adopt an alternative definition of economically equivalent swap that encompassed a broader range of swaps by including delivery dates that diverge by one or more calendar days—perhaps by several days or weeks—a speculator with a large portfolio of swaps may be more likely to be constrained by the applicable position limits and therefore may have an incentive either to minimize its swaps activity, or move its swaps activity to foreign jurisdictions. If there were many similarly situated speculators, the market for such swaps could become less liquid, which in turn could harm liquidity for bona fide hedgers. As a result, the Commission has preliminarily determined that the proposed definition's relatively narrow scope of swaps reasonably balances the factors in CEA section 4a(a)(3)(B)(ii) and (iii) by decreasing the possibility of illiquid markets for bona fide hedgers on the one hand while, on the other hand, focusing on the prevention of market manipulation during the most sensitive period of the spot month as discussed above.

Third, the proposed definition would help prevent regulatory arbitrage and would strengthen international comity. If the Commission proposed a definition that captured a broader range of swaps, U.S.-based swaps activity could potentially migrate to other jurisdictions with a narrower definition, such as the European Union (''EU''). In this regard, the proposed definition is similar in certain ways to the EU definition for OTC contracts that are ''economically equivalent'' to commodity derivatives traded on an EU trading venue.[131] The proposed definition of economically equivalent swaps thus furthers statutory goals, including those set forth in CEA section 4a(a)(2)(C), which requires the Commission to strive to ensure that any federal position limits are ''comparable'' to foreign exchanges and will not cause ''price discovery . . . to shift to trading'' on foreign exchanges.[132] Further, market participants trading in both U.S. and EU markets should find the proposed definition to be familiar, which may help reduce compliance costs for those market participants that already have systems and personnel in place to identify and monitor such swaps.

Each element of the proposed definition, as well as the proposed exclusions from the definition, is described below.

a. Scope of Identical Material Terms

Only ''material'' contractual specifications, terms, and conditions would be relevant to the analysis of whether a particular swap would qualify as an economically equivalent swap. The proposed definition would thus not require that a swap be identical in all respects to a referenced contract in order to be deemed ''economically equivalent.'' ''Material'' specifications, terms, and conditions would be limited to those provisions that drive the economic value of a swap, including with respect to pricing and risk. Examples of ''material'' provisions would include, for example: The underlying commodity, including commodity reference price and grade differentials; maturity or termination dates; settlement type (*e.g.,* cash- versus physically-settled); and, as applicable for physically-delivered swaps, delivery specifications, including commodity quality standards or delivery locations.[133] Because settlement type would be considered to be a material ''contractual specification, term, or condition,'' a cash-settled swap could only be deemed economically equivalent to a cash-settled referenced contract, and a physically-settled swap could only be deemed economically equivalent to a physically-settled referenced contract; however, a cash-settled swap that initially did not qualify as ''economically equivalent'' due to no corresponding cash-settled referenced contract (*i.e.,* no cash-settled look-alike futures contract), could subsequently become an ''economically equivalent swap'' if a cash-settled futures contract market were to develop. In addition, a swap that either references another referenced contract, or incorporates its terms by reference, would be deemed to share identical terms with the referenced contract and therefore would qualify as an economically equivalent swap.[134] Any change in the material terms of such a swap, however, would render the swap no longer economically equivalent for position limits purposes.[135]

In contrast, the Commission generally would consider those swap contractual terms, provisions, or terminology (*e.g.,* ISDA terms and definitions) that are unique to swaps (whether standardized

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[131] *See* EU Commission Delegated Regulation (EU) 2017/591, 2017 O.J. (L 87). The applicable European regulations define an OTC derivative to be ''economically equivalent'' when it has ''identical contractual specifications, terms and conditions, excluding different lot size specifications, delivery dates diverging by less than one calendar day and different post trade risk management arrangements.'' While the Commission's proposed definition is similar, the Commission's proposed definition requires ''identical *material*'' terms rather than ''identical'' terms. Further, the Commission's proposed definition excludes different ''lot size specifications or *notional amounts*'' rather than referencing only ''lot size'' since swaps terminology usually refers to ''notional amounts'' rather than to ''lot sizes.''

Both the Commission's definition and the applicable EU regulation are intended to prevent harmful netting. *See* European Securities and Markets Authority, *Draft Regulatory Technical Standards on Methodology for Calculation and the Application of Position Limits for Commodity Derivatives Traded on Trading Venues and Economically Equivalent OTC Contracts,* ESMA/2016/668 at 10 (May 2, 2016), *available at https://www.esma.europa.eu/sites/default/files/library/2016–668_opinion_on_draft_rts_21.pdf* (''[D]rafting the [economically equivalent OTC swap] definition in too wide a fashion carries an even higher risk of enabling circumvention of position limits by creating an ability to net off positions taken in on-venue contracts against only roughly similar OTC positions.'').

The applicable EU regulator, the European Securities and Markets Authority (''ESMA''), recently released a ''consultation paper'' discussing the status of the existing EU position limits regime and specific comments received from market participants. According to ESMA, no commenter, with one exception, supported changing the definition of an economically equivalent swap (referred to as an ''economically equivalent OTC contract'' or ''EEOTC''). ESMA further noted that for some respondents, ''the mere fact that very few EEOTC contracts have been identified is no evidence that the regime is overly restrictive.'' *See* European Securities and Markets Authority, *Consultation Paper MiFID Review Report on Position Limits and Position Management Draft Technical Advice on Weekly Position Reports,* ESMA70–156–1484 at 46, Question 15 (Nov. 5, 2019), *available at https://www.esma.europa.eu/document/consultation-paper-position-limits.*

[132] 7 U.S.C. 6a(a)(2)(C).

[133] When developing its definition of an ''economically equivalent swap,'' the Commission, based on its experience, preliminarily has determined that for a swap to be ''economically equivalent'' to a futures contract, the material contractual specifications, terms, and conditions would need to be identical. In making this determination, the Commission took into account, in regards to the economics of swaps, how a swap and a corresponding futures contract or option on a futures contract react to certain market factors and movements, the pricing variables used in calculating each instrument, the sensitivities of those variables, the ability of a market participant to gain the same type of exposures, and how the exposures move to changes in market conditions.

[134] For example, a cash-settled swap that either settles to the pricing of a corresponding cash-settled referenced contract, or incorporates by reference the terms of such referenced contract, could be deemed to be economically equivalent to the referenced contract.

[135] The Commission preliminarily recognizes that the material swap terms noted above are essential to determining the pricing and risk profile for swaps. However, there may be other contractual terms that also may be important for the counterparties but not necessarily ''material'' for purposes of position limits. For example, as discussed below, certain other terms, such as clearing arrangements or governing law, may not be material for the purpose of determining economic equivalence for federal position limits, but may nonetheless affect pricing and risk or otherwise be important to the counterparties.

or bespoke) not to be material for purposes of determining whether a swap is economically equivalent to a particular referenced contract. For example, swap provisions or terms designating business day or holiday conventions, day count (*e.g.,* 360 or actual), calculation agent, dispute resolution mechanisms, choice of law, or representations and warranties are generally unique to swaps and/or otherwise not material, and therefore would not be dispositive for determining whether a swap is economically equivalent.[136]

The Commission is unable to publish a list of swaps it would deem to be economically equivalent swaps because any such determination would involve a facts and circumstances analysis, and because most commodity swaps are created bilaterally between counterparties and traded OTC. Absent a requirement that market participants identify their economically equivalent swaps to the Commission on a regular basis, the Commission preliminarily believes that market participants are best positioned to determine whether particular swaps share identical material terms with referenced contracts and would therefore qualify as ''economically equivalent'' for purposes of federal position limits. However, the Commission understands that for certain bespoke swaps it may be unclear whether the facts and circumstances would demonstrate whether the swap qualifies as ''economically equivalent'' with respect to a referenced contract.

The Commission emphasizes that under this proposal, market participants would have the discretion to make such determination as long as they make a reasonable, good faith effort in reaching their determination, and that the Commission would not bring any enforcement action for violating the Commission's speculative position limits against such market participants as long as the market participant performed the necessary due diligence and is able to provide sufficient evidence, if requested, to support its reasonable, good faith effort.[137] Because market participants would be provided with discretion in making any ''economically equivalent'' swap determination, the Commission preliminarily anticipates that this flexibility should provide a greater level of certainty to market participants in contrast to the alternative in which market participants would be required to first submit swaps to the Commission staff and wait for feedback.[138]

b. Exclusions From the Definition of ''Economically Equivalent Swap''

As noted above, the Commission's proposed definition would expressly provide that differences in lot size or notional amount, delivery dates diverging by less than one calendar day (or less than two calendar days for natural gas), or post-trade risk management arrangements would not disqualify a swap from being deemed to be ''economically equivalent'' to a particular referenced contract.

i. Delivery Dates Diverging by Less Than One Calendar Day

The proposed definition as it applies to commodities other than natural gas would encompass swaps with delivery dates that diverge by less than one calendar day from that of a referenced contract.[139] As a result, a swap with a delivery date that differs from that of a referenced contract by one calendar day or more would not be deemed to be economically equivalent under the Commission proposal, and such swaps would not be required to be added to, nor permitted to be netted against, any referenced contract when calculating one's compliance with federal position limit levels.[140] The Commission recognizes that while a penultimate contract may be significantly correlated to its corresponding spot-month contract, it does not necessarily offer identical economic or risk exposure to the spot-month contract, and depending on the underlying commodity and market conditions, a market participant may open itself up to material basis risk by moving from the spot-month contract to a penultimate contract. Accordingly, the Commission has preliminarily determined that it would not be appropriate to permit market participants to net such penultimate positions against their core referenced futures contract positions since such positions do not necessarily reflect equivalent economic or risk exposure.

ii. Post-Trade Risk Management

The Commission is specifically excluding differences in post-trade risk management arrangements, such as clearing or margin, in determining whether a swap is economically equivalent. As noted above, many commodity swaps are traded OTC and may be uncleared or cleared at a different clearing house than the corresponding referenced contract.[141] Moreover, since the core referenced futures contracts, along with futures contracts and options on futures in general, are traded on DCMs with vertically integrated clearing houses, as a practical matter, it is impossible for OTC commodity swaps, which historically have been uncleared, to share identical post-trade clearing house or other post-trade risk management arrangements with their associated core referenced futures contracts.

Therefore, if differences in post-trade risk management arrangements were sufficient to exclude a swap from economic equivalence to a core

[136] Commodity swaps, which generally are traded OTC, are less standardized compared to exchange-traded futures and therefore must include these provisions in an ISDA master agreement between counterparties. While certain provisions, for example choice of law, dispute resolution mechanisms, or the general representations made in an ISDA master agreement, may be important considerations for the counterparties, the Commission would not deem such provisions material for purposes of determining economic equivalence under the federal position limits framework for the same reason the Commission would not deem a core referenced futures contract and a look-alike referenced contract to be economically different, even though the look-alike contract may be traded on a different exchange with different contractual representations, governing law, holidays, dispute resolution processes, or other provisions unique to the exchanges. Similarly, with respect to day counts, a swap could designate a day count that is different than the day count used in a referenced contract but adjust relevant swap economic terms (*e.g.,* relevant rates or payments, fees, basis, etc.) to achieve the same economic exposure as the referenced contract. In such a case, the Commission may not find such differences to be material for purposes of determining the swap to be economically equivalent for federal position limits purposes.

[137] As noted below, the Commission reserves the authority under this proposal to determine that a particular swap or class of swaps either is or is not ''economically equivalent'' regardless of a market participant's determination. *See infra* Section II.A.4.d. (discussion of commission determination of economic equivalence). As long as the market participant made its determination, prior to such Commission determination, using reasonable, good faith efforts, the Commission would not take any enforcement action for violating the Commission's position limits regulations if the Commission's determination differs from the market participant's.

[138] As discussed under Section II.A.16. (definition of ''referenced contract''), the Commission proposes to include a list of futures and related options that qualify as referenced contracts because such contracts are standardized and published by exchanges. In contrast, since swaps are largely bilaterally negotiated and OTC traded, a swap could have multiple permutations and any published list of economically equivalent swaps would be unhelpful or incomplete.

[139] This aspect of the proposed definition would be irrelevant for cash-settled swaps since ''delivery date'' applies only to physically-settled swaps.

[140] A swap as so described that is not ''economically equivalent'' would not be subject to a federal speculative position limit under this proposal.

[141] Similar to the Commission's understanding of ''material'' terms, the Commission construes ''post-trade risk management arrangements'' to include various provisions included in standard swap agreements, including, for example: Margin or collateral requirements, including with respect to initial or variation margin; whether a swap is cleared, uncleared, or cleared at a different clearing house than the applicable referenced contract; close-out, netting, and related provisions; and different default or termination events and conditions.

referenced futures contract, then such an exclusion could otherwise render ineffective the Commission's statutory directive under CEA section 4a(a)(5) to include economically equivalent swaps within the federal position limits framework. Accordingly, the Commission has preliminarily determined that differences in post-trade risk management arrangements should not prevent a swap from qualifying as economically equivalent with an otherwise materially identical referenced contract.

iii. Lot Size or Notional Amount

The last exclusion would clarify that differences in lot size or notional amount would not prevent a swap from being deemed to be economically equivalent to its corresponding referenced contract. The Commission's use of ''lot size'' and ''notional amount'' refer to the same general concept—while futures terminology usually employs ''lot size,'' swap terminology usually employs ''notional amount.'' Accordingly, the Commission proposes to use both terms to convey the same general meaning, and in this context does not mean to suggest a substantive difference between the two terms.

c. Economically Equivalent Natural Gas Swaps

Market dynamics in natural gas are unique in several respects including, among other things, that ICE and NYMEX both list high volume contracts, whereas liquidity in other commodities tends to pool at a single DCM. As expiration approaches for natural gas contracts, volume tends to shift from the NYMEX core referenced futures contract (''NG''), which is physically settled, to an ICE contract, which is cash settled. This trend reflects certain market participants' desire for exposure to natural gas prices without having to make or take delivery.[142] NYMEX and ICE also list several ''penultimate'' cash-settled referenced contracts that use the price of the physically-settled NYMEX contract as a reference price for cash settlement on the day before trading in the physically-settled NYMEX contract terminates.[143] In order to recognize the existing natural gas markets, which include active and vibrant markets in penultimate natural gas contracts, the Commission thus proposes a slightly broader economically equivalent swap definition for natural gas so that swaps with delivery dates that diverge by less than two calendar days from an associated referenced contract could still be deemed economically equivalent and would be subject to federal limits. The Commission intends for this change to prevent and disincentivize manipulation and regulatory arbitrage and to prevent volume from shifting away from NG to penultimate natural gas contract futures and/or penultimate swap markets in order to avoid federal position limits.[144]

d. Commission Determination of Economic Equivalence

While the Commission would primarily rely on market participants to determine whether their swaps meet the proposed ''economically equivalent swap'' definition, the Commission is proposing paragraph (3) to the definition to clarify that the Commission may determine on its own initiative that any swap or class of swaps satisfies, or does not satisfy, the economically equivalent definition with respect to any referenced contract or class of referenced contracts. The Commission believes that this provision may provide the ability to offer clarity to the marketplace in cases where uncertainty exists as to whether certain swaps would qualify (or would not qualify) as ''economically equivalent,'' and therefore would be (or would not be) subject to the proposed federal position limits framework. Similarly, where market participants hold divergent views as to whether certain swaps qualify as ''economically equivalent,'' the Commission can ensure that all market participants treat OTC swaps with identical material terms similarly, and also would be able to serve as a backstop in case market participants fail to properly treat economically equivalent swaps as such. As noted above, the Commission would not take any enforcement action with respect to violating the Commission's position limits regulations if the Commission disagrees with a market participant's determination as long as the market participant is able to provide sufficient support to show that it made a reasonable, good faith effort in applying its discretion.[145]

5. ''Eligible Affiliate''

The Commission proposes to create the new defined term ''eligible affiliate,'' which would be used in proposed § 150.2(k), discussed in connection with proposed § 150.2 below. As discussed further in that section of the release, an entity that qualifies as an ''eligible affiliate'' would be permitted to voluntarily aggregate its positions, even though it is eligible for an exemption from aggregation under § 150.4(b).

6. ''Eligible Entity''

The Commission adopted a revised ''eligible entity'' definition in the 2016 Final Aggregation Rulemaking.[146] The Commission is not proposing any further amendments to this definition, but is including that revised definition in this document so that all defined terms are included. As noted above, the Commission is also proposing a non-substantive change to remove the lettering from this and other definitions that appear lettered in existing § 150.1, and to list the definitions in alphabetical order.

7. ''Entity''

The Commission proposes defining ''entity'' to mean ''a 'person' as defined in section 1a of the Act.'' [147] The term, not defined in existing § 150.1, is used throughout proposed part 150 of the Commission's regulations.

8. ''Excluded Commodity''

The phrase ''excluded commodity'' is defined in CEA section 1a(19), but is not defined or used in existing part 150 of the Commission's regulations. The

[142] In part to address historical concerns over the potential for manipulation of physically-settled natural gas contracts during the spot month in order to benefit positions in cash-settled natural gas contracts, the Commission proposes later in this release to allow for a higher ''conditional'' spot month limit in cash-settled natural gas referenced contracts under the condition that market participants seeking to utilize such conditional limit exit any positions in physically-settled natural gas referenced contracts. *See infra* Section II.C.2.e. (proposed conditional spot month limit exemption for natural gas).

[143] Such penultimate contracts include: ICE's Henry Financial Penultimate Fixed Price Futures (PHH) and options on Henry Penultimate Fixed Price (PHE), and NYMEX's Henry Hub Natural Gas Penultimate Financial Futures (NPG).

[144] As noted above, the Commission is proposing a relatively narrow ''economically equivalent swap'' definition in order to prevent market participants from inappropriately netting positions in core referenced futures contracts against swap positions further out on the curve. The Commission preliminarily acknowledges that liquidity could shift to penultimate swaps as a result but believes that, with the exception of natural gas, this concern is mitigated since certain constraints exist that militate against this occurring. First, there may be basis risk between the penultimate swap and the core referenced futures contract. Second, compared to most other contracts, the Commission believes that natural gas has a relatively liquid penultimate futures market that enables a market participant to hedge or set-off its penultimate swap position. Since the constraints described above do not necessarily apply to the natural gas futures markets, the Commission preliminarily believes that liquidity may be incentivized to shift from NG to penultimate natural gas swaps in order to avoid federal position limits in the absence of the Commission's proposed exception for natural gas in the ''economically equivalent swap'' definition.

[145] *See supra* II.A.4.a. (discussing market participants' discretion in determining whether a swap is economically equivalent).

[146] *See* 17 CFR 150.1(d).

[147] 7 U.S.C. 1a(38).

Commission proposes including a definition of ''excluded commodity'' in part 150 that references that term as defined in CEA section 1a(19).[148]

9. ''Futures-Equivalent''

This phrase is currently defined in existing § 150.1(f) and is used throughout existing part 150 of the Commission's regulations to describe the method for converting a position in an option on a futures contract to an economically equivalent amount in a futures contract. The Dodd-Frank Act amendments to CEA section 4a,[149] in part, direct the Commission to apply aggregate federal position limits to physical commodity futures contracts and to swap contracts that are economically equivalent to such physical commodity futures on which the Commission has established limits. In order to aggregate positions in futures, options on futures, and swaps, it is necessary to adjust the position sizes, since such contracts may have varying units of trading (*e.g.,* the amount of a commodity underlying a particular swap contract could be larger than the amount of a commodity underlying a core referenced futures contract). The Commission thus proposes to adjust position sizes to an equivalent position based on the size of the unit of trading of the core referenced futures contract. The phrase ''futures-equivalent'' is used for that purpose throughout the proposed rules, including in connection with the ''referenced contract'' definition in proposed § 150.1. The Commission also proposes broadening this definition to include references to the proposed term ''core referenced futures contracts.''

10. ''Independent Account Controller''

The Commission adopted a revised ''independent account controller'' definition in the 2016 Final Aggregation Rule.[150] The Commission is not proposing any further amendments to this definition, but is including that revised definition in this document so that all defined terms appear together.

11. ''Long Position''

The phrase ''long position'' is currently defined in § 150.1(g) to mean ''a long call option, a short put option or a long underlying futures contract.'' The Commission proposes to update this definition to apply to swaps and to clarify that such positions would be on a futures-equivalent basis. This provision would thus be applicable to options on futures and swaps such that a long position would also include a long futures-equivalent option on futures and a long futures-equivalent swap.

12. ''Physical Commodity''

The Commission proposes to define the term ''physical commodity'' for position limits purposes. Congress used the term ''physical commodity'' in CEA sections 4a(a)(2)(A) and 4a(a)(2)(B) to mean commodities ''other than excluded commodities as defined by the Commission.'' [151] The proposed definition of ''physical commodity'' thus would include both exempt and agricultural commodities, but not excluded commodities.

13. ''Position Accountability''

Existing § 150.5 permits position accountability in lieu of position limits in certain cases, but does not define the term ''position accountability.'' The proposed amendments to § 150.5 would allow exchanges, in some cases, to adopt position accountability levels in lieu of, or in addition to, position limits. The Commission proposes a definition of ''position accountability'' for use throughout proposed § 150.5 as discussed in greater detail in connection with proposed § 150.5 below.

14. ''Pre-Enactment Swap''

The Commission proposes to create the defined term ''pre-enactment swap'' to mean any swap entered into prior to enactment of the Dodd-Frank Act of 2010 (July 21, 2010), the terms of which have not expired as of the date of enactment of that Act. As discussed in connection with proposed § 150.3 later in this release, if acquired in good faith, such swaps would be exempt from federal speculative position limits, although such swaps could not be netted with post-effective date swaps for purposes of complying with spot month speculative position limits.

15. ''Pre-Existing Position''

The Commission proposes to create the defined term ''pre-existing position'' to reference any position in a commodity derivative contract acquired in good faith prior to the effective date of a final federal position limit rulemaking. Proposed § 150.2(g) would set forth the circumstances under which position limits would apply to such positions.

16. ''Referenced Contract''

The nine contracts currently subject to federal limits, which are all physically-settled futures, are all listed in existing § 150.2.[152] As the Commission is proposing to expand the position limits framework to cover certain cash-settled futures and options on futures contracts and certain economically equivalent swaps, the Commission proposes a new defined term, ''referenced contract,'' for use throughout proposed part 150 to refer to contracts that would be subject to federal limits.

The referenced contract definition would thus include: (1) Any core referenced futures contract listed in proposed § 150.2(d); (2) any other contract (futures or option on futures), on a futures-equivalent basis with respect to a particular core referenced futures contract, that is directly or indirectly linked to the price of a core referenced futures contract, or that is directly or indirectly linked to the price of the same commodity underlying a core referenced futures contract (for delivery at the same location(s)); and (3) any economically equivalent swap, on a futures-equivalent basis.

The proposed referenced contract definition would include look-alike futures and options on futures contracts (as well as options or economically equivalent swaps with respect to such look-alike contracts) and contracts of the same commodity but different sizes (*e.g.,* mini contracts). Positions in referenced contracts may in certain circumstances be netted with positions in other referenced contracts. However, to avoid evasion and undermining of the position limits framework, non-referenced contracts on the same commodity could not be used to net down positions in referenced contracts.[153]

a. Cash-Settled Referenced Contracts

Under these proposed provisions, federal limits would apply to all cash-settled futures and options on futures contracts on physical commodities that are linked in some manner, whether directly or indirectly, to physically-settled contracts subject to federal limits, and to any cash settled swaps that are deemed ''economically equivalent swaps'' with respect to a particular cash-settled referenced contract.[154] While the Commission

[148] 7 U.S.C. 1a(19).

[149] Under CEA sections 4a(a)(2) and 4a(a)(5), speculative position limits apply to agricultural and exempt commodity swaps that are ''economically equivalent'' to DCM futures and options on futures contracts. 7 U.S.C. 6a(a)(2) and (5).

[150] *See* 17 CFR 150.1(e).

[151] 7 U.S.C. 6a(a)(2)(A) and (B).

[152] 17 CFR 150.2.

[153] A more detailed discussion of when netting is permitted appears below. *See infra* Section II.B.2.k. (discussion of netting).

[154] For example, ICE's Henry Penultimate Fixed Price Future, which cash-settles directly to

Continued

acknowledges previous comments to the effect that cash-settled contracts are less susceptible to manipulation and thus should not be subject to federal limits, the Commission is of the view that generally speaking, linked cash-settled and physically-settled contracts form one market, and thus should be subject to federal limits. This view is informed by the Commission's experience overseeing derivatives markets, where it has observed that it is common for the same market participant to arbitrage linked cash- and physically-settled contracts, and where it has also observed instances where linked cash-settled and physically-settled contracts have been used together as part of a manipulation.[155] In the Commission's view, cash-settled contracts are generally economically equivalent to physical-delivery contracts in the same commodity. In the absence of position limits, a trader with positions in both the physically-delivered and cash-settled contracts may have increased ability and incentive to manipulate one contract to benefit positions in the other.

The proposal to include futures contracts and options on futures that are ''indirectly linked'' to the core referenced futures contract under the definition of ''referenced contract'' is intended to prevent the evasion of position limits through the creation of an economically equivalent futures contract or option on a future, as applicable, that does not directly reference the price of the core referenced futures contract. Such contracts that settle to the price of a referenced contract but not to the price of a core referenced futures contract, for example, would be indirectly linked to the core referenced futures contract.[156]

On the other hand, an outright derivative contract whose settlement price is based on an index published by a price reporting agency that surveys cash market transaction prices (even if the cash market practice is to price at a differential to a futures contract) would not be directly or indirectly linked to the core referenced futures contract. Similarly, a physical-delivery derivative contract whose settlement price was based on the same underlying commodity at a different delivery location (*e.g.,* a hypothetical physical-delivery futures contract on ultra-low sulfur diesel delivered at L.A. Harbor instead of the NYMEX ultra-low sulfur diesel futures contract delivered in New York Harbor core referenced futures contract) would not be linked, directly or indirectly, to the core referenced futures contract because the price of the physically-delivered L.A. Harbor contract would reflect the L.A. Harbor market price for ultra-low sulfur diesel.

b. Exclusions From the Referenced Contract Definition

While the proposed referenced contract definition would include linked contracts, it would also explicitly exclude certain other types of contracts. Paragraph (3) of the proposed referenced contract definition would explicitly exclude from that definition a location basis contract, a commodity index contract, a swap guarantee, or a trade option that meets the requirements of § 32.3 of this chapter.

First, failing to exclude location basis contracts from the referenced contract definition could enable speculators to net portions of the location basis contract with outright positions in one of the locations comprising the basis contract, which would permit extraordinarily large speculative positions in the outright contract.[157] For example, under the proposed rules, a large outright position in Henry Hub Natural Gas futures could not be netted down against a location basis contract that cash-settles to the difference in price between Gulf Coast Natural Gas and Henry Hub Natural Gas. Absent the proposed exclusion, a market participant could otherwise increase its exposure in the outright contract by using the location basis contract to net down, and then increase further, an outright contract position that would otherwise be restricted by position limits.[158] Further, excluding location basis contracts from the referenced contract definition may allow commercial end-users to more efficiently hedge the cost of commodities at their preferred location.

Similarly, the proposed exclusion of commodity index contracts from the referenced contract definition would help ensure that market participants could not use a position in a commodity index contract to net down an outright position that was a component of the commodity index contract. If the Commission did not exclude commodity index contracts, then speculators would be allowed to take on massive outright positions in referenced contracts, which could lead to excessive speculation.

As noted above, it is common for swap dealers to enter into commodity index contracts with participants for which the contract would not qualify as a bona fide hedging position (*e.g.,* with a pension fund). Failing to exclude commodity index contracts from the referenced contract definition could enable a swap dealer to use positions in commodity index contracts to net down offsetting outright futures positions in the components of the index. This would have the effect of subverting the statutory pass-through swap language in CEA section 4a(c)(2)(B), which is intended to foreclose the recognition of positions entered into for risk management purposes as bona fide hedges unless the swap dealer is entering into positions opposite a counterparty for which the swap position is a bona fide hedge.[159]

In order to clarify the types of contracts that would qualify as location basis contracts and commodity index contracts, and thus would be excluded from the referenced contract definition, the Commission proposes guidance in Appendix C to part 150 of the Commission's regulations. The proposed guidance would include information which would help define the parameters of the terms ''location basis contract'' and ''commodity index contract.'' To the extent a particular contract fits within the proposed guidance, such contract would not be a referenced contract, would not be subject to federal limits, and could not

NYMEX's Henry Hub Natural Gas core referenced futures contract, would be considered a referenced contract under the rules proposed herein.

[155] The Commission has previously found that traders with positions in look-alike cash-settled contracts may have an incentive to manipulate and undermine price discovery in the physical-delivery contracts to which the cash-settled contract is linked. The practice known as ''banging the close'' or ''marking the close'' is one such manipulative practice that the Commission prosecutes and that this proposal seeks to prevent.

[156] As discussed above, the Commission is proposing a definition of ''economically equivalent swap'' that is narrower than the class of futures and options on futures that would be included as referenced contracts. *See supra* Section II.A.4. (discussion of economically equivalent swaps).

[157] *See infra* Section II.B.2.k. (discussion of netting).

[158] While excluding location basis contracts from the referenced contract definition would prevent the circumstance described above, it would also mean that location basis contracts would not be subject to federal limits. The Commission would be comfortable with this outcome because location basis contracts generally demonstrate minimal volatility and are typically significantly less liquid than the core referenced futures contracts, meaning they would be more costly to try to use in a manipulation.

[159] 7 U.S.C. 6a(c)(2)(B). While excluding commodity index contracts from the referenced contract definition would prevent the potentially risky netting circumstance described above, it would also mean that commodity index contracts would not be subject to federal limits. The Commission would be comfortable with this outcome because the commodities comprising the index would themselves be subject to limits, and because commodity index contracts generally tend to exhibit low volatility since they are diversified across many different commodities.

be used to net down positions in referenced contracts.[160]

Second, swap guarantees are explicitly excluded from the proposed referenced contract definition. In connection with further defining the term ''swap'' jointly with the Securities and Exchange Commission in connection with the ''Product Definition Adopting Release,'' [161] the Commission interpreted the term ''swap'' (that is not a ''security-based swap'' or ''mixed swap'') to include a guarantee of such swap, to the extent that a counterparty to a swap position would have recourse to the guarantor in connection with the position.[162] Excluding guarantees of swaps from the definition of referenced contract should help avoid any potential confusion regarding the application of position limits to guarantees of swaps. The Commission understands that swap guarantees generally serve as insurance, and in many cases swap guarantors guarantee the performance of an affiliate in order to entice a counterparty to enter into a swap with such guarantor's affiliate. As a result, the Commission preliminarily believes that swap guarantees neither contribute to excessive speculation, market manipulation, squeezes, or corners nor were contemplated by Congress when Congress articulated its policy goals in CEA sections 4a(a)(1)–(3).[163]

Third, trade options that meet the requirements of § 32.3 would also be excluded from the proposed referenced contract definition. The Commission has traditionally exempted trade options from a number of Commission requirements because they are typically used by end-users to hedge physical risk and thus do not contribute to excessive speculation. Trade options are not subject to position limits under current regulations, and the proposed exclusion of trade options from the referenced contract definition would simply codify existing practice.[164]

c. List of Referenced Contracts

In an effort to provide clarity to market participants regarding which exchange-traded contracts are subject to federal limits, the Commission anticipates publishing, and regularly updating, a list of such contracts on its website.[165] The Commission thus proposes to publish a *CFTC Staff Workbook of Commodity Derivative Contracts under the Regulations Regarding Position Limits for Derivatives* along with this release, which would provide a non-exhaustive list of referenced contracts and may be helpful to market participants in determining categories of contracts that would fit within the referenced contract definition. As always, market participants may request clarification from the Commission.

In order to ensure that the list remains up-to-date and accurate, the Commission is proposing changes to certain provisions of part 40 of its regulations which pertain to the collection of position limits information through the filing of product terms and conditions submissions. In particular, under existing rules, including §§ 40.2, 40.3, and 40.4, DCMs and SEFs are required to comply with certain submission requirements related to the listing of certain products. Many of the required submissions must include the product's ''terms and conditions,'' which is defined in § 40.1(j) and which includes, under § 40.1(j)(1)(vii), ''Position limits, position accountability standards, and position reporting requirements.'' The Commission proposes to expand § 40.1(j)(1)(vii), which addresses futures and options on futures, to also include an indication as to whether the contract meets the definition of a referenced contract as defined in § 150.1, and, if so, the name of the core referenced futures contract on which the referenced contract is based. The Commission proposes to also expand § 40.1(j)(2)(vii), which addresses swaps, to include an indication as to whether the contract meets the definition of economically equivalent swap as defined in § 150.1 of this chapter, and, if so, the name of the referenced contract to which the swap is economically equivalent. This information would enable the Commission to maintain on its website, *www.cftc.gov*, an up-to-date list of DCM and SEF contracts subject to federal limits.

17. ''Short Position''

The Commission proposes to expand the existing definition of ''short position,'' currently defined in § 150.1(h), to include swaps and to clarify that any such positions would be measured on a futures-equivalent basis.

18. ''Speculative Position Limit''

The Commission proposes to define the term ''speculative position limit'' for use throughout part 150 of the Commission's regulations to refer to federal or exchange-set limits, net long or net short, including single month, spot month, and all-months-combined limits. This proposed definition is not intended to limit the authority of exchanges to adopt other types of limits that do not meet the ''speculative position limit definition,'' such as a limit on gross long or gross short positions, or a limit on holding or controlling delivery instruments.

19. ''Spot Month,'' ''Single Month,'' and ''All-Months''

The Commission proposes to expand the existing definition of ''spot month'' to account for the fact that the proposed limits would apply to both physically-settled and certain cash-settled contracts, to clarify that the spot month for referenced contracts would be the same period as that of the relevant core referenced futures contract, and to account for variations in spot month conventions that differ by commodity. In particular, for the ICE U.S. Sugar No. 11 (SB) core referenced futures contract, the spot month would mean the period of time beginning at the opening of trading on the second business day following the expiration of the regular option contract traded on the expiring futures contract until the contract expires. For the ICE U.S. Sugar No. 16 (SF) core referenced futures contract, the spot month would mean the period of time beginning on the third-to-last trading day of the contract month until the contract expires. For the CME Live Cattle (LC) core referenced futures contract, the spot month would mean the period of time beginning at the close of trading on the fifth business day of the contract month until the contract expires.

The Commission also proposes to eliminate the existing definitions of ''single month'' and ''all-months'' because the definitions for those terms would be built into the proposed definition of ''speculative position limits'' described above.

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[160] *See infra* Section II.B.2.k. (discussion of netting).

[161] *See generally* Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR 48207 (Aug. 13, 2012) (''Product Definitions Adopting Release'').

[162] *See id.* at 48226.

[163] To the extent that swap guarantees may lower costs for uncleared OTC swaps in particular by incentivizing counterparties to agree to the swap, excluding swap guarantees arguably may improve market liquidity, which is consistent with the CEA's statutory goals in CEA section 4a(a)(3)(B) to ensure sufficient liquidity for bona fide hedgers when establishing its position limit framework.

[164] In the trade options final rule, the Commission stated its belief that federal limits should not apply to trade options, and expressed an intention to address trade options in the context of any final rulemaking on position limits. *See* Trade Options, 81 FR at 14966, 14971 (Mar. 21, 2016).

[165] As discussed above, the Commission will provide market participants with reasonable, good-faith discretion to determine whether a swap would qualify as economically equivalent for federal position limit purposes. *See supra* Section II.A.4. (discussion of economically equivalent swaps).

20. ''Spread Transaction''

The Commission proposes to incorporate a definition for transactions normally known to the trade as ''spreads,'' which would list the types of transactions that could qualify for spread exemptions for purposes of federal position limits. The proposed list would cover common types of inter-commodity and intra-commodity spreads such as: Calendar spreads; quality differential spreads; processing spreads (such as energy ''crack'' or soybean ''crush'' spreads); product or by-product differential spreads; and futures-options spreads.[166] Separately, under proposed § 150.3(a)(2)(ii), the Commission could determine to exempt any other spread transaction that is not included in the spread transaction definition, but that the Commission has determined is consistent with CEA section 4a(a)(3)(B),[167] and exempted, pursuant to proposed § 150.3(b).

21. ''Swap'' and ''Swap Dealer''

The Commission proposes to incorporate the definitions of ''swap'' and ''swap dealer'' as they are defined in section 1a of the Act and § 1.3 of this chapter.[168]

22. ''Transition Period Swap''

The Commission proposes to create the defined term ''transition period swap'' to mean any swap entered into during the period commencing July 22, 2010 and ending 60 days after the publication of a final federal position limits rulemaking in the **Federal Register,** the terms of which have not expired as of that date. As discussed in connection with proposed § 150.3 later in this release, if acquired in good faith, such swaps would be exempt from federal speculative position limits, although such swaps could not be netted with post-effective date swaps for purposes of complying with spot month speculative position limits.

Finally, the Commission proposes to eliminate existing § 150.1(i), which includes a chart specifying the ''first delivery month of the crop year'' for certain commodities. The crop year definition had been pertinent for purposes of the spread exemption to the individual month limit in current § 150.3(a)(3), which limits spreads to those between individual months in the same crop year and to a level no more than that of the all-months limit. This provision was pertinent at a time when the single month and all months combined limits were different. Now that the current and proposed single month and all months combined limits are the same, and now that the Commission is proposing a new process for granting spread exemptions in § 150.3, this provision is no longer needed.

23. Request for Comment

The Commission requests comment on all aspects of the proposed amendments and additions to the definitions in § 150.1. The Commission also invites comments on the following:

(1) Should the Commission include the enumerated hedges in regulations, rather than in an appendix of acceptable practices? Why or why not?

(2) Should the Commission list any additional common commercial hedging practices as enumerated hedges?

(3) The Commission proposes to eliminate the five day rule on federal position limits, instead allowing exchanges discretion on whether to apply or waive any five day rule or equivalent on their exchange position limits. The Commission believes that the five day rule can be an important way to help ensure that futures and cash market prices converge. As such, should the Commission require that exchanges apply the five day rule to some or all bona fide hedging positions and/or spread exemptions? If so, to which bona fide hedging positions? Should the exchanges retain the ability to waive such five day rule?

(4) The Commission requests comment on the nature of anticipated merchandising exemptions that have been granted by DCMs in connection with the 16 non-legacy commodities or in connection with exemptions from exchange limits in 9 legacy commodities.

(5) To what extent do the enumerated hedges proposed in this release encompass the types of positions discussed in the BFH Petition? Should additional types of positions identified in the BFH Petition, including examples nos. 3 (unpriced physical purchase and sale commitments) and 7 (scenario 2) (use of physical delivery referenced contracts to hedge physical transactions using calendar month averaging pricing), be enumerated as bona fide hedges, after notice and comment?

(6) The Commission requests comment as to whether price risk is attributable to a variety of factors, including political and weather risk, and could therefore allow hedging political, weather, or other risks, or whether price risk is something narrower in the application of bona fide hedging.

(7) While an ''economically equivalent swap'' qualifies as a referenced contract under paragraph (2) of the ''referenced contract'' definition, paragraph (1) of the ''referenced contract'' definition applies a broader test to determine whether futures contracts or options on a futures contract would qualify as a referenced contract. Instead of a separate definition for ''economically equivalent swaps,'' should the same test (*e.g.,* paragraph (1) of the ''referenced contract'' definition) that applies to futures and options on futures for determining status as ''referenced contracts'' also apply to determine whether a swap is an ''economically equivalent swap,'' and therefore a ''referenced contract''? Why or why not?

(8) The Commission is proposing to define ''economically equivalent swap'' in a manner that is generally consistent with the EU's definition, with the exception that a swap must have ''identical *material*'' terms, disregarding differences in lot size or notional amount, delivery dates diverging by less than one calendar day (or for natural gas, by less than two calendar days), or post-trade risk management arrangements. Is this approach either too narrow or too broad? Why or why not?

(9) The Commission requests comment how a market participant subject to both the CFTC's and EU's position limits regimes expects to comply with both regimes for contracts subject to both regimes.

(10) With respect to economically equivalent swaps, the Commission proposes an exception that would capture penultimate swaps only for natural gas contracts, including

[166] For example, trading activity in many commodity derivative markets is concentrated in the nearby contract month, but a hedger may need to offset risk in deferred months where derivative trading activity may be less active. A calendar spread trader could provide liquidity without exposing himself or herself to the price risk inherent in an outright position in a deferred month. Processing spreads can serve a similar function. For example, a soybean processor may seek to hedge his or her processing costs by entering into a ''crush'' spread, *i.e.,* going long soybeans and short soybean meal and oil. A speculator could facilitate the hedger's ability to do such a transaction by entering into a ''reverse crush'' spread (*i.e.,* going short soybeans and long soybean meal and oil). Quality differential spreads, and product or by-product differential spreads, may serve similar liquidity-enhancing functions when spreading a position in an actively traded commodity derivatives market such as CBOT Wheat (W) against a position in another actively traded market, such as MGEX Wheat.

[167] As noted above, CEA section 4a(a)(3)(B) provides that the Commission shall set limits ''to the maximum extent practicable, in its discretion—(i) to diminish, eliminate, or prevent excessive speculation as described under this section; (ii) to deter and prevent market manipulation, squeezes, and corners; (iii) to ensure sufficient market liquidity for bona fide hedgers; and (iv) to ensure that the price discovery function of the underlying market is not disrupted.''

[168] 7 U.S.C. 1a(47) and 1a(49); 17 CFR 1.3.

penultimate swaps on the NYMEX NG core referenced futures contract. Is this exception for such penultimate natural gas swaps appropriate, or should economically equivalent natural gas swaps be treated the same as other economically equivalent swaps? Why or why not?

(11) Should the Commission broaden the definition of ''economically equivalent swap'' to include penultimate referenced contracts for all (or at least a subset of) commodities subject to federal position limits? Why or why not?

(12) The Commission is proposing that a physically-settled swap may qualify as economically equivalent even if its delivery date diverges by less than one calendar day from its corresponding physically-settled referenced contract. Should the Commission include a similar provision for cash-settled swaps where cash-settled swaps could qualify as economically equivalent if their cash settlement price determination diverged from their corresponding cash-settled referenced contract by less than one calendar day?

(13) Under the proposed definition of ''economically equivalent swaps,'' a cash-settled swap that otherwise shares identical material terms with a physically-settled referenced contract (and vice-versa) would not be deemed to be economically equivalent due to the difference in settlement type. Should the Commission consider treating swaps that share identical material terms, other than settlement type (*i.e.,* cash-settled versus physically-settled swaps), to be economically equivalent? Why or why not?

(14) Consistent with the 2016 Reproposal, the Commission is proposing to explicitly exclude swap guarantees from the referenced contract definition.[169] Should the Commission again propose to exclude swap guarantees from the referenced contract definition? Why or why not? If the Commission does exclude swap guarantees, should such exclusion be limited to guarantees for affiliated entities only? Why or why not?

(15) Please indicate if any updates or other modifications are needed to: (1) The proposed list of referenced contracts that would appear in the *CFTC Staff Workbook of Commodity Derivative Contracts Under the Regulations Regarding Position Limits for Derivatives* posted on the Commission's website; [170] or (2) the proposed Appendix D to part 150 list of commodities deemed ''substantially the same'' for purposes of the term ''location basis contract'' as used in the proposed ''referenced contract'' definition.

(16) Should the Commission require exchanges to maintain a list of referenced contracts and location basis contracts listed on their platforms?

(17) The Commission has previously requested, and commenters have previously provided, a list of risks other than price risk for which commercial enterprises commonly need to hedge.[171] Please explain which hedges of non-price risks could be objectively and systematically verified as bona fide hedges by the Commission, and how the Commission would verify that such positions are bona fide hedges, including how the Commission would consistently and definitively quantify and assess whether any such hedges of non-price risks are bona fide hedges that comply with the proposed bona fide hedging definition.

(18) The Commission proposes to define spread transactions to include: Either a calendar spread, intercommodity spread, quality differential spread, processing spread (such as energy ''crack'' or soybean ''crush'' spreads), product or by-product differential spread, or futures-option spread. Are there other types of transactions commonly known to the trade as ''spreads'' that the Commission should include in its spread transaction definition? Please provide any examples or descriptions that will help the Commission determine whether such transactions would be consistent with CEA section 4a(a)(3)(B) and should be included in the definition of spread transaction.

(19) Should the Commission require market participants that trade economically equivalent swaps OTC, rather than on a SEF or DCM, to self-identify and report to the Commission that in their view, such swaps meet the Commission's proposed economically equivalent swap definition?

B. § 150.2—Federal Limit Levels

1. Existing § 150.2

Federal spot month, single month, and all-months-combined position limits currently apply to nine physically-settled futures contracts on agricultural commodities listed in existing § 150.2, and, on a futures-equivalent basis, to options contracts thereon. Existing federal limit levels set forth in § 150.2 [172] apply net long or net short and are as follows:

EXISTING LEGACY AGRICULTURAL CONTRACT FEDERAL SPOT MONTH, SINGLE MONTH, AND ALL-MONTHS-COMBINED LIMIT LEVELS

Contract	Spot month limit	Single month and all-months-combined limit
Chicago Board of Trade (''CBOT'') Corn (C)	600	33,000
CBOT Oats (O)	600	2,000
CBOT Soybeans (S)	600	15,000
CBOT Soybean Meal (SM)	720	6,500
CBOT Soybean Oil (SO)	540	8,000
CBOT Kansas City Hard Red Winter Wheat (KW)	600	12,000
CBOT Wheat (W)	600	12,000
ICE Futures U.S. (''ICE'') Cotton No. 2 (CT)	300	5,000
Minneapolis Grain Exchange (''MGEX'') Hard Red Spring Wheat (MWE)	600	12,000

[169] *See* 2016 Reproposal, 81 FR at 96966.

[170] *Position Limits for Derivatives,* U.S. Commodity Futures Trading Commission website, *available at https://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/PositionLimitsforDerivatives/index.htm.*

[171] *See, e.g.,* National Gas Supply Association Comment Letter at 4 (Feb. 28, 2017) in response to 2016 Reproposal (listing operational risk, liquidity risk, credit risk, locational risk, and seasonal risk).

[172] 17 CFR 150.2.

While not explicit in § 150.2, the Commission's practice has been to set spot month limit levels at or below 25 percent of deliverable supply based on DCM estimates of deliverable supply verified by the Commission, and to set limit levels outside of the spot month at 10 percent of open interest for the first 25,000 contracts of open interest, with a marginal increase of 2.5 percent of open interest thereafter.

2. Proposed § 150.2 [173]

a. Contracts Subject to Federal Limits

The Commission proposes to establish federal limits on the 25 core referenced futures contracts listed in proposed § 150.2(d),[174] and on their associated referenced contracts, which would include swaps that qualify as ''economically equivalent swaps.'' [175] The Commission proposes to establish position limits on futures and options on these 25 commodities on the basis that position limits on such contracts are ''necessary.'' A discussion of the necessity finding and the characteristics of the 25 core referenced futures contracts is in Section III.F.

In order to comply with CEA section 4a(a)(5), the Commission also proposes to establish limits on swaps that are ''economically equivalent'' to the above.[176] As discussed above, under the Commission's proposed definition of ''economically equivalent swap'' set forth in § 150.1, a swap would generally qualify as economically equivalent with respect to a particular referenced contract so long as the swap shares identical material contract specifications, terms, and conditions with the referenced contract, disregarding any differences with respect to lot size or notional amount, delivery dates diverging by less than one calendar day, (or for natural gas, by less than two calendar days) or post-trade risk-management arrangements.[177]

As described in greater detail below, the proposed federal limits would apply during all contract months for the nine legacy agricultural commodity contracts and only during the spot month for the 16 other commodity contracts.

Proposed § 150.2(e) would provide that the levels set forth below for the 25 contracts are listed in Appendix E to part 150 of the Commission's regulations and would set the compliance date for such levels at 365 days after publication of final position limits regulations in the **Federal Register**.

b. Proposed Federal Spot Month Limit Levels

Under the rules proposed herein, federal spot month limit levels would apply to all 25 core referenced futures contracts, and any associated referenced contracts.[178] Federal spot month limits for referenced contracts on all 25 commodities are essential for deterring and preventing excessive speculation, manipulation, corners and squeezes.[179] Proposed § 150.2(e) provides that federal spot month levels are set forth in proposed Appendix E to part 150 and are as follows:

Core referenced futures contract	2020 Proposed spot month limit	Existing federal spot month limit	Existing exchange-set spot month limit
Legacy Agricultural Contracts			
CBOT Corn (C)	1,200	600	600
CBOT Oats (O)	600	600	600
CBOT Soybeans (S)	1,200	600	600
CBOT Soybean Meal (SM)	1,500	720	720
CBOT Soybean Oil (SO)	1,100	540	540
CBOT Wheat (W)	1,200	600	[180] 600/500/400/300/220
CBOT KC HRW Wheat (KW)	1,200	600	600

[173] This portion of the release is organized by subject matter, rather than by lettered provision, and will proceed in the following order: (1) Contracts subject to federal limits; (2) proposed spot month limit levels; (3) proposed methodology for setting spot month limit levels; (4) proposed non-spot month limit levels; (5) proposed methodology for setting non-spot month limit levels; (6) subsequent levels; (7) relevant contract month for purposes of referenced contracts; (8) limits on pre-existing positions; (9) limits for positions on foreign boards of trade; (10) anti-evasion provision; (11) netting of positions; (12) eligible affiliates and aggregation; and (13) request for comment.

[174] Proposed § 150.2(d) provides that each core referenced futures contract includes any ''successor'' contracts. An example of a successor contract would be the RBOB Gasoline contract that was listed due to a change in gasoline specifications and that ultimately replaced the Unleaded Gasoline contract. For some time, both contracts were listed for trading to allow open interest to migrate to the new RBOB contract; once trading migrated, the Unleaded Gasoline contract was delisted.

[175] As described above, the proposed term ''referenced contract'' includes: (1) Futures and options on futures contracts that, with respect to a particular core referenced futures contract, are directly or indirectly linked to the price of that core referenced futures contract, or directly or indirectly linked to the price of the same commodity underlying the core referenced futures contract for delivery at the same location; and (2) ''economically equivalent swaps.'' *See* proposed ''referenced contract'' and ''economically equivalent swap'' definitions in 150.1.

[176] CEA section 4a(a)(5); 7 U.S.C. 6a(a)(5).

[177] *See infra* Section II.A.4. (definition of ''economically equivalent swap'').

[178] As described below, federal non-spot month limit levels would only apply to the nine legacy agricultural commodities. The 16 non-legacy commodities would be subject to federal limits during the spot month, and exchange-set limits and/or accountability outside of the spot month. *See infra* Section II.B.2.d. (discussion of proposed non-spot month limit levels).

[179] *See infra* Section III. (Legal Matters).

[180] CBOT's existing exchange-set limit for Wheat (W) is 600 contracts. However, for its May contract month, CBOT has a variable spot limit that is dependent upon the deliverable supply that it publishes from the CBOT's Stocks and Grain report on the Friday preceding the first notice day for the May contract month. In the last five trading days of the expiring futures month in May, the speculative position limit is: (1) 600 contracts if deliverable supplies are at or above 2,400 contracts; (2) 500 contracts if deliverable supplies are between 2,000 and 2,399 contracts; (3) 400 contracts if deliverable supplies are between 1,600 and 1,999 contracts; (4) 300 contracts if deliverable supplies are between 1,200 and 1,599 contracts; and (5) 220 contracts if deliverable supplies are below 1,200 contracts.

[181] The proposed federal spot month limit for CME Live Cattle (LC) would feature a step-down limit similar to the CME's existing Live Cattle (LC) step-down exchange set limit. The proposed federal spot month step down limit is: (1) 600 at the close of trading on the first business day following the first Friday of the contract month; (2) 300 at the close of trading on the business day prior to the last five trading days of the contract month; and (3) 200 at the close of trading on the business day prior to the last two trading days of the contract month.

[182] CME's existing exchange-set limit for Live Cattle (LC) has a step-down spot month limit: (1) 450 at the close of trading on the first business day following the first Friday of the contract month; (2) 300 at the close of trading on the business day prior to the last five trading days of the contract month; and (3) 200 at the close of trading on the business day prior to the last two trading days of the contract month.

[183] CBOT's existing exchange-set spot month limit for Rough Rice (RR) is 600 contracts for all contract months. However, for July and September, there is a step-down limit from 600 contracts. In the last five trading days of the expiring futures month, the speculative position limit for the July futures month steps down to 200 contracts from 600 contracts and the speculative position limit for the September futures month steps down to 250 contracts from 600 contracts.

[184] NYMEX recommends implementing a step-down federal spot position limit for its Light Sweet Crude Oil (CL) futures contract: (1) 6,000 contracts as of the close of trading three business days prior to the last trading day of the contract; (2) 5,000 contracts as of the close of trading two business days prior to the last trading day of the contract; and (3) 4,000 contracts as of the close of trading one business day prior to the last trading day of the contract.

Core referenced futures contract	2020 Proposed spot month limit	Existing federal spot month limit	Existing exchange-set spot month limit
MGEX HRS Wheat (MWE)	1,200	600	600
ICE Cotton No. 2 (CT)	1,800	300	300
Other Agricultural Contracts			
CME Live Cattle (LC)	[181] 600/300/200	n/a	[182] 450/300/200
CBOT Rough Rice (RR)	800	n/a	[183] 600/200/250
ICE Cocoa (CC)	4,900	n/a	1,000
ICE Coffee C (KC)	1,700	n/a	500
ICE FCOJ–A (OJ)	2,200	n/a	300
ICE U.S. Sugar No. 11 (SB)	25,800	n/a	5,000
ICE U.S. Sugar No. 16 (SF)	6,400	n/a	n/a
Metals Contracts			
COMEX Gold (GC)	6,000	n/a	3,000
COMEX Silver (SI)	3,000	n/a	1,500
COMEX Copper (HG)	1,000	n/a	1,500
NYMEX Platinum (PL)	500	n/a	500
NYMEX Palladium (PA)	50	n/a	50
Energy Contracts			
NYMEX Light Sweet Crude Oil (CL)	[184] 6,000/5,000/4,000	n/a	3,000
NYMEX NYH ULSD Heating Oil (HO)	2,000	n/a	1,000
NYMEX NYH RBOB Gasoline (RB)	2,000	n/a	1,000
NYMEX Henry Hub Natural Gas (NG)	2,000	n/a	1,000

Limits for any contract with a proposed limit above 100 contracts would be rounded up to the nearest 100 contracts from the exchange-recommended level and/or from 25 percent of deliverable supply.

c. Process for Calculating Federal Spot Month Limit Levels

The existing federal spot month limit levels on the nine legacy agricultural contracts have remained constant for decades, yet the markets have changed significantly during that time period, including the advent of electronic trading and the implementation of extended trading hours. Further, open interest and trading volume have since reached record levels, and some of the deliverable supply estimates on which the existing federal spot month limits were originally based are now decades out of date. In light of these and other factors, CME Group, ICE, and MGEX recommended federal spot month limit levels for each of their respective core referenced futures contracts, including contracts that would be subject to federal limits for the first time under this proposal.[185] Commission staff reviewed these recommendations and conducted its own analysis of them, including by requesting additional information and by independently assessing the recommended levels using its own experience, observations, and knowledge. The Commission proposes to adopt each of the exchange-recommended levels as federal spot month limit levels.

In setting federal limits, the Commission considers the four policy objectives in CEA section 4a(a)(3)(B). That is, to set limits, to the maximum extent practicable, in its discretion, to: (1) Diminish, eliminate, or prevent excessive speculation; (2) deter and prevent market manipulation, squeezes, and corners; (3) ensure sufficient market liquidity for bona fide hedgers; and (4) ensure that the price discovery function of the underlying market is not disrupted.[186] In setting federal position limit levels, the Commission endeavors to maximize these objectives by setting limits that are low enough to prevent excessive speculation, manipulation, squeezes, and corners that could disrupt price discovery, but high enough so as not to restrict liquidity for bona fide hedgers.

Based on the Commission's experience overseeing federal position limits for decades, and overseeing exchange-set position limits submitted to the Commission pursuant to part 40 of its regulations, the Commission has analyzed and evaluated the information provided by CME Group, ICE, and MGEX, and preliminarily finds that none of the recommended levels considered in preparing this release appear improperly calibrated such that they might hinder liquidity for bona fide hedgers, or invite excessive speculation, manipulation, corners, or squeezes, including activity that could impact price discovery. For these reasons, discussed in turn below, the Commission preliminarily believes that the DCMs' recommended spot month limit levels all further the statutory objectives set forth in CEA section 4a(a)(3)(B).[187]

i. The Proposed Spot Month Limit Levels Are Low Enough To Prevent Excessive Speculation and Protect Price Discovery

All 25 of the exchange-recommended levels are at or below 25 percent of deliverable supply.[188] The Commission has long used deliverable supply as the basis for spot month position limits due to concerns regarding corners, squeezes, and other settlement-period manipulative activity.[189] It would be difficult, in the absence of other factors, for a participant to corner or squeeze a market if the participant holds less than or equal to 25 percent of deliverable supply because, among other things, any

[185] *See* ICE Comment Letter at 8 (May 14, 2019); *MGEX Comment Letter* at 2, 4–8 (Aug. 31, 2018); and *Summary DSE Proposed Limits, CME Group Comment Letter* (Nov. 26, 2019), available at *https://comments.cftc.gov* (comment file for RIN 3038–AD99).

[186] 7 U.S.C. 6a(a)(3)(B).

[187] 7 U.S.C. 6a(a)(3)(B).

[188] The recommended levels range from approximately 7 percent of deliverable supply to 25 percent of deliverable supply.

[189] *See, e.g.,* Revision of Federal Speculative Position Limits and Associated Rules, 64 FR 24038 (May 5, 1999).

potential economic gains resulting from the manipulation may be insufficient to justify the potential costs, including the costs of acquiring, and ultimately offloading, the positions used to effectuate the manipulation.

By restricting positions to a proportion of the deliverable supply of the commodity, the spot month position limits require that no one speculator can hold a position larger than 25 percent of deliverable supply, reducing the possibility that a market participant can use derivatives, including referenced contracts, to affect the price of the cash commodity (and vice versa). Limiting a speculative position based on a percentage of deliverable supply also restricts a speculative trader's ability to establish a leveraged position in cash-settled derivative contracts, reducing that trader's incentive to manipulate the cash settlement price.[190] Further, by proposing levels that are sufficiently low to prevent market manipulation, including corners and squeezes, the proposed levels also help ensure that the price discovery function of the underlying market is not disrupted because markets that are free from corners, squeezes, and other manipulative activity reflect fundamentals of supply and demand rather than artificial pressures.

Each of the exchange-recommended levels is based on a percentage of deliverable supply estimated by the relevant exchange and submitted to the Commission for review.[191] The Commission has closely assessed the estimates, which CME Group, ICE, and MGEX updated with recent data using the methodologies they used during the 2016 Reproposal.[192] The Commission hereby verifies that the estimates submitted by the exchanges are reasonable.

In verifying the DCMs' estimates of deliverable supply, the Commission is not endorsing any particular methodology for estimating deliverable supply beyond what is already set forth in Appendix C to part 38 of the Commission's regulations.[193] As circumstances change over time, such DCMs may need to adjust the methodology, assumptions, and allowances that they use to estimate deliverable supply to reflect then current market conditions and other relevant factors.

ii. The Proposed Spot Month Limit Levels are High Enough To Ensure Sufficient Market Liquidity for Bona Fide Hedgers

Section 4a(a)(1) of the CEA addresses ''excessive speculation. . .causing sudden or unreasonable fluctuations or unwarranted [price] changes . . .'' [194] Speculative activity that is not ''excessive'' in this manner is not a focus of section 4a(a)(1). Rather, speculative activity may generate liquidity by enabling market participants with bona fide hedging positions to trade more efficiently. Setting position limits too low could result in reduced liquidity, including for bona fide hedgers. The Commission has not observed, or received any complaints about, a lack of liquidity for bona fide hedgers in the markets for the 25 core referenced futures contracts. In fact, as described later in this release, the 25 core referenced futures contracts represent some of the most liquid markets overseen by the Commission.[195] Market developments that have taken place since federal spot month limits were last amended decades ago, such as electronic trading and expanded trading hours, have likely only contributed to these already liquid markets.[196] Market participants have more opportunities than ever to enter, trade, or exit a position. By proposing to generally increase the existing federal spot month limit levels, and by proposing federal spot month limit levels that are generally equal to or higher than existing exchange-set levels,[197] yet in all cases still low enough to prevent excessive speculation, manipulation, corners and squeezes, the Commission does not expect the proposed limits to result in a reduction in liquidity for bona fide hedgers.

iii. The Proposed Spot Month Limit Levels Fall Within a Range of Acceptable Levels

ICE and MGEX recommended federal spot month limit levels at 25 percent of deliverable supply, while CME Group generally recommended levels below 25 percent of deliverable supply.[198] These

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[190] *Id.*

[191] *See ICE Comment Letter* at 8 (May 14, 2019); *MGEX Comment Letter* at 2, 4–8 (Aug. 31, 2018); and *Summary DSE Proposed Limits, CME Group Comment Letter* (Nov. 26, 2019), *available at https://comments.cftc.gov* (comment file for RIN 3038–AD99).CME Group submitted updated estimates of deliverable supply and recommended federal spot month limit levels for CBOT Corn (C), CBOT Oats (O), CBOT Rough Rice (RR), CBOT Soybeans (S), CBOT Soybean Meal (SM), CBOT Soybean Oil (SO), CBOT Wheat (W), and CBOT KC HRW Wheat (KW); COMEX Gold (GC), COMEX Silver (SI), NYMEX Platinum (PL), NYMEX Palladium (PA), and COMEX Copper (HG); and NYMEX Henry Hub Natural Gas (NG), NYMEX Light Sweet Crude Oil (CL), NYMEX NY Harbor ULSD Heating Oil (HO), and NYMEX NY Harbor RBOB Gasoline (RB). ICE submitted updated estimates of deliverable supply and recommended federal spot month limit levels for ICE Cocoa (CC), ICE Coffee C (KC), ICE Cotton No. 2 (CT), ICE FCOJ–A (OJ), ICE U.S. Sugar No. 11 (SB), and ICE U.S. Sugar No. 16 (SF). MGEX submitted an updated deliverable supply estimate and indicated that if the Commission adopted a specific spot month position limit, MGEX believes the federal spot month limit level for MGEX Hard Red Spring Wheat (MWE) should be no less than 1,000 contracts. Commission staff reviewed the exchange submissions and conducted its own research. Commission staff reviewed the data submitted, confirmed that the data submitted accurately reflected the source data, and considered whether the data sources were authoritative. Commission staff considered whether the assumptions made by the exchanges in the submissions were acceptable, or whether alternative assumptions would lead to similar results. In some cases, Commission staff conducted trade source interviews. Commission staff replicated the calculations included in the submissions.

[192] *See* CME Group Comment Letter (Apr. 15, 2016); CME Group Comment Letter (addressing natural gas) (Sept. 15, 2016); CME Group Comment Letter (addressing ULSD) (Sept. 15, 2016); ICE Comment Letter (Apr. 20, 2016); and MGEX Comment Letter (Jul. 13, 2016), available at *https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1772&ctl00_ctl00_cphContentMain_MainContent_gvCommentListChangePage=8_50*. At that time, the Commission reviewed the methodologies that the DCMs used to prepare the estimates, among other things, and verified the deliverable supply estimates as reasonable. *See* 2016 Reproposal, 81 FR at 96754.

[193] 17 CFR part 38, Appendix C.

[194] CEA section 4a(a)(1); 7 U.S.C. 6a(a)(1).

[195] *See infra* Section III.F.

[196] With the exception of CBOT Oats (O), open interest for the legacy agricultural commodities has increased dramatically over the past several decades, some by a factor of four.

[197] While the proposed spot month limit levels are generally higher than the existing federal or exchange-set levels, the proposed federal level for COMEX Copper (HG) is below the existing exchange-set level, the proposed federal level for CBOT Oats (O) is the same as the existing federal and exchange-set level, and the proposed federal levels for NYMEX Platinum (PL) and NYMEX Palladium (PA) are the same as the existing exchange-set levels.

[198] For the following core referenced futures contracts, CME Group recommended spot month levels below 25 percent of deliverable supply: CBOT Corn (C) (9.22% of deliverable supply), CBOT Oats (O) (19.29%), CBOT Soybeans (S) (15.86%), CBOT Soybean Meal (SM) (16.77%), Soybean Oil (SO) (8.31%), CBOT Wheat (W) (9.24%), CBOT KC HRW Wheat (KW) (9.24%), CME Live Cattle (LC) (step-down limits 15.86%–7.93%–5.29%), CBOT Rough Rice (RR) (8.94%), COMEX Gold (GC) (12.72%), COMEX Silver (SI) (12.62%), COMEX Copper (HG) (9.66%), NYMEX Platinum (PL) (13.60%), NYMEX Palladium (PA) (17.18%), NYMEX Light Sweet Crude Oil (CL) (step-down limits 11.16%–9.30%–7.44%), NYMEX NYH ULSD Heating Oil (HO) (10.85%), and NYMEX NYH RBOB Gasoline (RB) (7.41%). CME Group recommended spot month levels at 25 percent of estimated deliverable supply for NYMEX Henry Hub Natural Gas (NG). ICE and MGEX recommended limit levels at 25 percent of estimated deliverable supply for each of their core referenced futures contracts: Cocoa (CC), Coffee C (KC), FCOJ–A (OJ), Cotton No. 2 (CT), U.S. Sugar No. 11 (SB), and U.S. Sugar No. 16 (SF) on ICE, and Hard Red Spring Wheat (MWE) on MGEX. *See ICE Comment Letter* at 1–7 (May 14, 2019); *MGEX Comment Letter* at 2, 4–8 (Aug. 31, 2018); and *Summary DSE Proposed Limits, CME Group Comment Letter* (Nov. 26, 2019), *available at https://comments.cftc.gov* (comment file for RIN 3038–AD99).

distinctions reflect philosophical and other differences among the exchanges and differences between the core referenced futures contracts and their underlying commodities, including a preference on the part of CME Group not to increase existing limit levels applicable to its core referenced futures contracts too drastically.[199] The Commission has previously stated that ''there is a range of acceptable limit levels,'' [200] and continues to believe this is true, both for spot and non-spot month limits. There is no single ''correct'' spot month limit level for a given contract, and it is likely that a number of limit levels within a certain range could effectively address the 4a(a)(3) factors. While the CME Group, ICE, and MGEX recommended levels all fall at different ends of the deliverable supply range, the levels all fall at or below 25 percent of deliverable supply, which is critical for protecting the spot month from excessive speculation, manipulation, corners and squeezes.

iv. The Proposed Spot Month Limit Levels Account for Differences Between Markets

In addition to being high enough to ensure sufficient liquidity, and low enough to prevent excessive speculation and manipulation, the proposed spot month limit levels are also calibrated to further address CEA section 4a(a)(3) by accounting for differences between markets for the core referenced futures contracts and for their underlying commodities.[201]

For the agricultural commodities, the Commission considered a variety of factors in evaluating the exchange-recommended spot month levels, including concentration and composition of market participants, the historical price volatility of the commodity, convergence between the futures and cash market prices at the expiration of the contract, and the Commission's experience observing how the supplies of agricultural commodities are affected by weather (drought, flooding, or optimal growing conditions), storage costs, and delivery mechanisms. In the Commission's view, the exchanges' recommended spot month levels for each of the agricultural contracts would allow for speculators to be present in the market while preventing speculative positions from being so large as to harm convergence and otherwise hinder statutory objectives.

The Commission also considered the delivery mechanisms for the agricultural commodities in assessing the exchange-recommended spot month levels. For example, for the CME Live Cattle (LC) contract, the Commission considered the physical limitation that exists on how many cattle can be processed (inspected, graded, and weighed) at the delivery facilities. CME Group currently has an exchange-set step-down spot month limit, and recommended a federal step-down limit for CME Live Cattle (LC) of 600/300/200 contracts in order to avoid congestion and to foster convergence by gradually reducing the limit levels in a manner that meets the processing capacity of the delivery facilities. The Commission proposes to adopt this step-down limit due to the unique attributes of the CME Live Cattle (LC) contract.

For the metals contracts, which are all listed on NYMEX, the Commission took delivery mechanisms, among other factors, into account in assessing the recommended spot month limit levels. Upon expiration, the long for each metals contract receives the ownership certificate (warrant) for the metal already in the warehouse/depository and can continue to store the metal where it is, load-out the metal, or short a futures contract to sell the ownership certificate. This delivery mechanism, which allows for the resale of the warrant while the metal remains in the warehouse, provides for relatively inexpensive and simple delivery when compared to the delivery mechanisms for other commodity types. Further, metals tend not to spoil and are cheap to store on a per dollar basis compared to other commodities. As metals are generally easier to obtain, store, and sell than other commodity types, it is also potentially cheaper to accomplish a corner or squeeze in metals than in other commodity types. The Commission has previously observed manipulative activity in metals as evidenced by the Hunt Brother silver and Sumitomo copper events. The Commission kept this history in mind in accepting CME Group's recommendation to take a fairly cautious approach with respect to the recommended levels for each metal contract, which are each well below 25 percent of deliverable supply.[202] Commission staff has, however, reviewed each of the metals contracts previously and confirms that these contracts satisfy all regulatory requirements, including the DCM Core Principle 3 requirement that the contracts are not readily susceptible to manipulation.

Additionally, the Commission considered the volatility in the estimated deliverable supply for metals. For the COMEX Copper (HG) contract, the estimated deliverable supply for copper (measured by copper stocks in COMEX-approved warehouses) has experienced considerable volatility during the past decade, resulting in COMEX amending its exchange-set spot month position limit multiple times, decreasing or increasing the limit level to reflect the amount of copper in its approved warehouses.[203] Similarly, volatility in deliverable supplies has been observed for the NYMEX Palladium (PA) contract, where production of palladium from major producers has been declining while demand for palladium by the auto

[199] CME Group has indicated that for its own exchange-set limits, it historically has not typically set the limit at the full 25 percent of deliverable supply when launching a new product, regardless of asset class or commodity. CME Group's recommended spot month limit levels are based on observations regarding the orderliness of liquidations and monitoring for appropriate price convergence. CME Group indicated that the recommended levels reflect a measured approach calibrated to avoid the risk of disruption to its markets, and stated that upon analyzing a reasonable body of data relating to the expirations with the recommended spot month limit levels, CME Group would consider in the future making any recommendations for increases in limits if any additional increases were appropriate. *Summary DSE Proposed Limits,* CME Group Comment Letter (Nov. 26, 2019), *available at https://comments.cftc.gov (comment file for RIN 3038–AD99).*

[200] *See, e.g.,* Revision of Federal Speculative Position Limits, 57 FR at 12766, 12770 (Apr. 13, 1992).

[201] Commenters, including those responding to the 2016 Reproposal, have previously requested that limit levels should be set on a commodity-by-commodity basis to recognize differences among commodities, including differences in liquidity, seasonality, and other economic factors. *See, e.g.,* AQR Capital Management Comment Letter at 12 (Feb. 28, 2017); Copperwood Asset Management Comment Letter at 3 (Feb. 28, 2017); Managed Funds Association, Asset Management Group of the Securities Industry and Financial Markets Association, and the Alternative Investment Management Association Comment Letter at 9–12 (Feb. 28, 2017); and National Grain and Feed Association Comment Letter at 2 (Feb. 28, 2017).

[202] As noted above, CME Group's recommended federal level of 1,000 for COMEX Copper (HG) is below the existing exchange-set level of 1,500, and CME Group's recommended federal levels for NYMEX Platinum (PL) and NYMEX Palladium (PA) are equal to the existing exchange-set levels of 500 and 50, respectively. CME Group recommended federal levels of 6,000 for COMEX Gold (GC) and 3,000 for COMEX Silver (SI), which would represent an increase over the existing exchange-set levels of 3,000 and 1,500, respectively. While CME Group's recommended federal COMEX Gold (GC) and COMEX Silver (SI) levels are higher than the existing exchange-set levels, the recommended levels still represent only approximately 13 percent of deliverable supply each. *Summary DSE Proposed Limits,* CME Group Comment Letter (Nov. 26, 2019), available at *https://comments.cftc.gov* (comment file for RIN 3038–AD99).

[203] The volatility was based on factors such as the bust in the housing market in 2008, the severe recession in the United States in 2009, and high demand for copper exports to China, which has grown continually over the past 20 years.

industry for catalytic converters has increased. This trend in palladium stocks in exchange-approved depositories has been observed since 2014. In a series of amendments, NYMEX reduced its exchange-set spot month limit from 650 contracts to below 200 contracts over time.[204]

The Commission has not observed similar volatility in the deliverable supply estimates for agricultural or energy commodities. Given this history of volatility in deliverable supply estimates for metals, if the Commission were to set limit levels at, rather than below, 25 percent of deliverable supply, and if deliverable supply were to subsequently change drastically, the spot month limit level could end up being well above (or below) 25 percent of deliverable supply, and thus potentially too high (or too low) to further statutory objectives.

For the energy complex, the Commission considered factors such as the underlying infrastructure and connectivity. For example, as of 2017, generally, out of commodities underlying the core referenced futures contracts in energy, natural gas had the most robust infrastructure for moving the commodity, with over 1,600,000 miles of pipeline (including distribution mains, transmission pipelines, and gathering lines) in the United States, compared to only 215,000 miles of pipeline for oil (including crude and product lines).[205] The robust infrastructure for moving natural gas supports CME Group's recommended spot month limit level at 25 percent of estimated deliverable supply for the NYMEX Henry Hub Natural Gas (NG) contract, while comparatively smaller crude oil and crude product pipeline infrastructure support CME Group's recommended spot month limit levels below 25 percent of estimated deliverable supply for the NYMEX Light Sweet Crude Oil (CL) and NYMEX NYH RBOB Gasoline (RB) contracts.

The Commission also considered factors such as the large amounts of liquidity in the cash-settled natural gas referenced contracts relative to the physically settled NYMEX Henry Hub Natural Gas (NG) core referenced futures contract. For that contract, CME Group recommended setting the spot month limit at 25 percent of estimated deliverable supply (2,000 contract spot month limit) with a conditional limit exemption of 10,000 contracts net long or net short conditioned on the participant not holding or controlling any positions during the spot month in the physically-settled NYMEX Henry Hub Natural Gas (NG) core referenced futures contract. Speculators who desire price exposure to natural gas will likely trade in the cash-settled contracts because, generally, they do not have the ability to make or take delivery; trading in the cash-settled contract removes the chance that they may be unable to exit the physically-settled NYMEX Henry Hub Natural Gas (NG) contract and be selected to make or take delivery of natural gas. Thus, speculators are likely to remain out of the NYMEX Henry Hub Natural Gas (NG) contract during the spot month. Since corners and squeezes cannot be effected using cash settled contracts, the Commission proposes a spot month limit set at 25 percent of deliverable supply for the NYMEX Henry Hub Natural Gas (NG) core referenced futures contract.

Further, for certain energy commodities, CME Group recommended step-down limits, including for commodities where delivery constraints could hinder convergence or where market participants otherwise provided feedback that such limits would help maintain orderly markets. In the case of NYMEX Light Sweet Crude Oil (CL), CME Group currently has a single spot-month limit of 3,000 contracts, but is recommending a step down limit that would end at 4,000 contracts (step-down limits of 6,000/5,000/4,000). Historically, as liquidity decreases in the contract, the exchange would have a step down mechanism in its exemptions that it had granted to force market participants to lower their positions to the current 3,000 contract spot month limit. Given the recommended increase to a final step-down limit of 4,000 contracts, the exchange, through feedback from market participants, recommended a step-down spot month limit that would in effect provide the same diminishing effect on positions.

d. Proposed Federal Single Month and All-Months Combined (''Non-Spot Month'') Limit Levels

Under the rules proposed herein, federal non-spot month limits would only apply to the nine agricultural commodities currently subject to federal limits. The 16 additional contracts covered by this proposal would be subject to federal limits only during the spot month, and exchange-set limits and/or accountability requirements outside of the spot month.[206]

The Commission proposes to maintain federal non-spot month limits for the nine legacy agricultural contracts, with the modifications set forth below, because the Commission has observed no reason to eliminate them. These non-spot month limits have been in place for decades, and while the Commission is proposing to modify the limit levels,[207] removing the levels entirely could potentially result in market disruption. In fact, commercial market participants trading the nine legacy agricultural contracts have requested that the Commission maintain federal limits outside the spot month in order to promote market integrity. For the following reasons, however, the Commission is not proposing limits outside the spot month for the other 16 contracts.

[204] *See, e.g.,* NYMEX Submissions Nos. 14–463 (Oct. 31, 2014), 15–145 (Apr. 14, 2015), and 15–377 (Aug. 27, 2015).

[205] *See U.S. Oil and Gas Pipeline Mileage,* Bureau of Transportation Statistics website, *available at www.bts.gov/content/us-oil-and-gas-pipeline-mileage.*

[206] *Market Resources,* ICE Futures website, *available at https://www.theice.com/futures-us/market-resources* (ICE exchange-set position limits); *Position Limits,* CME Group website, *available at https://www.cmegroup.com/market-regulation/position-limits.html*; *Rules and Regulations of the Minneapolis Grain Exchange, Inc.,* MGEX, *available at http://www.mgex.com/documents/Rulebook_051.pdf* (MGEX exchange-set position limits).

[207] *See infra* Section II.B.2.e.

First, corners and squeezes cannot occur outside the spot month when there is no threat of delivery, and there are tools other than federal position limits for deterring and preventing manipulation outside of the spot month.[208] Surveillance at both the exchange and federal level, coupled with exchange-set limits and/or accountability, would continue to offer strong deterrence and protection against manipulation outside of the spot month. In particular, under this proposal, for the 16 contracts that would be subject to federal limits only during the spot month, exchanges would be required to establish either position limit levels or position accountability levels outside of the spot month.[209] Any such accountability and limit levels would be subject to standards established by the Commission including, among other things, that any such levels be ''necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index.'' [210] Exchanges would also be required to submit any rules adopting or modifying such position limit and/or accountability levels to the Commission pursuant to part 40 of the Commission's regulations.[211]

Exchange position accountability establishes a level at which an exchange will ask traders additional questions, including regarding the trader's purpose for the position, and will evaluate existing market conditions. If the position does not raise any concerns, the exchange will allow the trader to exceed the accountability level. If the position raises concerns, the exchange has the authority to instruct the trader not to increase the position further, or to reduce the position. Accountability is a particularly flexible and effective tool because it provides the exchanges with an opportunity to intervene once a position hits a relatively low level, while still affording market participants with the flexibility to establish a large position when warranted by the nature of the position and the condition of the market.

The Commission has decades of experience overseeing accountability levels implemented by exchanges,[212] including for all 16 contracts that would not be subject to federal limits outside of the spot month under this proposal. Such accountability levels apply to all participants on the exchange, whether commercial or non-commercial, and regardless of whether the participant would qualify for an exemption. In the Commission's experience, these levels have functioned as-intended, and the Commission views exchange accountability outside of the spot month as an equally robust, yet more flexible, alternative to federal non-spot month speculative position limits.

Second, applying federal limits during the spot month to referenced contracts based on all 25 core referenced futures contracts, and outside of the spot month only to referenced contracts based on the nine legacy agricultural commodities, furthers statutory goals while minimizing the impact on existing industry practice and leveraging existing exchange-set limits and accountability levels that appear to have functioned well. The Commission thus endeavors to minimize market disruption that could result from eliminating existing federal non-spot month limits on certain agricultural commodities and from adding new non-spot limits on certain metals and energy commodities that have never been subject to federal limits. Layering federal non-spot month limits for the 16 additional contracts on top of existing exchange-set limit/accountability levels may only provide minimal benefits, if any, and would forego the benefits associated with flexible accountability levels, which provide many of the same protections as hard limits but with significantly more flexibility for market participants to exceed the accountability level in cases where the position would not harm the market.

As set forth in proposed § 150.2(e), proposed federal non-spot month levels applicable to referenced contracts based on the nine legacy agricultural contracts are listed in proposed Appendix E and are as follows:

Core referenced futures contract	2020 Proposed single month and all-months combined limit based on new 10/2.5 formula for first 50,000 OI	Existing federal single month and all-months-combined limit	Existing exchange-set single month and all-months-combined limit
CBOT Corn (C)	57,800	33,000	33,000
CBOT Oats (O)	2,000	2,000	2,000
CBOT Soybeans (S)	27,300	15,000	15,000
CBOT Soybean Meal (SM)	16,900	6,500	6,500
CBOT Soybean Oil (SO)	17,400	8,000	8,000
CBOT Wheat (W)	19,300	12,000	12,000
KC HRW Wheat (KW)	12,000	12,000	12,000
MGEX HRS Wheat (MWE)	12,000	12,000	12,000
ICE Cotton No. 2 (CT)	11,900	5,000	5,000

[208] In the case of certain commodities where open interest in the deferred month contracts may be much larger, it may become difficult to exert market power via concentrated futures positions. For example, a participant with a large cash-market position and a large deferred futures position may attempt to move cash markets in order to benefit that deferred futures position. Any attempt to do so could become muted due to general futures market resistance from multiple vested interests present in that deferred futures month (*i.e.,* the overall size of the deferred contracts may be too large for one individual to influence via cash market activity). However, if a large position accumulated over time in a particular deferred month is held into the spot month, it is possible that such positions could form the groundwork for an attempted corner or squeeze in the spot month.

[209] *See infra* Section II.D.4. (discussion of proposed § 150.5).

[210] *Id.*

[211] Under the proposed ''position accountability'' definition in § 150.1, DCM accountability rules would have to require a trader whose position exceeds the accountability level to consent to: (1) Provide information about its position to the DCM; and (2) halt increasing further its position or reduce its position in an orderly manner, in each case as requested by the DCM.

[212] *See, e.g.,* 56 FR 51687 (Oct. 15, 1991) (permitting CME to establish position accountability for certain financial contracts traded on CME), Speculative Position Limits—Exemptions from Commission Rule 1.61, 57 FR 29064 (June 30, 1992) (permitting the use of accountability for trading in energy commodity contracts), and 17 CFR 150.5(e) (2009) (formally recognizing the practice of accountability for contracts that met specified standards).

e. Methodology for Setting Proposed Non-Spot Month Limit Levels

The Commission's practice has been to set non-spot month limit levels for the nine legacy agricultural contracts at 10 percent of the open interest for the first 25,000 contracts and 2.5 percent of the open interest thereafter (the ''10, 2.5 percent formula'').[213] The existing non-spot month limit levels have not been updated to reflect changes in open interest data in over a decade, and the 10, 2.5 percent formula has been used since the 1990s, and was based on the Commission's experience up until that time.[214] The Commission's adoption of the 10, 2.5 percent formula was based on two primary factors: growth in open interest and the size of large traders' positions.[215]

The Commission proposes to maintain the 10, 2.5 percent formula for non-spot limits, with the limited change that the 2.5 percent calculation will be applied to open interest above 50,000 contracts rather than to the current level of 25,000 contracts. The Commission believes that this change is warranted due to the significant overall increase in open interest in these markets, which has roughly doubled since federal limits were set on these markets. The Commission would apply the modified formula to recent open interest data for the periods from July 2017–June 2018 and July 2018–June 2019 of the applicable futures and delta adjusted futures options. The resulting proposed limit levels, set forth in the second column in the table above, would generally be higher than existing limit levels, with the exception of CBOT Oats (O), CBOT KC HRW Wheat (KW), and MGEX HRS Wheat (MWE), where proposed levels would remain at the existing levels.

The Commission continues to believe that a formula based on a percentage of open interest is an appropriate tool for establishing limits outside the spot month. As the Commission stated when it initially proposed to use an open interest formula, taking open interest into account ''will permit speculative position limits to reflect better the changing needs and composition of the futures markets . . .'' [216] Open interest is a measure of market activity that reflects the number of contracts that are ''open'' or live, where each contract of open interest represents both a long and a short position. Relative to contracts with smaller open interest, contracts with larger open interest may be better able to mitigate the disruptive impact of excessive speculation because there may be more activity to oppose, diffuse, or otherwise counter a potential pricing disruption. Limiting positions to a percentage of open interest: (1) Helps ensure that positions are not so large relative to observed market activity that they risk disrupting the market; (2) allows speculators to hold sufficient contracts to provide a healthy level of liquidity for hedgers; and (3) allows for increases in position limits and position sizes as markets expand and become more active.

While the Commission continues to prefer a formula based on a percentage of open interest, market and potential regulatory changes counsel in favor of proposing a slight modification to the existing formula. In particular, as discussed in detail below, open interest has grown, and market composition has changed, significantly since the 1990s. The proposed increase in the open interest portion of the non-spot month limit formula from 25,000 to 50,000 contracts would provide a modest increase in the non-spot month limit of 1,875 contracts (over what the limit would be if the 10, 2.5 percent formula were applied at 25,000 contracts), assuming the underlying commodity futures market has open interest of at least 50,000 contracts. The Commission believes that the amended non-spot month formula would provide a conservative increase in the non-spot month limits for most contracts to better reflect the general increase observed in open interest across futures markets since the late 1990s, as discussed below.

i. Increases in Open Interest

The table below provides data that describes the market environment during the period prior to, and subsequent to, the adoption of the 10, 2.5 percent formula by the Commission in 1999. The data includes futures contracts and the delta-adjusted options on futures open interest.[217] The first column of the table provides the maximum open interest in the nine legacy agricultural contracts over the five year period ending in 1999. The CBOT Corn (C) contract had maximum open interest of approximately 463,000 contracts, and the CBOT Soybeans (S) contract had maximum open interest of approximately 227,000 contracts. The other seven contracts had maximum open interest figures that ranged from less than 20,000 contracts for CBOT Oats (O) to approximately 172,000 for CBOT Soybean Oil (SO). Hence, when adopting the 10, 2.5 percent formula in 1999, the Commission's experience in these markets was of aggregate futures and options on futures open interest well below 500,000 contracts.

TABLE—MAXIMUM FUTURES AND OPTIONS ON FUTURES OPEN INTEREST, 1994–2018

	1994–1999	2000–2004	2005–2009	2010–2014	2015–2018
CBOT Corn (C)	463,386	828,176	1,897,484	2,052,678	2,201,990
ICE Cotton No. 2 (CT)	122,989	140,240	388,336	296,596	344,302

[213] For example, assume a commodity contract has an aggregate open interest of 200,000 contracts over the past 12 month period. Applying the 10, 2.5 percent formula to an aggregate open interest of 200,000 contracts would yield a non-spot month limit of 6,875 contracts. That is, 10 percent of the first 25,000 contracts would equal 2,500 contracts (25,000 contracts × 0.10 = 2,500 contracts). Then add 2.5 percent of the remaining 175,000 of aggregate open interest or 4,375 contracts (175,000 contracts × 0.025 = 4,375 contracts) for a total non-spot month limit of 6,875 contracts (2,500 contracts + 4,375 contracts = 6,875 contracts).

[214] *See, e.g.,* Revision of Federal Speculative Position Limits and Associated Rules, 64 FR at 24038 (May 5, 1999) (increasing deferred-month limit levels based on 10 percent of open interest up to an open interest of 25,000 contracts, with a marginal increase of 2.5 percent thereafter). Prior to 1999, the Commission had given little weight to the size of open interest in the contract in determining the position limit level—instead, the Commission's traditional standard was to set limit levels based on the distribution of speculative traders in the market. *See, e.g.,* 64 FR at 24039; Revision of Federal Speculative Position Limits and Associated Rules, 63 FR at 38525, 38527 (July 17, 1998).

[215] *See* 64 FR at 24038. *See also* 63 FR at 38525, 38527 (The 1998 proposed revisions to non-spot month levels, which were eventually adopted in 1999, were based upon two criteria: ''(1) the distribution of speculative traders in the markets; and (2) the size of open interest.'').

[216] Revision of Federal Speculative Position Limits, 57 FR 12766, 12770 (Apr. 13, 1992). The Commission also stated that providing for a marginal increase was ''based upon the universal observation that the size of the largest individual positions in a market do not continue to grow in proportion with increases in the overall open interest of the market.'' *Id.*

[217] Delta is a ratio comparing the change in the price of an asset (a futures contract) to the corresponding change in the price of its derivative (an option on that futures contract) and has a value that ranges between zero and one. In-the-money call options get closer to 1 as their expiration approaches. At-the-money call options typically have a delta of 0.5, and the delta of out-of-the-money call options approaches 0 as expiration nears. The deeper in-the-money the call option, the closer the delta will be to 1, and the more the option will behave like the underlying asset. Thus, delta-adjusted options on futures will represent the total position of those options as if they were converted to futures.

TABLE—MAXIMUM FUTURES AND OPTIONS ON FUTURES OPEN INTEREST, 1994–2018—Continued

	1994–1999	2000–2004	2005–2009	2010–2014	2015–2018
CBOT Oats (O)	18,879	17,939	16,860	15,375	11,313
CBOT Soybeans (S)	227,379	327,276	672,061	991,258	997,881
CBOT Soybean Meal (SM)	155,658	183,255	241,917	392,265	544,363
CBOT Soybean Oil (SO)	172,424	191,337	328,050	395,743	547,784
CBOT Wheat (W)	163,193	187,181	507,401	576,333	621,750
CBOT Wheat: Kansas City Hard Red Winter (KW)	76,435	87,611	159,332	189,972	311,592
MGEX Wheat: Minneapolis Hard Red Spring (MWE)	24,999	36,155	57,765	68,409	80,635

The table also displays the maximum open interest figures for subsequent periods up to, and including, 2018. The maximum open interest for all of these contracts, except for oats, generally increased over the period.[218] By the 2015–2018 period covered in the last column of the table, five of the contracts had maximum open interest greater than 500,000 contracts. The contracts for CBOT Corn (C), CBOT Soybeans (S), and CBOT Hard Red Winter Wheat (KW) saw maximum open interest increase by a factor of four to five times the maximum open interest during the 1994–1999 period leading up to the Commission's adoption of the 10, 2.5 percent formula in 1999.

ii. Changes in Market Composition

As open interest has increased, the current non-spot limits have become significantly more restrictive over time. In particular, because the 2.5 percent incremental increase applies after the first 25,000 contracts of open interest, limits on commodities with open interest above 25,000 contracts (*i.e.,* all commodities other than oats) continue to increase at a much slower rate of 2.5 percent rather than 10 percent, as for the first 25,000 contracts. This gradual increase was less of a problem in the latter part of the 1990s, for example, when open interest in each of the nine legacy agricultural contracts was below 500,000, and in many cases below 200,000. More recently, however, open interest has grown above 500,000 for a majority of the legacy contracts. The 10, 2.5 percent formula has thus become more restrictive for market participants, including those entities with positions that may not be eligible for a bona fide hedging exemption, but who might otherwise provide valuable liquidity to commercial firms.

This problem has become worse over time because dealers play a much more significant role in the market today than at the time the Commission adopted the 10, 2.5 percent formula. Prior to 1999, the Commission regulated physical commodity markets where the largest participants were often large commercial interests who held short positions. The offsetting positions were often held by small, individual traders, who tended to be long.[219] Several years after the Commission adopted the 10, 2.5 percent formula, the composition of futures market participants changed, as dealers began to enter the physical commodity futures market in larger size. The table below presents data from the Commission's publicly available ''Bank Participation Report'' (''BPR''), as of the December report for 2002–2018.[220] The table displays the number of banks holding reportable positions for the seven futures contracts for which federal limits apply and that were reported in the BPR.[221] The report presents data for every market where five or more banks hold reportable positions. The BPR is based on the same large-trader reporting system database used to generate the Commission's Commitments of Traders (''COT'') report.[222]

No data was reported for the seven futures contracts in December 2002, indicating that fewer than five banks held reportable positions at the time of the report. The December 2003 report shows that five or more banks held reportable positions in four of the commodity futures. The number of banks with reportable positions generally increased in the early to mid-2000s. As described in the Commission's 2008 Staff Report on Commodity Swap Dealers & Index Traders, major changes in the composition of futures markets developed over the 20 years prior to 2008, including an influx of swap dealers (''SDs''), affiliated with banks or other large financial institutions, acting as aggregators or market makers and providing swaps to commercial hedgers and to other market participants.[223] The dealers functioned in the swaps market and also used the futures markets to hedge their exposures. When the Commission adopted the 10, 2.5 percent formula in 1999, it had limited experience with physical commodity derivatives markets in which such banks were significant participants.

TABLE—NUMBER OF REPORTING COMMERCIAL BANKS WITH LONG FUTURES POSITIONS

Year	Corn	Cotton	Soybeans	Soybean meal	Soybean oil	Wheat	Wheat KCBT
2002	NR	NR	NR	NR	NR	NR	NR
2003	5	6	7	NR	NR	5	NR
2004	5	10	7	NR	NR	7	NR
2005	10	8	6	NR	5	9	9
2006	11	11	9	NR	7	14	7
2007	13	8	12	NR	6	14	6
2008	17	13	16	NR	6	14	9

[218] *See infra* Section II.B.2.e.iii. (discussion of proposed non-spot month limit level for CBOT Oats (O)).

[219] Stewart, Blair, *An Analysis of Speculative Trading in Grain Futures,* Technical Bulletin No. 1001, U.S. Department of Agriculture (Oct. 1949).

[220] *Bank Participation Reports,* U.S. Commodity Futures Trading Commission website, *available at https://www.cftc.gov/MarketReports/BankParticipationReports/index.htm* .

[221] The term ''reportable position'' is defined in § 15.00(p) of the Commission's regulations. 17 CFR 15.00(p).

[222] *Commitments of Traders,* U.S. Commodity Futures Trading Commission website, *available at www.cftc.gov/MarketReports/CommitmentsofTraders/index.htm.* There are generally still as many large commercial traders in the markets today as there were in the 1990s.

[223] *Staff Report on Commodity Swap Dealers & Index Traders with Commission Recommendations,* U.S. Commodity Futures Trading Commission (Sept. 2008), *available at https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/cftcstaffreportonswapdealers09.pdf.*

TABLE—NUMBER OF REPORTING COMMERCIAL BANKS WITH LONG FUTURES POSITIONS—Continued

Year	Corn	Cotton	Soybeans	Soybean meal	Soybean oil	Wheat	Wheat KCBT
2009	8	8	8	NR	NR	13	NR
2010	7	7	7	NR	NR	11	NR
2011	10	11	9	5	5	10	NR
2012	8	10	11	6	6	13	5
2013	11	11	13	10	6	11	5
2014	15	12	15	10	9	15	6
2015	12	13	13	12	9	16	9
2016	15	14	15	12	10	15	6
2017	16	13	12	11	9	16	8
2018	16	15	18	15	13	18	12

NR = ''Not Reported''.

For 2003, the first year in the report with reported data on the futures for these physical commodities, the BPR showed, as displayed in the table below, that the reporting banks held modest positions, totaling 3.4 percent of futures long open interest for wheat and smaller positions in other futures. The positions displayed in the table below increased over the next several years, generally peaking around 2005/2006 as a fraction of the long open interest.

TABLE—PERCENT OF FUTURES LONG OPEN INTEREST HELD BY COMMERCIAL BANKS

Year (Dec.)	Corn	Cotton	Soybeans	Soybean meal	Soybean oil	Wheat	Wheat KCBT
2002 ..	NR	NR	NR	NR	NR	NR	NR
2003 ..	1.5%	1.4%	0.8%	NR	NR	3.4%	NR
2004 ..	7.0	6.5	3.6	NR	NR	14.5	NR
2005 ..	12.5	13.8	8.3	NR	6.8	20.2	5.2
2006 ..	9.4	14.2	7.7	NR	6.7	17.0	6.9
2007 ..	9.2	9.7	6.7	NR	6.5	13.5	5.5
2008 ..	8.9	18.2	10.0	NR	6.4	18.7	7.1
2009 ..	4.3	6.5	3.6	NR	NR	9.3	NR
2010 ..	3.7	2.5	4.7	NR	NR	6.9	NR
2011 ..	4.1	3.3	4.9	1.9	4.4	7.7	NR
2012 ..	4.7	9.9	3.7	5.8	5.5	7.4	3.5
2013 ..	5.3	9.1	4.4	7.0	4.1	6.2	6.4
2014 ..	9.7	10.0	6.3	6.7	6.5	7.7	10.1
2015 ..	8.1	10.1	5.0	5.9	6.4	7.8	4.3
2016 ..	8.1	8.5	7.1	10.7	6.6	7.3	5.2
2017 ..	5.5	9.5	4.3	9.1	7.3	7.7	4.8
2018 ..	5.8	8.3	5.9	9.2	7.6	10.2	7.0

NR = ''Not Reported''.

iii. Proposed Non-Spot Month Limits for Hard Red Wheat and Oats

The Commission proposes partial wheat parity outside of the spot month: limits for CBOT KC HRW Wheat (KW) and MGEX HRS Wheat (MWE) would be set at 12,000 contracts, while limits for CBOT Wheat (W) would be set at 19,300 contracts. Based on the Commission's experience since 2011 with non-spot month speculative position limit levels at 12,000 for the CBOT KC HRW Wheat (KW) and MGEX HRS Wheat (MWE) core referenced futures contracts, the Commission is proposing to maintain the current non-spot month limit levels for those two contracts, rather than reducing the existing levels to the lower levels that would result from applying the proposed modified 10, 2.5 percent formula.[224] The current 12,000 contract level appears to have functioned well for these contracts, and the Commission sees no market-based reason to reduce the levels.

CBOT KC HRW Wheat (KW) and MGEX HRS Wheat (MWE) are both hard red wheats representing about 60 percent of the wheat grown in the United States[225] and about 80 percent of the wheat grown in Canada.[226] Although the CBOT Wheat (W) contract allows for delivery of hard red wheat, it typically sees deliveries of soft white wheat varieties, which comprises a smaller percentage of the wheat grown in North America. Even though the CBOT Wheat (W) contract has the majority of liquidity among the three wheat contracts as measured by open interest and trading volume, it is the hard red wheats that make up the bulk of wheat crops in North America. Thus, the Commission proposes to maintain the non-spot month limit for the CBOT KC HRW Wheat (KW) contract and MGEX HRS Wheat (MWE) contract at the 12,000 contract level even though both contracts would have a lower non-spot month limit based solely on the open interest formula. The Commission preliminarily believes that maintaining partial parity and the existing non-spot month limits in this manner will benefit the MWE and KW markets since the two species of wheat are similar (*i.e.,* hard red wheat) to one another relative to CBOT Wheat (W), which is soft white

[224] Applying the proposed modified 10, 2.5 percent formula to recent open interest data for these two contracts would result in limit levels of 11,900 and 5,700, respectively.

[225] *Wheat Sector at a Glance,* USDA Economic Research Service, *available at https://www.ers.usda.gov/topics/crops/wheat/wheat-sector-at-a-glance.*

[226] *Estimated Areas, Yield, Production, Average Farm Price and Total Farm Value of Principal Field Crops, In Metric and Imperial Units,* Statistics Canada website, *available at https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3210035901.*

wheat; and as a result, the Commission has preliminarily determined that decreasing the non-spot month levels for MWE could impose liquidity costs on the MWE market and harm bona fide hedgers, which could further harm liquidity for bona fide hedgers in the related KW market.

However, the Commission has determined not to raise the proposed limit levels for CBOT KC HRW Wheat (KW) and MGEX HRS Wheat (MWE) to the proposed 19,300 contract limit level for CBOT Wheat (W) because 19,300 contracts appears to be extraordinarily large in comparison to open interest in the CBOT KC HRW Wheat (KW) and MGEX HRS Wheat (MWE) markets, and the limit levels for both contracts are already larger than a limit level based on the 10, 2.5 percent formula. The Commission is concerned that substantially raising non-spot limits on the KW or MWE contracts could create a greater likelihood of excessive speculation given their smaller overall trading relative to the CBOT Wheat (W) contract. In response to prior proposals, which would have resulted in lower non-spot limits for MWE, MGEX had requested parity among all wheat contracts. In part, MGEX reasoned that intermarket spread trading among the three contracts is vital to their price discovery function.[227] The Commission notes that intermarket spreading is permitted under this proposal.[228] The intermarket spread exemption should address any concerns over the loss of liquidity in spread trades among the three wheat contracts.

Likewise, based on the Commission's experience since 2011 with the current non-spot month speculative position limit of 2,000 contracts for CBOT Oats (O), the Commission is proposing to maintain the current 2,000 contract level rather than reducing it to the lower levels that would result from applying the updated 10, 2.5 formula.[229] The existing 2,000 contract limit for CBOT Oats (O) appears to have functioned well, and the Commission sees no reason to reduce it.

While retaining the existing non-spot month limits for the MWE and KW contracts and for CBOT Oats (O) does break with the proposed non-spot month formula, the Commission has confidence that the existing contract limits should continue to be appropriate for these contracts. Furthermore, even when relying on a single criterion, such as percentage of open interest, the Commission has historically recognized that there can ''result . . . a range of acceptable position limit levels.'' [230]

For all of the core referenced contracts, based on decades of experience overseeing exchange-set position limits and administering its own federal position limits regime, the Commission is of the view that the proposed non-spot month limit levels are also low enough to diminish, eliminate, or prevent excessive speculation, and to deter and prevent market manipulation, squeezes, and corners. The Commission has previously studied prior increases in federal non-spot month limits and concluded that the overall impact was modest, and that any changes in market performance were most likely attributable to factors other than changes in the federal position limit rules.[231] The Commission has since gained further experience which supports that conclusion, including by monitoring amendments to position limit levels by exchanges. Further, given the significant increases in open interest and changes in market composition that have occurred since the 1990s, the Commission is comfortable that the proposal to amend the 10, 2.5 percent formula will adequately address each of the policy objectives set forth in CEA section 4a(a)(3).[232]

iv. Conclusion

With the exception of the CBOT KC HRW Wheat (KW), MGEX HRS Wheat (MWE), and CBOT Oats (O) contracts, as noted above, the proposed formula would result in higher non-spot month limit levels than those currently in place. Furthermore, as noted above, under the rules proposed herein, the nine legacy agricultural contracts would be the only contracts subject to limits outside of the spot month. Aside from the CBOT Oats (O) contract, these contracts all have high open interest, and thus their pricing may be less likely to be affected by the trading of large position holders in non-spot months. Further, consistent with the approach proposed herein to leverage existing exchange-level programs and expertise, the proposed federal non-spot month limit levels would serve simply as ceilings—exchanges would remain free to set exchange levels below the federal limit. The exchanges currently have systems and processes in place to monitor and surveil their markets in real time, and have the ability, and regulatory responsibility, to act quickly in the event of a disturbance.[233]

Additionally, exchanges have tools other than position limits for protecting markets. For instance, exchanges can establish position accountability levels well below a position limit level, and can impose liquidity and concentration surcharges to initial margin if they are vertically integrated with a derivatives clearing organization. One reason that the Commission is proposing to update the formula for calculating non-spot month limit levels is that the exchanges may be able in certain circumstances to act much more quickly than the Commission, including quickly altering their own limits and accountability levels based on changing market conditions. Any decrease in an exchange-set limit would effectively lower the federal limit for that contract, as market participants would be required to comply with both federal and exchange-set limits, and as the Commission has the authority to enforce violations of both federal and exchange-set limits.[234]

f. Subsequent Spot and Non-Spot Month Limit Levels

Prior to amending any of the proposed spot or non-spot month levels, if adopted, the Commission would provide for public notice and comment by publishing the proposed levels in the **Federal Register**. Under proposed § 150.2(f), should the Commission wish to rely on exchange estimates of deliverable supply to update spot month speculative limit levels, DCMs would be required to supply to the Commission deliverable supply estimates upon request. Proposed § 150.2(j) would delegate the authority to make such requests to the Director of the Division of Market Oversight.

Recognizing that estimating deliverable supply can be a time and resource consuming process for DCMs and for the Commission, the Commission is not proposing to require

[227] *See* Statement of Layne Carlson, CFTC Agricultural Advisory Committee meeting, Sept. 22, 2015, at 38–44.

[228] *See supra* Section II.A.20. (definition of spread transaction).

[229] Applying the proposed modified 10, 2.5 percent formula to recent open interest data for oats would result in a 700 contract limit level.

[230] Revision of Speculative Position Limits, 57 FR 12770, 12766 (Apr. 13, 1992). *See also* Revision of Speculative Position Limits and Associated Rules, 63 FR at 38525, 38527 (July 17, 1998). *Cf.* 2013 Proposal, 78 FR at 75729 (there may be range of spot month limits that maximize policy objectives).

[231] 64 FR 24038, 24039 (May 5, 1999).

[232] 7 U.S.C. 6a(a)(3)(B).

[233] For example, under DCM Core Principle 4, DCMs are required to ''have the capacity and responsibility to prevent manipulation, price distortion, and disruptions of the delivery or cash-settlement process through market surveillance, compliance, and enforcement practices and procedures,'' including ''methods for conducting real-time monitoring of trading'' and ''comprehensive and accurate trade reconstructions.'' 7 U.S.C. 7(d)(4).

[234] *See infra* Section II.D.4.g. (discussion of Commission enforcement of exchange-set limits).

DCMs to submit such estimates on a regular basis; instead, DCMs would be required to submit estimates of deliverable supply if requested by the Commission.[235] DCMs would also have the option of submitting estimates of deliverable supply and/or recommended speculative position limit levels if they wanted the Commission to consider them when setting/adjusting federal limit levels. Any such information would be included in a Commission action proposing changes to the levels. The Commission encourages exchanges to submit such estimates and recommendations voluntarily, as the exchanges are uniquely situated to recommend updated levels due to their knowledge of individual contract markets. When submitting estimates, DCMs would be required under proposed § 150.2(f) to provide a description of the methodology used to derive the estimate, as well as any statistical data supporting the estimate, so that the Commission can verify that the estimate is reasonable. DCMs should consult the guidance regarding estimating deliverable supply set forth in Appendix C to part 38.[236]

g. Relevant Contract Month

Proposed § 150.2(c) clarifies that the spot month and single month for any given referenced contract is determined by the spot month and single month of the core referenced futures contract to which that referenced contract is linked. This requires that referenced contracts be linked to the core referenced futures contract in order to be netted for position limit purposes. For example, for the NYMEX NY Harbor ULSD Heating Oil (HO) futures core referenced futures contract, the spot month period starts at the close of trading three business days prior to the last trading day of the contract. The spot month period for the NYMEX NY Harbor ULSD Financial (MPX) futures referenced contract would thus start at the same time—the close of trading three business days prior to the last trading day of the core referenced futures contract.

h. Limits on ''Pre-Existing Positions''

Under proposed § 150.2(g)(1), other than pre-enactment swaps and transition period swaps as defined in proposed § 150.1, ''pre-existing positions,'' defined in proposed § 150.1 as positions established in good faith prior to the effective date of a final federal position limits rulemaking, would be subject to federal spot month limit levels. This clarification is intended to avoid rendering spot month limits ineffective—failing to apply spot month limits to such pre-existing positions could result in a large, pre-existing position either intentionally or unintentionally causing a disruption to the price discovery function of the core referenced futures contract as positions are rolled into the spot month. The Commission is particularly concerned about protecting the spot month in physical-delivery futures from price distortions or manipulation that would disrupt the hedging and price discovery utility of the futures contract.

Proposed § 150.2(g)(2) would provide that the proposed non-spot month limit levels would not apply to positions acquired in good faith prior to the effective date of such limit, recognizing that pre-existing large positions may have a relatively less disruptive effect outside of the spot month than during the spot month given that physical delivery occurs only during the spot month. However, other than pre-enactment swaps and transition period swaps, any pre-existing positions held outside the spot month would be attributed to such person if the person's position is increased after the effective date of a final federal position limits rulemaking.

i. Positions on Foreign Boards of Trade

CEA section 4a(a)(6) directs the Commission to, among other things, establish limits on the aggregate number of positions in contracts based upon the same underlying commodity that may be held by any person across contracts listed by DCMs, certain contracts traded on a foreign board of trade (''FBOT'') with linkages to a contract traded on a registered entity, and swap contracts that perform or affect a significant price discovery function with respect to regulated entities.[237] Pursuant to that directive, proposed § 150.2(h) would apply the proposed limits to a market participant's aggregate positions in referenced contracts executed on a DCM and on, or pursuant to the rules of, an FBOT, provided that the referenced contracts settle against a price of a contract listed for trading on a DCM or SEF, and that the FBOT makes such contract available in the United States through ''direct access.'' [238] In other words, a market participant's positions in referenced contracts listed on a DCM and on an FBOT registered to provide direct access would collectively have to stay below the federal limit level for the relevant core referenced futures contract. The Commission preliminarily believes that, as proposed, § 150.2(h) would lessen regulatory arbitrage by eliminating a potential loophole whereby a market participant could accumulate positions on certain FBOTs in excess of limits in referenced contracts.[239]

j. Anti-Evasion

Pursuant to the Commission's rulemaking authority in section 8a(5) of the CEA,[240] the Commission proposes § 150.2(i), which is intended to deter and prevent a number of potential methods of evading the position limits proposed herein. The proposed anti-evasion provision is not intended to capture a trading strategy merely because it may result in smaller position size for purposes of position limits, but rather is intended to deter and prevent cases of willful evasion of federal position limits, the specifics of which the Commission may be unable to anticipate. The proposed federal position limit requirements would apply during the spot month for all referenced contracts subject to federal limits and non-spot position limit requirements would only apply for the nine legacy agricultural contracts.

[235] For example, if a contract has problems with pricing convergence between the futures and the cash market, it could be a symptom of a deliverable supply issue in the market. In such a situation, the Commission may request an updated deliverable supply estimate from the relevant DCM to help identify the possible cause of the pricing anomaly.

[236] 17 CFR part 38, Appendix C.

[237] 7 U.S.C. 6a(a)(6).

[238] Commission regulation § 48.2(c) defines ''direct access'' to mean an explicit grant of authority by a foreign board of trade to an identified member or other participant located in the United States to enter trades directly into the trade matching system of the foreign board of trade. 17 CFR 48.2(c).

[239] In addition, CEA section 4(b)(1)(B) prohibits the Commission from permitting an FBOT to provide direct access to its trading system to its participants located in the United States unless the Commission determines, in regards to any FBOT contract that settles against any price of one or more contracts listed for trading on a registered entity, that the FBOT (or its foreign futures authority) adopts position limits that are comparable to the position limits adopted by the registered entity. 7 U.S.C. 6(b)(1)(B). CEA section 4(b)(1)(B) provides that the Commission may not permit a foreign board of trade to provide to the members of the foreign board of trade or other participants located in the United States direct access to the electronic trading and order-matching system of the foreign board of trade with respect to an agreement, contract, or transaction that settles against any price (including the daily or final settlement price) of 1 or more contracts listed for trading on a registered entity, unless the Commission determines that the foreign board of trade (or the foreign futures authority that oversees the foreign board of trade) adopts position limits (including related hedge exemption provisions) for the agreement, contract, or transaction that are comparable to the position limits (including related hedge exemption provisions) adopted by the registered entity for the 1 or more contracts against which the agreement, contract, or transaction traded on the foreign board of trade settles.

[240] 7 U.S.C. 12a(5).

Under this proposed framework, and because the threat of corners and squeezes is the greatest in the spot month, the Commission preliminarily anticipates that it may focus its attention on anti-evasion activity during the spot month.

First, the proposed rule would consider a commodity index contract and/or location basis contract used to willfully circumvent position limits to be a referenced contract subject to federal limits. Because commodity index contracts and location basis contracts are excluded from the proposed ''referenced contract'' definition and thus not subject to federal limits,[241] the Commission intends that proposed § 150.2(i) would close a potential loophole whereby a market participant who has reached its limits could purchase a commodity index contract in a manner that allowed the participant to exceed limits when taking into account the weighting in the component commodities of the index contract. The proposed rule would close a similar potential loophole with respect to location basis contracts.

Second, proposed § 150.2(i) would provide that a bona fide hedge recognition or spread exemption would no longer apply if used to willfully circumvent speculative position limits. This provision is intended to help ensure that bona fide hedge recognitions and spread exemptions are granted and utilized in a manner that comports with the CEA and Commission regulations, and that the ability to obtain a bona fide hedge recognition or spread exemption does not become an avenue for market participants to inappropriately exceed speculative position limits.

Third, a swap contract used to willfully circumvent speculative position limits would be deemed an economically equivalent swap, and thus a referenced contract, even if the swap does not meet the economically equivalent swap definition set forth in proposed § 150.1. This provision is intended to deter and prevent the structuring of a swap in order to willfully evade speculative position limits.

The determination of whether particular conduct is intended to circumvent or evade requires a facts and circumstances analysis. In preliminarily interpreting these anti-evasion rules, the Commission is guided by its interpretations of anti-evasion provisions appearing elsewhere in the Commission's regulations, including the interpretation of the anti-evasion rules that the Commission adopted in its rulemakings to further define the term ''swap'' and to establish a clearing requirement under section 2(h)(1)(A) of the CEA.[242]

Generally, consistent with those interpretations, in evaluating whether conduct constitutes evasion, the Commission would consider, among other things, the extent to which the person lacked a legitimate business purpose for structuring the transaction in that particular manner. For example, an analysis of how a swap was structured could reveal that persons crafted derivatives transactions, structured entities, or conducted themselves in a manner without a legitimate business purpose and with the intent to willfully evade position limits by structuring a swap such that it would not meet the proposed ''economically equivalent swap'' definition. As stated in a prior rulemaking, a person's specific consideration of, for example, costs or regulatory burdens, including the avoidance thereof, is not, in and of itself, dispositive that the person is acting without a legitimate business purpose in a particular case.[243] The Commission will view legitimate business purpose considerations on a case-by-case basis in conjunction with all other relevant facts and circumstances.

Further, as part of its facts and circumstances analysis, the Commission would look at factors such as the historical practices behind the market participant and transaction in question. For example, with respect to § 150.2(i)(3), the Commission would consider whether a market participant has a history of structuring its swaps one way, but then starts structuring its swaps a different way around the time the participant risked exceeding a speculative position limit as a result of its swap position, such as by modifying the delivery date or other material terms and conditions such that the swap no longer meets the definition of an ''economically equivalent swap.''

Consistent with interpretive language in prior rulemakings addressing evasion,[244] when determining whether a particular activity constitutes willful evasion, the Commission will consider the extent to which the activity involves deceit, deception, or other unlawful or illegitimate activity. Although it is likely that fraud, deceit, or unlawful activity will be present where willful evasion has occurred, the Commission does not believe that these factors are a prerequisite to an evasion finding because a position that does not involve fraud, deceit, or unlawful activity could still lack a legitimate business purpose or involve other indicia of evasive activity. The presence or absence of fraud, deceit, or unlawful activity is one fact the Commission will consider when evaluating a person's activity. That said, the proposed anti-evasion provision does require willfulness, *i.e.* ''scienter.'' The Commission will interpret ''willful'' consistent with how the Commission has in the past, that acting either intentionally or with reckless disregard constitutes acting ''willfully.'' [245]

In determining whether a transaction has been entered into or structured willfully to evade position limits, the Commission will not consider the form, label, or written documentation as dispositive. The Commission also is not requiring a pattern of evasive transactions as a prerequisite to prove evasion, although such a pattern may be one factor in analyzing whether evasion has occurred. In instances where one party willfully structures a transaction to evade but the other counterparty does not, proposed § 150.2(i) would apply to the party who willfully structured the transaction to evade.

Finally, entering into transactions that qualify for the forward exclusion from the swap definition shall not be considered evasive. However, in circumstances where a transaction does not, in fact, qualify for the forward exclusion, the transaction may or may not be evasive depending on an analysis of all relevant facts and circumstances.

k. Netting

For the reasons discussed above, the referenced contract definition in proposed § 150.1 includes, among other things, cash-settled contracts that are linked, either directly or indirectly, to a core referenced futures contract; and any ''economically equivalent

[241] *See supra* Section II.A.16.b. (explanation of proposed exclusions from the ''referenced contract'' definition).

[242] *See* Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR 48207, 48297–48303 (Aug. 13, 2012); Clearing Requirement Determination Under Section 2(h) of the CEA, 77 FR 74284, 74317–74319 (Dec. 13, 2012).

[243] *See* Clearing Requirements Determination Under Section 2(h) of the CEA, 77 FR at 74319.

[244] *See* Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR 48207, 48297–48303 and Clearing Requirement Determination Under Section 2(h) of the CEA, 77 FR 74284, 74317–74319.

[245] *See In re Squadrito,* [1990–1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,262 (CFTC Mar. 27, 1992) (adopting definition of ''willful'' in *McLaughlin* v. *Richland Shoe Co.,* 486 U.S. 128 (1987)).

swaps.'' [246] Under proposed § 150.2(a), federal spot month limits would apply to physical-delivery referenced contracts separately from federal spot month limits applied to cash-settled referenced contracts, meaning that during the spot month, positions in physically-settled contracts may not be netted with positions in linked cash-settled contracts. Specifically, all of a trader's positions (long or short) in a given physically-settled referenced contract (across all exchanges and OTC as applicable) [247] are netted and subject to the spot month limit for the relevant commodity, and all of such trader's positions in any cash-settled referenced contracts (across all exchanges and OTC as applicable) linked to such physically-settled core referenced futures contract are netted and independently (rather than collectively along with the physically-settled positions) subject to the federal spot month limit for that commodity.[248] A position in a commodity contract that is not a referenced contract is therefore not subject to federal limits, and, as a consequence, cannot be netted with positions in referenced contracts for purposes of federal limits.[249] For example, a swap that is not a referenced contract because it does not meet the economically equivalent swap definition could not be netted with positions in a referenced contract.

Allowing the netting of linked physically-settled and cash-settled contracts during the spot month could lead to disruptions in the price discovery function of the core referenced futures contract or allow a market participant to manipulate the price of the core referenced futures contract. Absent separate spot month limits for physically-settled and cash-settled contracts, the spot month limit would be rendered ineffective, as a participant could maintain large positions in excess of limits in both the physically-settled contract and the linked cash-settled contract, enabling the participant to disrupt the price discovery function as the contracts go to expiration by taking large opposite positions in the physically-settled core referenced futures and cash-settled referenced contracts, or potentially allowing a participant to effect a corner or squeeze.[250]

Proposed § 150.2(b), which would establish limits outside the spot month, does not use the ''separately'' language. Accordingly, outside of the spot month, participants may net positions in linked physically-settled and cash-settled referenced contracts, because there is no immediate threat of delivery.

Finally, proposed § 150.2(a) and (b) also provide that spot and non-spot limits apply ''net long or net short.'' Consistent with existing § 150.2, this language requires that, both during and outside the spot month, and subject to the provisions governing netting described above, a given participant's long positions in a particular contract be aggregated (including across exchanges and OTC as applicable), and a participant's short positions be aggregated (including across exchanges and OTC as applicable), and those aggregate long and short positons be netted—in other words, it is the net value that is subject to federal limits.

Consistent with current and historical practice, the speculative position limits proposed herein would apply to positions throughout each trading session, including as of the close of each trading session.[251]

l. ''Eligible Affiliates'' and Aggregation

Proposed § 150.2(k) addresses entities that qualify as an ''eligible affiliate'' as defined in proposed § 150.1. Under the proposed definition, an ''eligible affiliate'' includes certain entities that, among other things, are required to aggregate their positions under § 150.4 and that do not claim an exemption from aggregation. There may be certain entities that are eligible for an exemption from aggregation but that prefer to aggregate rather than disaggregate their positions; for example, when aggregation would result in advantageous netting of positions with affiliated entities. Proposed § 150.2(k) is intended to address such a circumstance by making clear that an ''eligible affiliate'' may opt to aggregate its positions even though it is eligible to disaggregate.

m. Request for Comment

The Commission requests comment on all aspects of proposed § 150.2. The Commission also invites comments on the following:

(20) Are there legitimate strategies on which the Commission should offer guidance with respect to the anti-evasion provision?

(21) Should the Commission list by regulation specific factors/circumstances in which it may set spot month limits with other than the at or below 25 percent of deliverable supply formula, and non-spot month limits with other than the modified 10, 2.5 percent formula proposed herein? If so, please provide examples of any such factors, including an explanation of whether and why different formulas make sense for different commodities.

(22) Is the proposed compliance date of twelve months after publication of a final federal position limits rulemaking in the **Federal Register** an appropriate amount of time for compliance? If not, please provide reasons supporting a different timeline. Do market participants support delaying compliance until one year after a DCM has had its new § 150.9 rules approved by the Commission under § 40.5?

(23) The Commission understands that it may be possible for a market participant trading options to start a trading day below the delta-adjusted federal speculative position limit for that option, but end up above such limit as the option becomes in-the-money during the spot month. Should the Commission allow for a one-day grace period with respect to federal position limits for market participants who have exercised options that were out-of-the money on the previous trading day but that become in-the-money during the trading day in the spot month?

(24) Given that the contracts in corn and soybean complex are more liquid than CBOT Oats (O) and the MGEX HRS (MWE) wheat contract, should the Commission employ a higher open interest formula for corn and the soybean complex?

(25) Should the Commission phase-in the proposed increased federal non-spot month limits incrementally over a period of time, rather than implementing the entire increase upon the effective date? Please explain why or why not. If so, please comment on an appropriate phase-in schedule, including whether different

[246] *See supra* Section II.A.16. (discussion of the proposed referenced contract definition).

[247] In practice, the only physically-settled referenced contracts under this proposal would be the 25 core referenced futures contracts, none of which are listed on multiple DCMs, although there could potentially be physically-settled OTC swaps that would satisfy the ''economically equivalent swap'' definition and therefore would also qualify as referenced contracts.

[248] Consistent with CEA section 4a(a)(6), this would include positions across exchanges.

[249] Proposed Appendix C to part 150 provides guidance regarding the referenced contract definition, including that the following types of contracts are not deemed referenced contracts, meaning such contracts are not subject to federal limits and cannot be netted with positions in referenced contracts for purposes of federal limits: Location basis contracts; commodity index contracts; and trade options that meet the requirements of 17 CFR 32.3.

[250] For example, absent such a restriction in the spot month, a trader could stand for 100 percent of deliverable supply during the spot month by holding a large long position in the physical-delivery contract along with an offsetting short position in a cash-settled contract, which effectively would corner the market.

[251] *See, e.g.,* Elimination of Daily Speculative Trading Limits, 44 FR 7124, 7125 (Feb. 6, 1979).

commodities should be subject to different schedules.

(26) The Commission is aware that the non-spot month open interest is skewed to the first new crop (usually December or November) for the nine legacy agricultural contracts. The Commission understands that cotton may be unique because it has an extended harvest period starting in July in the south and working its way north until November. There may be some concern with positions being rolled from the prompt month into deferred contract months causing disruption to the price discovery function of the Cotton futures. Should the Commission consider lowering the single month limit to a percentage of the all months limits for Cotton? If so, what percentage of the all month limit should be used for the single month limit? Please provide a rationale for your percentage.

(27) Should the Commission allow market participants who qualify for the conditional spot month limit in natural gas to net cash-settled natural gas referenced contracts across DCMs? Why or why not?

C. § 150.3—Exemptions From Federal Position Limits

1. Existing §§ 150.3, 1.47, and 1.48

Existing § 150.3(a), which pre-dates the Dodd-Frank Act, lists positions that may, under certain circumstances, exceed federal limits: (1) Bona fide hedging transactions, as defined in the current bona fide hedging definition in § 1.3; and (2) certain spread or arbitrage positions.[252] So that the Commission can effectively oversee the use of such exemptions, existing § 150.3(b) provides that the Commission or certain Commission staff may make special calls to demand certain information from exemption holders, including information regarding positions owned or controlled by that person, trading done pursuant to that exemption, and positions that support the claimed exemption.[253] Existing § 150.3(a) allows for bona fide hedging transactions to exceed federal limits, and the current process for a person to request such recognitions for non-enumerated hedges appears in § 1.47.[254] Under that provision, persons seeking recognition by the Commission of a non-enumerated bona fide hedging transaction or position must file statements with the Commission.[255] Initial statements must be filed with the Commission at least 30 days in advance of exceeding the limit.[256] Similarly, existing § 1.48 sets forth the process for market participants to file an application with the Commission to recognize certain enumerated anticipatory positions as bona fide hedging positions.[257] Under that provision, such recognitions must be requested 10 days in advance of exceeding the limit.[258]

Further, the Commission provides self-effectuating spread exemptions for the nine legacy agricultural contracts currently subject to federal limits, but does not specify a formal process for granting such spread exemptions.[259] The Commission's authority and existing regulation for exempting certain spread positions can be found in section 4a(a)(1) of the Act and existing § 150.3(a)(3) of the Commission's regulations, respectively.[260] In particular, CEA section 4a(a)(1) provides the Commission with authority to exempt from position limits transactions ''normally known to the trade as 'spreads' or 'straddles' or 'arbitrage.' ''

2. Proposed § 150.3

As described elsewhere in this release, the Commission is proposing a new bona fide hedging definition in § 150.1 (described above) and a new streamlined process in proposed § 150.9 for recognizing non-enumerated bona fide hedging positions (described further below). The Commission thus proposes to update § 150.3 to conform to those new proposed provisions. Proposed § 150.3 also includes new exemption types not explicitly listed in existing § 150.3, including: (i) Exemptions for financial distress situations; (ii) conditional exemptions for certain spot month positions in cash-settled natural gas contracts; and (iii) exemptions for pre-enactment swaps and transition period swaps.[261] Proposed § 150.3(b)–(g) respectively address: Requests for relief from position limits submitted directly to the Commission or Commission staff (rather than to an exchange under proposed § 150.9, as discussed further below); previously-granted risk management exemptions to position limits; exemption-related recordkeeping and special-call requirements; the aggregation of accounts; and the delegation of certain authorities to the Director of the Division of Market Oversight.

a. Bona Fide Hedging Positions and Spread Exemptions

The Commission has years of experience granting and monitoring spread exemptions, and enumerated and non-enumerated bona fide hedges, as well as overseeing exchange processes for administering exemptions from exchange-set limits on such contracts. As a result of this experience, the Commission has determined to continue to allow self-effectuating enumerated bona fide hedges and certain spread exemptions for all contracts that would be subject to federal position limits, as explained further below.

i. Bona Fide Hedging Positions

First, under proposed § 150.3(a)(1)(i), bona fide hedge recognitions for positions in referenced contracts that fall within one of the proposed enumerated hedges set forth in proposed Appendix A to part 150, discussed above, would be self-effectuating for purposes of federal position limits. Market participants would thus not be required to request Commission approval prior to exceeding federal position limits in such cases, but would be required to request a bona fide hedge exemption from the relevant exchange for purposes of exchange-set limits established pursuant to proposed § 150.5(a), and submit required cash-market information to the exchange as part of such request.[262] The Commission has also determined to allow the proposed enumerated anticipatory bona fide hedges (some of which are not currently self-effectuating and thus are required to be approved by the Commission under existing § 1.48) to be self-effectuating for purposes of federal limits (and thus would not require prior

[252] 17 CFR 150.3(a).

[253] 17 CFR 150.3(b).

[254] 17 CFR 1.47.

[255] 17 CFR 1.47(a).

[256] 17 CFR 1.47(b).

[257] 17 CFR 1.48.

[258] *Id.*

[259] Since 1938, the Commission (known as the Commodity Exchange Commission in 1938) has recognized the use of spread positions to facilitate liquidity and hedging. Notice of Proposed Order in the Matter of Limits on Position and Daily Trading in Grain for Future Delivery, 3 FR 1408 (June 14, 1938).

[260] *See* 7 U.S.C. 6a(a)(1) and 17 CFR 150.3(a)(3) (providing that the position limits set in § 150.2 may be exceeded to the extent such positions are: Spread or arbitrage positions between single months of a futures contract and/or, on a futures-equivalent basis, options thereon, outside of the spot month, in the same crop year; provided, however, that such spread or arbitrage positions, when combined with any other net positions in the single month, do not exceed the all-months limit set forth in § 150.2.). Although existing § 150.3(a)(3) does not specify a formal process for granting spread exemptions, the Commission is able to monitor traders' gross and net positions using part 17 data, the monthly Form 204, and information from the applicable DCMs to identify any such spread positions.

[261] The Commission revised § 150.3(a) in 2016, relocating the independent account controller aggregation exemption from § 150.3(a)(4) in order to consolidate it with the Commission's aggregation requirements in § 150.4(b)(4). *See* Final Aggregation Rulemaking, 81 FR at 91489–90.

[262] *See infra* Section II.D.4.a. *See also* proposed § 150.5(a)(2)(ii)(A)(1).

Commission approval for such enumerated anticipatory hedges). The Commission may consider expanding the proposed list of enumerated hedges at a later time, after notice and comment, as it gains experience with the new federal position limits framework proposed herein.

Second, under proposed § 150.3(a)(1)(ii), for positions in referenced contracts that do not fit within one of the proposed enumerated hedges in Appendix A, (*i.e.,* non-enumerated bona fide hedges), market participants must request approval from the Commission, or from an exchange, prior to exceeding federal limits. Such exemptions thus would not be self-effectuating and market participants in such cases would have two options for requesting such a non-enumerated bona fide hedge recognition: (1) Apply directly to the Commission in accordance with proposed § 150.3(b) (described below), and separately also apply to an exchange pursuant to exchange rules established under proposed § 150.5(a); [263] or, alternatively (2) apply to an exchange pursuant to proposed § 150.9 for a non-enumerated bona fide hedge recognition that could be valid both for purposes of federal and exchange-set position limit requirements, unless the Commission (and not staff) objects to the exchange's determination within a limited period of time.[264] As discussed elsewhere in this release, market participants relying on enumerated or non-enumerated bona fide hedge recognitions would no longer have to file the monthly Form 204/304 with supporting cash market information.[265]

ii. Spread Exemptions

Under proposed § 150.3(a)(2)(i), spread exemptions for positions in referenced contracts would be self-effectuating, provided that the position fits within one of the types of spreads listed in the spread transaction definition in proposed § 150.1,[266] and provided further that the market participant separately requests a spread exemption from the relevant exchange's limits established pursuant to proposed § 150.5(a).

The Commission anticipates that such spread exemptions might include spreads that are ''legged in,'' that is, carried out in two steps, or alternatively are ''combination trades,'' that is, all components of the spread are executed simultaneously or near simultaneously. The list of spread transactions in proposed § 150.1 reflects the most common types of spread strategies for which the Commission and/or exchanges have previously granted spread exemptions.

Under proposed § 150.3(a)(2)(ii), for all contracts subject to federal limits, if the spread position does not fit within one of the spreads listed in the spread transaction definition in proposed § 150.1, market participants must apply for the spread exemption relief directly from the Commission in accordance with proposed § 150.3(b). The market participant must receive notification of the approved spread exemption under proposed § 150.3(b)(4) before exceeding the federal speculative position limits for that spread position. The Commission may consider expanding the proposed spread transactions definition at a later time, after notice and comment, as it gains experience with the new federal position limits framework proposed herein.

iii. Removal of Existing §§ 1.47, 1.48, and 140.97

Given the proposal set forth in § 150.9, as described in detail below, to allow for a streamlined process for recognizing bona fide hedges for purposes of federal limits,[267] the Commission also proposes to delete existing §§ 1.47 and 1.48. The Commission preliminarily believes that overall, the proposed approach would lead to a more efficient bona fide hedge recognition process. As the Commission proposes to delete §§ 1.47 and 1.48, the Commission also proposes to delete existing § 140.97, which delegates to the Director of the Division of Enforcement or his designee authority regarding requests for classification of positions as bona fide hedges under existing §§ 1.47 and 1.48.[268]

The Commission does not intend the proposed replacement of §§ 1.47 and 1.48 to have any bearing on bona fide hedges previously recognized under those provisions. With the exception of certain recognitions for risk management positions discussed below, positions that were previously recognized as bona fide hedges under §§ 1.47 or 1.48 would continue to be recognized, provided they continue to meet the statutory bona fide hedging definition and all other existing and proposed requirements.

b. Process for Requesting Commission-Provided Relief for Non-Enumerated Bona Fide Hedges and Spread Exemptions

Under the proposed rules, non-enumerated bona fide hedging recognitions may only be granted by the Commission as proposed in § 150.3(b), or under the streamlined process proposed in § 150.9. Further, spread exemptions that do not meet the proposed spread transaction definition may only be granted by the Commission as proposed in § 150.3(b). Under the Commission process in § 150.3(b), a person seeking a bona fide hedge recognition or spread exemption may submit a request to the Commission.

With respect to bona fide hedge recognitions, such request must include: (i) A description of the position in the commodity derivative contract for which the application is submitted, including the name of the underlying commodity and the position size; (ii) information to demonstrate why the position satisfies section 4a(c)(2) of the Act and the definition of bona fide hedging transaction or position in proposed § 150.1, including factual and legal analysis; (iii) a statement concerning the maximum size of all gross positions in derivative contracts for which the application is submitted (in order to provide a view of the true footprint of the position in the market); (iv) information regarding the applicant's activity in the cash markets and the swaps markets for the commodity underlying the position for which the application is submitted; [269] and (v) any other information that may help the Commission determine whether the position meets the requirements of section 4a(c)(2) of the Act and the definition of bona fide hedging transaction or position in § 150.1.[270]

With respect to spread exemptions, such request must include: (i) A description of the spread transaction for which the exemption application is

[263] *See infra* Section II.D.4. (discussion of proposed § 150.5).

[264] *See infra* Section II.G.3. (discussion of proposed § 150.9).

[265] *See infra* Section II.H.2. (discussion of the proposed elimination of Form 204).

[266] *See supra* Section II.A.20. (proposed definition of ''spread transaction'' in § 150.1, which would cover: Calendar spreads; quality differential spreads; processing spreads (such as energy ''crack'' or soybean ''crush'' spreads); product or by-product differential spreads; and futures-options spreads.)

[267] *Id.*

[268] 17 CFR 140.97.

[269] The Commission would expect that applicants would provide cash market data for at least the prior year.

[270] For example, the Commission may, in its discretion, request a description of any positions in other commodity derivative contracts in the same commodity underlying the commodity derivative contract for which the application is submitted. Other commodity derivatives contracts could include other futures, options, and swaps (including over-the-counter swaps) positions held by the applicant.

submitted;[271] (ii) a statement concerning the maximum size of all gross positions in derivative contracts for which the application is submitted; and (iii) any other information that may help the Commission determine whether the position is consistent with section 4a(a)(3)(B) of the Act.

Under proposed § 150.3(b)(2), the Commission, or Commission staff pursuant to delegated authority proposed in § 150.3(g), may request additional information from the requestor and must provide the requestor with ten business days to respond. Under proposed § 150.3(b)(3) and (4), the requestor, however, may not exceed federal position limits unless it receives a notice of approval from the Commission or from Commission staff pursuant to delegated authority proposed in § 150.3(g); *provided however,* that, due to demonstrated sudden or unforeseen increases in its bona fide hedging needs, a person may request a recognition of a bona fide hedging transaction or position within five business days after the person established the position that exceeded the federal speculative position limit.[272]

Under this proposed process, market participants would be encouraged to submit their requests for bona fide hedge recognitions and spread exemptions as early as possible since proposed § 150.3(b) would not set a specific timeframe within which the Commission must make a determination for such requests.

Further, all approved bona fide hedge recognitions and spread exemptions must be renewed if there are any changes to the information submitted as part of the request, or upon request by the Commission or Commission staff.[273] Finally, the Commission (and not staff) may revoke or modify any bona fide hedge recognition or spread exemption at any time if the Commission determines that the bona fide hedge recognition or spread exemption, or portions thereof, are no longer consistent with the applicable statutory and regulatory requirements.[274]

The Commission anticipates that most market participants would utilize the streamlined process set forth in proposed § 150.9 and described below, rather than the process as proposed in § 150.3(b), because exchanges would generally be able to make such determinations more efficiently than Commission staff, and because market participants are likely already familiar with the proposed processes set forth in § 150.9, which is intended to leverage the processes currently in place at the exchanges for addressing requests for exemptions from exchange-set limits. Nevertheless, proposed § 150.3(a)(1) and (2) clarify that market participants may seek relief from federal position limits for non-enumerated bona fide hedges and spread transactions that do not meet the proposed spread transactions definition directly from the Commission. After receiving any approval of a bona fide hedge or spread exemption from the Commission, the market participant would still be required to request a bona fide hedge recognition or spread exemption from the relevant exchange for purposes of exchange-set limits established pursuant to proposed § 150.5(a).

c. Request for Comment

The Commission requests comments on all aspects of proposed § 150.3(a)(1) and (2). The Commission also invites comment on the following:

(28) Out of concern that large demand for delivery against long nearby futures positions may outpace demand on spot cash values, the Commission has previously discussed allowing cash and carry exemptions as spreads on the condition that the exchange ensures that exit points in cash and carry spread exemptions would facilitate an orderly liquidation.[275] Should the Commission allow the granting of cash and carry exemptions under such conditions? If so, please explain why, including how such exemptions would be consistent with the Act and the Commission's regulations. If not, please explain why not, and if other circumstances would be better, including better for preserving convergence, which is essential to properly functioning markets and price discovery. If cash and carry exemptions were allowed, how could an exchange ensure that exit points in cash and carry exemptions facilitate convergence of cash and futures?

d. Financial Distress Exemptions

Proposed § 150.3(a)(3) would allow for a financial distress exemption in certain situations, including the potential default or bankruptcy of a customer or a potential acquisition target. For example, in periods of financial distress, such as a customer default at an FCM or a potential bankruptcy of a market participant, it may be beneficial for a financially-sound market participant to take on the positions and corresponding risk of a less stable market participant, and in doing so, exceed federal speculative position limits. Pursuant to authority delegated under §§ 140.97 and 140.99, Commission staff previously granted exemptions in these types of situations to avoid sudden liquidations required to comply with a position limit.[276] Such sudden liquidations could otherwise potentially hinder statutory objectives, including by reducing liquidity, disrupting price discovery, and/or increasing systemic risk.[277]

The proposed exemption would be available to positions of ''a person, or related persons,'' meaning that a financial distress exemption request should be specific to the circumstances of a particular person, or to persons related to that person, and not a more general request by a large group of unrelated people whose financial distress circumstances may differ from one another. The proposed exemption would be granted on a case by case basis in response to a request submitted pursuant to § 140.99, and would be

[271] The nature of such description would depend on the facts and circumstances, and different details may be required depending on the particular spread.

[272] Where a person requests a bona fide hedge recognition within five business days after they exceed federal position limits, such person would be required to demonstrate that they encountered sudden or unforeseen circumstances that required them to exceed federal position limits before submitting and receiving approval of their bona fide hedge application. These applications submitted after a person has exceeded federal position limits should not be habitual and will be reviewed closely. If the Commission reviews such application and finds that the position does not qualify as a bona fide hedge, then the applicant would be required to bring their position into compliance within a commercially reasonable time, as determined by the Commission in consultation with the applicant and the applicable DCM or SEF. If the applicant brings the position into compliance within a commercially reasonable time, then the applicant will not be considered to have violated the position limits rules. Further, any intentional misstatements to the Commission, including statements to demonstrate why the bona fide hedging needs were sudden and unforeseen, would be a violation of sections 6(c)(2) and 9(a)(2) of the Act.

[273] *See* proposed § 150.3(b)(5). Currently, the Commission does not require automatic updates to bona fide hedge applications, and does not require applications or updates thereto for spread exemptions, which are self-effectuating. Consistent with current practices, under proposed § 150.3(b)(5), the Commission would not require automatic annual updates to bona fide hedge and spread exemption applications; rather, updated applications would only be required if there are changes to information the requestor initially submitted or upon Commission request. This approach is different than the proposed streamlined process in § 150.9, which would require automatic annual updates to such applications, which is more consistent with current exchange practices. *See, e.g.,* CME Rule 559.

[274] This proposed authority to revoke or modify a bona fide hedge recognition or spread exemption would not be delegated to Commission staff.

[275] *See, e.g.,* 2016 Reproposal, 81 FR 96704 at 96833.

[276] *See, e.g.,* CFTC Press Release No. 5551–08, *CFTC Update on Efforts Underway to Oversee Markets,* (Sept. 19, 2008), *available at http://www.cftc.gov/PressRoom/PressReleases/pr5551-08.*

[277] *See* 7 U.S.C. 6a(a)(3).

evaluated based on the specific facts and circumstances of a particular person or related persons. Any such financial distress position would not be a bona fide hedging transaction or position unless it otherwise met the substantive and procedural requirements set forth in proposed §§ 150.1, 150.3, and 150.9, as applicable.

e. Conditional Spot Month Exemption in Natural Gas

Certain natural gas contracts are currently subject to exchange-set limits, but not federal limits.[278] This proposal would apply federal limits to certain natural gas contracts for the first time by including the physically-settled NYMEX Henry Hub Natural Gas (''NYMEX NG'') contract as a core referenced futures contract listed in proposed § 150.2(d). As set forth in proposed Appendix E to part 150, that physically-settled contract, as well as any cash-settled natural gas contract that qualifies as a referenced contract,[279] would be separately subject to a federal spot month limit, net long or net short, of 2,000 NYMEX NG equivalent-size contracts.

Under the referenced contract definition in proposed § 150.1, ICE's cash-settled Henry Hub LD1 contract, ICE's Henry Financial Penultimate Fixed Price Futures, NYMEX's cash-settled Henry Hub Natural Gas Last Day Financial Futures contract, Nodal Exchange's (''Nodal'') cash-settled Henry Hub Monthly Natural Gas contract, and NFX cash-settled Henry Hub Natural Gas Financial Futures contract, for example, would each qualify as a referenced contract subject to federal limits by virtue of being cash-settled to the physically-settled NYMEX NG core referenced futures contract.[280] Any other cash-settled contract that meets the referenced contract definition would also be subject to federal limits, as would an ''economically equivalent swap,'' as defined in proposed § 150.1, with respect to any natural gas referenced contract.

Proposed § 150.3(a)(4) would permit a new federal conditional spot month limit exemption for certain cash-settled natural gas referenced contracts. Under proposed § 150.3(a)(4), market participants seeking to exceed the proposed 2,000 NYMEX NG equivalent-size contract spot month limit for a cash-settled natural gas referenced contract listed on any DCM could receive an exemption that would be capped at 10,000 NYMEX NG equivalent-size contracts net long or net short per DCM, plus an additional 10,000 NYMEX NG futures equivalent size contracts in economically equivalent swaps. A grant of such an exemption would be conditioned on the participant not holding or controlling any positions during the spot month in the physically-settled NYMEX NG core referenced futures contract.[281]

This proposed conditional exemption level of 10,000 contracts per DCM in natural gas would codify into federal regulations the industry practice of an exchange-set conditional limit that is five times the size of the spot month limit that has developed over time, and which the Commission preliminarily believes has functioned well. The practice balances the needs of certain market participants, who may currently hold or control 5,000 contracts in each DCM's cash-settled natural gas futures contracts and prefer a sizeable position in a cash-settled contract in order to obtain the desired exposure without needing to make or take delivery of natural gas, with the policy objectives of the Commission, which has historically had concerns about the possibility of traders attempting to manipulate the physically-settled NYMEX NG contract (*i.e.,* mark-the close) in order to benefit from a larger position in the cash-settled ICE LD1 Natural Gas Swap and/or NYMEX Henry Hub Natural Gas Last Day Financial Futures contract during the spot month as these contracts expired.[282]

NYMEX, ICE, NFX, and Nodal currently have rules in place establishing a conditional spot month limit exemption equivalent to up to 5,000 contracts (in NYMEX-equivalent size) for their respective cash-settled natural gas contracts, provided that the trader does not maintain a position in the physically-settled NYMEX NG contract during the spot month.[283] Together, the ICE, NYMEX, NFX, and Nodal rules allow a trader to hold up to 20,000 (NYMEX-equivalent size) contracts during the spot month combined across ICE, NYMEX, NFX, and Nodal cash-settled natural gas contracts, provided the trader does not hold positions in excess of 5,000

[278] Some examples include natural gas contracts that use the NYMEX NG futures contract as a reference price, such as ICE's Henry Financial Penultimate Fixed Price Futures (PHH), options on Henry Penultimate Fixed Price (PHE), Henry Basis Futures (HEN) and Henry Swing Futures (HHD); NYMEX's E-mini Natural Gas Futures (QG), Henry Hub Natural Gas Last Day Financial Futures (HH), and Henry Hub Natural Gas Financial Calendar Spread (3 Month) Option (G3); and Nasdaq Futures, Inc.'s (''NFX'') Henry Hub Natural Gas Financial Futures (HHQ), and Henry Hub Natural Gas Penultimate Financial Futures (NPQ).

[279] Under the referenced contract definition proposed in § 150.1, cash-settled natural gas referenced contracts are those futures or options contracts, including spreads, that are:

(1) Directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of the physically-settled NYMEX NG core referenced futures contract; or

(2) Directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of the same commodity underlying the physically-settled NYMEX NG core referenced futures contract for delivery at the same location or locations as specified in the NYMEX NG core referenced futures contract. As proposed, the referenced contract definition does not include a location basis contract, a commodity index contract, or a trade option that meets the requirements of § 32.3 of this chapter. *See* proposed § 150.1.

[280] On November 12, 2019, Nodal announced that it had reached an agreement to acquire the core assets of NFX. *See Nodal Exchange Acquires U.S. Commodities Business of Nasdaq Futures, Inc. (NFX),* Nodal Exchange website (Nov. 12, 2019), *available at https://www.nodalexchange.com/wp-content/uploads/20191112-Nodal-NFX-release-Final.pdf* (press release). The acquisition includes all of NFX's energy complex of futures and options contracts, including NFX's Henry Hub Natural Gas Financial Futures contract. Because that contract will become part of Nodal's offerings, that contract, as well as Nodal's existing Henry Hub Monthly Natural Gas contract, would continue to qualify as referenced contracts under the proposed definition herein, and thus would be subject to federal limits by virtue of being cash-settled to the physically-settled NYMEX NG core referenced futures contract. According to the November 12, 2019 press release, ''Nodal Exchange and Nodal Clear plan to complete the integration of U.S. Power contracts by December 2019. U.S. Natural Gas, Crude Oil and Ferrous Metals contracts could transfer to Nodal as soon as spring 2020.'' *Id.*

[281] While the NYMEX NG is the only natural gas contract included as a core referenced futures contract in this release, the conditional spot month exemption proposed herein would also apply to any other physically-settled natural gas contract that the Commission may in the future designate as a core referenced futures contract, as well as to any physically-delivered contract that is substantially identical to the NYMEX NG and that qualifies as a referenced contract, or that qualifies as an economically equivalent swap.

[282] As noted above, current exchange rules establish a spot month limit of 1,000 NYMEX equivalent sized contracts. The Commission proposes a federal spot month limit of 2,000 NYMEX equivalent sized contracts based on updated deliverable supply estimates. *See supra* Section II.B.2.b. (2020 proposed spot month limit chart). The proposed conditional spot month limit exemption of 10,000 contracts per exchange is thus five times the proposed federal spot month limit.

[283] *See* ICE Rule 6.20(c), NYMEX Rule 559.F, NFX Rule Chapter V, Section 13(a), and Nodal Rule 6.5.2. The spot month for such contracts is three days. *See also Position Limits,* CMG Group website, *available at https://www.cmegroup.com/market-regulation/position-limits.html* (NYMEX position limits spreadsheet); *Market Resources,* ICE Futures website, *available at https://www.theice.com/futures-us/market-resources* (ICE position limits spreadsheet). NYMEX rules establish an exchange-set spot month limit of 1,000 contracts for its physically-settled NYMEX NG Futures contract and a separate spot month limit of 1,000 contracts for its cash-settled Henry Hub Natural Gas Last Day Financial Futures contract. As the ICE natural gas contract is one quarter the size of the NYMEX contract, ICE's exchange-set natural gas limits are shown in NYMEX equivalents throughout this section of the release. ICE thus has rules in place establishing an exchange-set spot month limit of 4,000 contracts (equivalent to 1,000 NYMEX contracts) for its cash-settled Henry Hub LD1 Fixed Price Futures contract.

contracts on any one DCM, and provided further that the trader does not hold any positions in the physically-settled NYMEX NG contract during the spot month.[284]

The DCMs originally adopted these rules, in consultation with Commission staff, in large part to address historical concerns over the potential for manipulation of physically-settled natural gas contracts during the spot month in order to benefit positions in cash-settled natural gas contracts, and to accommodate certain trading dynamics unique to the natural gas contracts. In particular, in natural gas, open interest tends to decline in the NYMEX NG contract approaching expiration and tends to increase rapidly in the ICE cash-settled Henry Hub LD1 contract. These dynamics suggest that cash-settled natural gas contracts serve an important function for hedgers and speculators who wish to recreate and/or hedge the physically-settled NYMEX NG contract price without being required to make or take delivery.

The condition in proposed § 150.3(a)(4), however, should remove the potential to manipulate the physically-settled natural gas contract in order to benefit a sizeable position in the cash-settled contract. To qualify for the exemption, market participants would not be permitted to hold any spot month positions in the physically-settled contract. This proposed conditional exemption would prevent manipulation by traders with leveraged positions in the cash-settled contracts (in comparison to the level of the limit in the physical-delivery contract) who might otherwise attempt to mark the close or distort physical-delivery prices in the physically-settled contract to benefit their leveraged cash-settled positions. Thus, the exemption would establish a higher conditional limit for the cash-settled contract than for the physical-delivery contract, so long as the cash-settled positions are decoupled from spot-month positions in physical-delivery contracts which set or affect the value of such cash-settled positions.

While the Commission is unaware of any natural gas swaps that would qualify as ''economically equivalent swaps,'' the Commission proposes to apply the conditional exemption to swaps as well, provided that a given market participant's positions in such cash-settled swaps do not exceed 10,000 futures-equivalent contracts and provided that the participant does not hold spot-month positions in physically settled natural gas contracts. Because swaps may generally be fungible across markets, that is, a position may be established on one SEF and offset on another SEF or OTC, the Commission proposes that economically equivalent swap contracts have a conditional spot month limit of 10,000 economically equivalent contracts in total across all SEFs and OTC.

A market participant that sought to hold positions in both the NYMEX NG physically-settled contract and in any cash-settled natural gas contract would not be eligible for the proposed conditional exemption. Such a participant could only hold up to 2,000 contracts net long or net short across exchanges/OTC in physically-settled natural gas referenced contract(s), and another 2,000 contracts net long or net short across exchanges/OTC in cash-settled natural gas contract referenced contract(s).[285]

f. Exemption for Pre-Enactment Swaps and Transition Period Swaps

In order to promote a smooth transition to compliance for swaps not previously subject to federal speculative position limits, proposed § 150.3(a)(5) would provide that federal speculative position limits shall not apply to positions acquired in good faith in any pre-enactment swap or in any transition period swap, in either case as defined by § 150.1.[286] Any swap that meets the proposed economically equivalent swap definition, but that otherwise qualifies as a pre-enactment swap or transition period swap, would thus be exempt from federal speculative position limits. This exemption would be self-effectuating and would not require a market participant to request relief.

In order to further lessen the impact of the proposed federal limits on market participants, for purposes of complying with the proposed federal non-spot month limits, the proposed rule would also allow both pre-enactment swaps and transition period swaps to be netted with commodity derivative contracts acquired more than 60 days after publication of final rules in the **Federal Register**. Any such positions would not be permitted to be netted during the spot month so as to avoid rendering spot month limits ineffective—the Commission is particularly concerned about protecting the spot month in physical-delivery futures from price distortions or manipulation that would disrupt the hedging and price discovery utility of the futures contract.

g. Previously-Granted Risk Management Exemptions

As discussed elsewhere in this release, the Commission previously recognized, as bona fide hedges under § 1.47, certain risk-management positions in physical commodity futures and/or options on futures contracts thereon held outside of the spot month that were used to offset the risk of commodity index swaps and other related exposure, but that did not represent substitutes for transactions or positions to be taken in a physical marketing channel. However, as noted earlier in this release, the Commission interprets Dodd-Frank Act amendments to the CEA as eliminating the Commission's authority to grant such relief unless the position satisfies the pass-through provision in CEA section 4a(c)(2)(B).[287] Accordingly, to ensure consistency with the Dodd-Frank Act, the Commission will not recognize further risk management positions as bona fide hedges, unless the position otherwise satisfies the requirements of the pass-through provisions.[288]

In addition, the Commission proposes in § 150.3(c) that such previously-granted exemptions shall not apply after the effective date of a final federal position limits rulemaking implementing the Dodd-Frank Act. Proposed § 150.3(c) uses the phrase ''positions in financial instruments'' to refer to such commodity index swaps and related exposure and would have the effect of revoking the ability to use previously-granted risk management exemptions once the limits proposed in § 150.2 go into effect.

h. Recordkeeping

Proposed § 150.3(d) establishes recordkeeping requirements for persons who claim any exemptions or relief under proposed § 150.3. Proposed § 150.3(d) should help to ensure that any person who claims any exemption permitted under proposed § 150.3 can demonstrate compliance with the applicable requirements. Under proposed § 150.3(d)(1), any persons

[284] In practice, a majority of the trading in such contracts is on ICE and NYMEX. As noted above, Nodal is acquiring NFX, including its Henry Hub Natural Gas Financial Futures contract.

[285] *See supra* Section II.B.2.k. (discussion of netting).

[286] ''Pre-enactment swap'' would mean any swap entered into prior to enactment of the Dodd-Frank Act of 2010 (July 21, 2010), the terms of which have not expired as of the date of enactment of that Act. ''Transition period swap'' would mean a swap entered into during the period commencing after the enactment of the Dodd-Frank Act of 2010 (July 21, 2010), and ending 60 days after the publication in the **Federal Register** of final amendments to this part implementing section 737 of the Dodd-Frank Act of 2010.

[287] *See supra* Section II.A.1.c.ii.(1). (discussion of the temporary substitute test and risk-management exemptions).

[288] *See supra* Section II.A.1.c.vi. (discussion of proposed pass-through language).

claiming an exemption would be required to keep and maintain complete books and records concerning all details of their related cash, forward, futures, options on futures, and swap positions and transactions, including anticipated requirements, production and royalties, contracts for services, cash commodity products and by-products, cross-commodity hedges, and records of bona fide hedging swap counterparties.

Proposed § 150.3(d)(2) addresses recordkeeping requirements related to the pass-through swap provision in the proposed definition of bona fide hedging transaction or position in proposed § 150.1.[289] Under proposed § 150.3(d)(2), a pass-through swap counterparty, as contemplated by proposed § 150.1, that relies on a representation received from a bona fide hedging swap counterparty that a swap qualifies in good faith as a bona fide hedging position or transaction under proposed § 150.1, would be required to: (i) Maintain any written representation for at least two years following the expiration of the swap; and (ii) furnish the representation to the Commission upon request.

i. Call for Information

The Commission proposes to move existing § 150.3(b), which currently allows the Commission or certain Commission staff to make special calls to demand certain information regarding positions or trading, to proposed § 150.3(e), with some technical modifications. Together with the recordkeeping provision of proposed § 150.3(d), proposed § 150.3(e) should enable the Commission to monitor the use of exemptions from speculative position limits and help to ensure that any person who claims any exemption permitted by proposed § 150.3 can demonstrate compliance with the applicable requirements.

j. Aggregation of Accounts

Proposed § 150.3(f) would clarify that entities required to aggregate under § 150.4 would be considered the same person for purposes of determining whether they are eligible for a bona fide hedge recognition under § 150.3(a)(1).

k. Delegation of Authority

Proposed § 150.3(g) would delegate authority to the Director of the Division of Market Oversight to: Grant financial distress exemptions pursuant to proposed § 150.3(a)(3); request additional information with respect to an exemption request pursuant to proposed § 150.3(b)(2); determine, in consultation with the exchange and applicant, a commercially reasonable amount of time required for a person to bring its position within the federal position limits pursuant to proposed § 150.3(b)(3)(ii)(B); make a determination whether to recognize a position as a bona fide hedging transaction or to grant a spread exemption pursuant to proposed § 150.3(b)(4); and to request that a person submit updated materials or renew their request pursuant to proposed § 150.3(b)(2) or (5). This proposed delegation would enable the Division of Market Oversight to act quickly in the event of financial distress and in the other circumstances described above.

l. Request for Comment

The Commission requests comment on all aspects of proposed § 150.3. In addition, the Commission understands that there may be certain not-for-profit electric and natural gas utilities that have certain public service missions and that are prohibited, by their governing body, risk management policies, or otherwise, from speculating, and that would request relief from federal position limits once federal limits on swaps are implemented. The Commission requests comment on all aspects of the concept of an exemption from part 150 of the Commission's regulations for certain not-for-profit electric and natural gas utility entities that have unique public service missions to provide reliable, affordable energy services to residential, commercial, and industrial customers, and that are prohibited from speculating. In addition, the Commission requests comment on whether the definition of ''economically equivalent swap'' would cover the types of hedging activities such utilities engage in with respect to their OTC swap activity.

The Commission also invites comments on the following:

(29) What are the overarching issues or concerns the Commission should consider regarding a potential exemption from position limits for such not- for-profit electric and natural gas utilities?

(30) Are there certain provisions in part 150 of the Commission's regulations that should apply to such not-for-profit electric and natural gas utilities even if the Commission were to grant such entities an exemption with respect to federal position limits?

(31) Are there other types of entities, similar to the not-for-profit electric and natural gas utilities described above, for which the Commission should also consider granting such exemptive relief by rule, and why?

(32) What types of conditions, restrictions, or criteria should the Commission consider applying with respect to such an exemption?

(33) Should higher position limits in cash-settled natural gas futures be conditioned on the closing of any positions in the physically delivered natural gas contract? Are there characteristics of the natural gas futures markets that weigh in favor of or against the higher conditional limits?

D. § 150.5—Exchange-Set Position Limits and Exemptions Therefrom

1. Background

For the avoidance of confusion, the discussion of § 150.5 that follows addresses exchange-set limits and exemptions therefrom, not federal limits. For a discussion of the proposed processes by which an exemption may be recognized for purposes of federal limits, please see the discussion of proposed § 150.3 above and § 150.9 below.

Under DCM Core Principle 5, DCMs shall adopt for each contract, as is necessary and appropriate, position limitations or position accountability for speculators, and, for any contract subject to a federal position limit, DCMs must establish exchange-set limits for that contract no higher than the federal limit level.[290] Similarly, under SEF Core Principle 6, SEFs that are trading facilities shall adopt for each contract, as is necessary and appropriate, position limitations or position accountability for speculators, and, for any contract subject to a federal position limit, SEFs that are trading facilities must establish exchange-set limits for that contract no higher than the federal limit, and must monitor positions established on or through the SEF for compliance with the limit set by the Commission and the limit, if any, set by the SEF.[291] Beyond these and other statutory and Commission requirements, unless otherwise determined by the Commission, DCM and SEF Core Principle 1 afford DCMs and SEFs ''reasonable discretion'' in establishing the manner in which they comply with the core principles.[292]

The current regulatory provisions governing exchange-set position limits and exemptions therefrom appear in § 150.5.[293] To align § 150.5 with Dodd-

[289] *See supra* Section II.A.1.c.vi. (discussion of proposed pass-through language).

[290] *See* 7 U.S.C. 7(d)(5).

[291] *See* 7 U.S.C. 7b–3(f)(6).

[292] *See* 7 U.S.C. 7(d)(1) and 7 U.S.C. 7b–3(f)(1).

[293] 17 CFR 150.5.

Frank statutory changes [294] and with other changes proposed herein,[295] the Commission proposes a new version of § 150.5. This new proposed § 150.5 would generally afford exchanges the discretion to decide for themselves how best to set limit levels and grant exemptions from such limits in a manner that best reflects their specific markets.

2. Implementation of Exchange-Set Limits on Swaps

With respect to the DCM Core Principle 5 and SEF Core Principle 6 requirements addressing exchange-set limits on swaps, the Commission is preliminarily determining that it is reasonable to delay implementation because requiring compliance would be impracticable, and in some cases impossible, at this time.[296]

The Commission has previously explained why it has proposed to temporarily delay imposition of exchange-set position limits on swaps.[297] The decision to delay imposing exchange-set position limits on swaps is based largely on the lack of exchange access to sufficient data regarding individual market participants' open swap positions, which means that, without action to provide further access to swap data to exchanges, the exchanges cannot effectively monitor swap position limits.

The Commission preliminarily believes that delayed implementation of exchange-set speculative position limits on swaps at this time is not inconsistent with the statutory objectives outlined in section 4a(a)(3) of the CEA: To diminish excessive speculation, to deter market manipulation, to ensure sufficient liquidity for bona fide hedgers, and to ensure that the price discovery function of the underlying market it not disrupted.[298]

Accordingly, while proposed § 150.5 will apply to DCMs and SEFs, the requirements associated with swaps would be enforced at a later time. In other words, exchanges must comply with proposed § 150.5 only with respect to futures and options on futures traded on DCMs, and with respect to swaps at a later time as determined by the Commission.

3. Existing § 150.5

As noted above, existing § 150.5 predates the Dodd-Frank Act and addresses the establishment of DCM-set position limits for all contracts not subject to federal limits under existing § 150.2 (aside from certain major foreign currencies).[299] Existing § 150.5(a) authorizes DCMs to set different limits for different contracts and contract months, and permits DCMs to grant exemptions from DCM-set limits for spreads, straddles, or arbitrage trades.

Existing § 150.5(b) provides a limited set of methodologies for DCMs to use in establishing initial limit levels, including separate maximum limit levels for spot month limits in physical-delivery contracts, spot month limits in cash-settled contracts, non-spot month limits for tangible commodities other than energy, and non-spot month limits for energy products and non-tangible commodities, including financials.[300] Existing § 150.5(c) provides that DCMs may adjust their speculative initial levels as follows: (i) No greater than 25 percent of deliverable supply for adjusted spot month levels in physically-delivered contracts; (ii) ''no greater than necessary to minimize the potential for manipulation or distortion of the contract's or the underlying commodity's price'' for adjusted spot month levels in cash-settled contracts; and (iii) for adjusted non-spot month limit levels, either no greater than 10 percent of open interest, up to 25,000 contracts, with a marginal increase of 2.5 percent thereafter, or based on position sizes customarily held by speculative traders on the DCM.

Existing § 150.5(d) addresses bona fide hedging exemptions from DCM-set limits, including an exemption application process, providing that exchange-set speculative position limits shall not apply to bona fide hedging positions as defined by a DCM in accordance with the definition of bona fide hedging transactions and positions for excluded commodities in § 1.3. Existing § 150.5(d) also addresses factors for consideration by DCMs in recognizing bona fide hedging exemptions (or position accountability), including whether such positions ''are not in accord with sound commercial practices or exceed an amount which may be established and liquidated in an orderly fashion.'' [301]

Existing § 150.5(e) permits DCMs in certain circumstances to submit for Commission approval, as a substitute for the position limits required under § 150.5(a), (b), and (c), a DCM rule requiring traders ''to be accountable for large positions,'' meaning that under certain circumstances, traders must provide information about their position upon request to the exchange, and/or consent to halt increasing further a position if so ordered by the exchange.[302] Among other things, this provision includes open interest and volume-based parameters for determining when DCMs may do so.[303]

Existing § 150.5(f) provides that DCM speculative position limits adopted pursuant to § 150.5 shall not apply to certain positions acquired in good faith prior to the effective date of such limits or to a person that is registered as an FCM or as a floor broker under authority of the CEA except to the extent that transactions made by such person are made on behalf of or for the account or benefit of such person.[304] This provision also provides that in addition to the express exemptions specified in § 150.5, a DCM may propose such other exemptions from the requirements of § 150.5 as are consistent with the purposes of § 150.5, and provides procedures for doing so.[305] Finally, existing § 150.5(g) addresses aggregation of positions for which a person directly or indirectly controls trading.

4. Proposed § 150.5

Pursuant to CEA sections 5(d)(1) and 5h(f)(1), the Commission proposes a new version of § 150.5.[306] Proposed § 150.5 is intended to provide the ability for DCMs and SEFs to set limit levels

[294] While existing § 150.5 on its face only applies to contracts that are not subject to federal limits, DCM Core Principle 5, as amended by Dodd-Frank, and SEF Core Principle 6, establish requirements both for contracts that are, and are not, subject to federal limits. 7 U.S.C. 7(d)(5) and 7 U.S.C. 7b–3(f)(6).

[295] Significant changes proposed herein include the process set forth in proposed § 150.9 and revisions to the bona fide hedging definition proposed in § 150.1.

[296] The Commission has observed in prior releases that courts have upheld relieving regulated entities of their statutory obligations where compliance is impossible or impracticable. 2016 Supplemental Proposal, 81 FR at 38462.

[297] 2016 Supplemental Proposal, 81 FR at 38459–62; 2016 Reproposal, 81 FR at 96784–86.

[298] 7 U.S.C. 6a(a)(3).

[299] Existing § 150.5(a) states that the requirement to set position limits shall not apply to futures or option contract markets on major foreign currencies, for which there is no legal impediment to delivery and for which there exists a highly liquid cash market. 17 CFR 150.5(a).

[300] *See* 17 CFR 150.5(b)(1)–(3) (no greater than one-quarter of the estimated spot month deliverable supply for physical delivery contracts during the spot month; no greater than necessary to minimize the potential for manipulation or distortion of the contract's or the underlying commodity's price for cash-settled contracts during the spot month; no greater than 1,000 contracts for tangible commodities other than energy outside the spot month; and no greater than 5,000 contracts for energy products and nontangible commodities, including financials outside the spot month).

[301] *See* 17 CFR 150.5(d)(1).

[302] 17 CFR 150.5(e).

[303] 17 CFR 150.5(e)(1)–(4).

[304] 17 CFR 150.5(f).

[305] *Id.*

[306] As mentioned above, while proposed § 150.5 will include references to swaps and SEFs, the proposed rule would initially only apply to DCMs, as requirements relating to exchange-set limits on swaps would be phased in at a later time.

and grant exemptions in a manner that best accommodates activity particular to their markets, while promoting compliance with DCM Core Principle 5 and SEF Core Principle 6 and ensuring consistency with other changes proposed herein, including the process for exchanges to administer applications for non-enumerated bona fide hedge exemptions for purposes of federal limits proposed in § 150.9.[307]

Proposed § 150.5 contains two main sub-sections, with each sub-section addressing a different category of contract: (i) Proposed § 150.5(a) would include rules governing exchange-set limits for contracts subject to federal limits; and (ii) proposed § 150.5(b) would include rules governing exchange-set limits for physical commodity contracts that are not subject to federal limits.

As described in further detail below, the proposed provisions addressing exchange-set limits on contracts that are not subject to federal limits reflect a principles-based approach and include acceptable practices that provide for non-exclusive methods of compliance with the principles-based regulations. The Commission would therefore provide exchanges with the ability to set limits and grant exemptions in the manner that most suits their unique markets. Each proposed provision of § 150.5 is described in detail below.

a. Proposed § 150.5(a)—Requirements for Exchange-Set Limits on Commodity Derivative Contracts Subject to Federal Limits Set Forth in § 150.2

Proposed § 150.5(a) would apply to all contracts subject to the federal limits proposed in § 150.2 and, among other things, is intended to help ensure that exchange-set limits do not undermine the federal limits framework. Under proposed § 150.5(a)(1), for any contract subject to a federal limit, DCMs and, ultimately, SEFs, would be required to establish exchange-set limits for such contracts. Consistent with DCM Core Principle 5 and SEF Core Principle 6, the exchange-set limit levels on such contracts, whether cash-settled or physically-settled, and whether during or outside the spot month, would have to be no higher than the level specified for the applicable referenced contract in proposed § 150.2. Exchanges would be free to set position limits that are more stringent than the federal limit for a particular contract, and would also be permitted to adopt position accountability at a level lower than the federal limit, in addition to an exchange-set position limit that is equal to or less than the federal limit.

Proposed § 150.5(a)(2) would permit exchanges to grant exemptions from exchange-set limits established under proposed § 150.5(a)(1) as follows:

First, if such exemptions from exchange-set limits conform to the types of exemptions that may be granted for purposes of federal limits under proposed §§ 150.3(a)(1)(i), 150.3(a)(2)(i), and 150.3(a)(4)–(5) (enumerated bona fide hedge recognitions and spread exemptions that are listed in the spread transaction definition in proposed § 150.1, as well as exempt conditional spot month positions in natural gas and pre-enactment and transition period swaps), then the level of the exemption may exceed the applicable federal position limit under proposed § 150.2. Since the proposed exemptions listed above are self-effectuating for purposes of federal position limit levels, exchanges may grant such exemptions pursuant to proposed § 150.5(a)(2)(i).

Second, if such exemptions from exchange-set limits conform to the exemptions from federal limits that may be granted under proposed §§ 150.3(a)(1)(ii) and 150.3(a)(2)(ii) (respectively, non-enumerated bona fide hedges and spread transactions that are not currently listed in the spread transaction definition in proposed § 150.1), then the level of the exemption may exceed the applicable federal position limit under proposed § 150.2, provided that the exemption for purposes of federal limits is first approved in accordance with proposed § 150.3(b) or § 150.9, as applicable.

Third, if such exemptions conform to the exemptions from federal limits that may be granted under proposed § 150.3(a)(3) (financial distress positions), then the level of the exemption may exceed the applicable federal position limit under proposed § 150.2, provided that the Commission has first issued a letter approving such exemption pursuant to a request submitted under § 140.99.[308]

Finally, for purposes of exchange-set limits only, exchanges may grant exemption types that are not listed in § 150.3(a). However, in such cases, the exemption level would have to be capped at the level of the applicable federal position limit, so as not to undermine the federal limit framework, unless the Commission has first approved such exemption for purposes of federal limits pursuant to § 150.3(b).

Exchanges that wish to offer exemptions from their own limits other than the types listed in proposed § 150.3(a) could also submit rules to the Commission allowing for such exemptions pursuant to part 40. The Commission would carefully review any such exemption types for compliance with applicable standards, including any statutory requirements [309] and Commission-set standards.[310]

Under proposed § 150.5(a)(2)(ii)(A), exchanges that wish to grant exemptions from their own limits would have to require traders to file an application. Aside from the requirements discussed below, including the requirement that the exchange collect cash-market and swaps market information from the applicant, exchanges would have flexibility to establish the application process as they see fit, including adopting protocols to reduce burdens by leveraging existing processes with which their participants are already familiar. For all exemption types, exchanges would have to generally require that such applications be filed in advance of the date such position would be in excess of the limits, but exchanges would be given the discretion to adopt rules allowing traders to file applications within five business days after a trader established such position. Exchanges wishing to grant such retroactive exemptions would have to require market participants to demonstrate circumstances warranting a sudden and unforeseen hedging need.

Proposed § 150.5(a)(2)(ii)(B) would provide that exchanges must require that a trader reapply for the exemption granted under proposed § 150.5(a)(2) at least annually so that the exchange and the Commission can closely monitor exemptions for contracts subject to

[307] To avoid confusion created by the parallel federal and exchange-set position limit frameworks, the Commission clarifies that proposed § 150.5 deals solely with exchange-set position limits and exemptions therefrom, whereas proposed § 150.9 deals solely with federal limits and recognition of exchange-granted exemptions and bona fide hedging determinations for purposes of federal limits.

[308] Under the proposal, requests for exemptions for financial distress positions would be submitted directly to the Commission (or delegated staff) for consideration, and any approval of such exemption would be issued in the form of an exemption letter from the Commission (or delegated staff) pursuant to § 140.99.

[309] For example, an exchange would not be permitted to adopt rules allowing for risk management exemptions in physical commodities because the Commission interprets Dodd-Frank amendments to CEA section 4a(c)(2) as prohibiting risk management exemptions in such commodities. *See supra* Section II.A.1.c.ii.(1). (discussion of the temporary substitute test and risk-management exemptions).

[310] For example, as discussed below, proposed § 150.5(a)(2)(ii)(C) would require that exchanges take into account whether the requested exemption would result in positions that are not in accord with sound commercial practices in the relevant commodity derivative market and/or would not exceed an amount that may be established and liquidated in an orderly fashion in that market.

federal speculative position limits, and to help ensure that the exchange and the Commission remain aware of the trader's activities. Proposed § 150.5(a)(2)(ii)(C) would authorize exchanges to deny, limit, condition, or revoke any exemption request in accordance with exchange rules,[311] and would set forth a principles-based standard for the granting of exemptions that do not conform to the type that the Commission may grant under proposed § 150.3(a). Specifically, exchanges would be required to take into account: (i) Whether the requested exemption from its limits would result in a position that is ''not in accord with sound commercial practices'' in the market in which the DCM is granting the exemption; and (ii) whether the requested exemption would result in a position that would ''exceed an amount that may be established or liquidated in an orderly fashion in that market.'' Exchanges' evaluation of exemption requests against these standards would be a facts and circumstances determination.

Activity may reflect ''sound commercial practice'' for a particular market or market participant but not for another. Similarly, activity may reflect ''sound commercial practice'' outside the spot month but not in the spot month. Further, activity with manipulative intent or effect, or that has the potential or effect of causing price distortion or disruption, would be inconsistent with ''sound commercial practice,'' even if common practice among market participants. While an exemption granted to an individual market participant may reflect ''sound commercial practice'' and may not ''exceed an amount that may be established or liquidated in an orderly fashion in that market,'' the Commission expects exchanges to also evaluate whether the granting of a particular exemption type to multiple participants could have a collective impact on the market in a manner inconsistent with ''sound commercial practice'' or in a manner that could result in a position that would ''exceed an amount that may be established or liquidated in an orderly fashion in that market.''

[311] Currently, DCMs review and set exemption levels annually based on the facts and circumstances of a particular exemption and the market conditions at that time. As such, a DCM may decide to deny, limit, condition, or revoke a particular exemption, typically, if the DCM determines that certain conditions have changed and warrant such action. This may happen if, for example, there are droughts, floods, embargoes, trade disputes, or other events that cause shocks to the supply or demand of a particular commodity and thus impact the DCM's disposition of a particular exemption.

The Commission understands that the above-described parameters for exemptions from exchange-set limits are generally consistent with current industry practice among DCMs. Bearing in mind that proposed § 150.5(a) would apply to contracts subject to federal limits, the Commission proposes codifying such parameters, as they would establish important, minimum standards needed for exchanges to administer, and the Commission to oversee, a robust program for granting exemptions from exchange-set limits in a manner that does not undermine the federal limits framework. Proposed § 150.5(a) also would afford exchanges the ability to generally oversee their programs for granting exemptions from exchange limits as they see fit, including to establish different application processes and requirements to accommodate the unique characteristics of different contracts.

If adopted, changes proposed herein may result in certain ''pre-existing positions'' being subject to speculative position limits even though the position predated the adoption of such limits.[312] So as not to undermine the federal position limits framework during the spot month, and to minimize disruption outside the spot month, the Commission proposes § 150.5(a)(3), which would require that during the spot month, for contracts subject to federal limits, exchanges must impose limits no larger than federal levels on ''pre-existing positions,'' other than for pre-enactment swaps and transition period swaps.

However, outside the spot month, exchanges would not be required to impose limits on such positions, provided the position is acquired in good faith consistent with the ''pre-existing position'' definition of proposed § 150.1, and provided further that if the person's position is increased after the effective date of the limit, such pre-existing position, other than pre-enactment swaps and transition period swaps, along with the position increased after the effective date, would be attributed to the person. This provision is consistent with the proposed treatment of pre-existing positions for purposes of federal limits set forth in proposed § 150.2(g) and is intended to prevent spot month limits from being rendered ineffective.

Not subjecting pre-existing positions to spot month limits could result in a large, pre-existing position either intentionally or unintentionally causing a disruption as it is rolled into the spot month, and the Commission is particularly concerned about protecting the spot month in physical-delivery futures from corners and squeezes. Outside of the spot month, however, concerns over corners and squeezes may be less acute.[313]

Finally, the Commission seeks a balance between having sufficient information to oversee the exchange-granted exemptions, and not burdening exchanges with excessive periodic reporting requirements. The Commission thus proposes under § 150.5(a)(4) to require one monthly report by each exchange. Certain exchanges already voluntarily file these types of monthly reports with the Commission, and proposed § 150.5(a)(4) would standardize such reports for all exchanges that process applications for bona fide hedges, spread exemptions, and other exemptions for contracts that are subject to federal limits. The proposed report would provide information regarding the disposition of any application to recognize a position as a bona fide hedge (both enumerated and non-enumerated) or to grant a spread or other exemption, including any renewal, revocation of, or modification to the terms and conditions of, a prior recognition or exemption.[314]

As specified under proposed § 150.5(a)(4), the report would provide certain details regarding the bona fide hedging position or spread exemption, including: The effective date and expiration date of any recognition or exemption; any unique identifier assigned to track the application or position; identifying information about the applicant; the derivative contract or positions to which the application pertains; the maximum size of the commodity derivative position that is recognized or exempted by the exchange (including any ''walk-down'' requirements); [315] any size limitations the exchange sets for the position; and a brief narrative summarizing the applicant's relevant cash market activity.

[314] In the monthly report, exchanges may elect to list new recognitions or exemptions, and modifications to or revocations of prior recognitions and exemptions each month; alternatively, exchanges may submit cumulative monthly reports listing all active recognitions and exemptions (*i.e.,* including exemptions that are not new or have not changed).

[315] An exchange could determine to recognize as a bona fide hedge or spread exemption all, or a portion, of the commodity derivative position for which an application has been submitted, provided that such determination is made in accordance with the requirements of proposed § 150.5 and is consistent with the Act and the Commission's regulations. In addition, an exchange could require that a bona fide hedging positon or spread position be subject to ''walk-down'' provisions that require the trader to scale down its positions in the spot month in order to reduce market congestion as needed based on the facts and circumstances.

With respect to any unique identifiers to be included in the proposed monthly report, the exchange's assignment of a unique identifier would assist the Commission's tracking process. The unique identifier could apply to each of the bona fide hedge or spread exemption applications that the exchange receives, and, separately, each type of commodity derivative position that the exchange wishes to recognize as a bona fide hedge or spread exemption. Accordingly, the Commission suggests that, as a ''best practice,'' the exchange's procedures for processing bona fide hedging position and spread exemption applications contemplate the assignment of such unique identifiers.

The proposed report would also be required to specify the maximum size and/or size limitations by contract month and/or type of limit (*e.g.,* spot month, single month, or all-months-combined), as applicable.

The proposed monthly report would be a critical element of the Commission's surveillance program by facilitating its ability to track bona fide hedging positions and spread exemptions approved by exchanges. The proposed monthly report would also keep the Commission informed as to the manner in which an exchange is administering its application procedures, the exchange's rationale for permitting large positions, and relevant cash market activity. The Commission expects that exchanges would be able to leverage their current exemption processes and recordkeeping procedures to generate such reports.

In certain instances, information included in the proposed monthly report may prompt the Commission to request records required to be maintained by an exchange. For example, the Commission proposes that, for each derivative position that an exchange wishes to recognize as a bona fide hedge, or any revocation or modification of such recognition or exemption, the report would include a concise summary of the applicant's activity in the cash markets and swaps markets for the commodity underlying the position. The Commission expects that this summary would focus on the facts and circumstances upon which an exchange based its determination to recognize a bona fide hedge, to grant a spread exemption, or to revoke or modify such recognition or exemption. In light of the information provided in the summary, or any other information included in the proposed monthly report regarding the position, the Commission may request the exchange's complete record of the application. The Commission expects that it would only need to request such complete records in the event that it noticed an issue that could cause market disruptions.

Proposed § 150.5(a)(4) would require an exchange, unless instructed otherwise by the Commission, to submit such monthly reports according to the form and manner requirements the Commission specifies. In order to facilitate the processing of such reports, and the analysis of the information contained therein, the Commission would establish reporting and transmission standards. The proposal would also require that such reports be submitted to the Commission using an electronic data format, coding structure, and electronic data transmission procedures approved in writing by the Commission, as specified on its website.[316]

Request for Comment

The Commission requests comment on all aspects of proposed § 150.5(a). The Commission also invites comments on the following:

(34) The Commission has proposed that exchanges submit monthly reports under § 150.5(a)(4). Do exchanges prefer that the Commission specify a particular day each month as a deadline for submitting such monthly reports or do exchanges prefer to have discretion in determining which day to submit such reports?

b. Proposed § 150.5(b)—Requirements and Acceptable Practices for Exchange-Set Limits on Commodity Derivative Contracts in a Physical Commodity That Are Not Subject to the Limits Set Forth in § 150.2

As described elsewhere in this release, the Commission is proposing federal speculative limits on 25 core referenced futures contracts and their respective referenced contracts.[317] DCMs, and, ultimately, SEFs, listing physical commodity contracts for which federal limits do not apply would have to comply with proposed § 150.5(b), which includes a combination of rules and references to acceptable practices.

Under proposed § 150.5(b), for physical commodity derivatives that are not subject to federal limits, whether cash-settled or physically-settled, exchanges would be subject to flexible standards during the product's spot month and non-spot month. During the spot month, under proposed § 150.5(b)(1)(i), exchanges would be required to establish position limits, and such limits would have to be set at a level that is no greater than 25 percent of deliverable supply. As described in detail in connection with the proposed federal spot month limits described above, it would be difficult, in the absence of other factors, for a participant to corner or squeeze a market if the participant holds less than or equal to 25 percent of deliverable supply, and the Commission has long used deliverable supply as the basis for spot month position limits due to concerns regarding corners, squeezes, and other settlement-period manipulative activity.[318]

The Commission recognizes, however, that there may be circumstances where an exchange may not wish to use the 25 percent formula, including, for example, if the contract is cash-settled, does not have a measurable deliverable supply, or if the exchange can demonstrate that a different parameter is better suited for a particular contract or market.[319] Accordingly, the proposal would afford exchanges the ability to submit to the Commission alternative potential methodologies for calculating spot month limit levels required by proposed § 150.5(b)(1), provided that the limits are set at a level that is ''necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index.'' This standard has appeared in existing § 150.5 since its adoption in connection with spot month limits on cash-settled contracts. As noted above, existing § 150.5 includes separate parameters for spot month limits in physical-delivery contracts and for cash-settled contracts, but does not include flexibility for exchanges to consider alternative parameters. In an effort to both simplify the regulation and provide the ability for exchanges to consider multiple parameters that may be better suited for certain products, the Commission proposes the above standard as a principles-based requirement for both cash-settled and physically-settled contracts subject to proposed § 150.5(b).

Outside of the spot month, where, historically, attempts at certain types of market manipulation are generally less of a concern, proposed § 150.5(b)(2)(i) would allow exchanges to choose between position limits or position accountability for physical commodity

[316] The Commission would provide such form and manner instructions on the Forms and Submissions page at *www.cftc.gov.* Such instructions would likely be published in the form of a technical guidebook.

[317] *See infra* Section III.F.

[318] *See supra* Section II.B.2. (discussion of proposed § 150.2).

[319] Guidance for calculating deliverable supply can be found in Appendix C to part 38. 17 CFR part 38, Appendix C.

contracts that are not subject to federal limits. While exchanges would be provided the ability to decide whether to use limit levels or accountability levels for any such contract, under either approach, the exchange would have to set a level that is ''necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index.''

To help exchanges efficiently demonstrate compliance with this standard for physical commodity contracts outside of the spot month, the Commission proposes separate acceptable practices for exchanges that wish to adopt non-spot month position limits and exchanges that wish to adopt non-spot month accountability.[320] For exchanges that choose to adopt non-spot month position limits, rather than position accountability, proposed paragraph (a)(1) to Appendix F of part 150 would set forth non-exclusive acceptable practices. Under that provision, exchanges would be deemed in compliance with proposed § 150.5(b)(2)(i) if they set non-spot limit levels for each contract subject to § 150.5(b) at a level no greater than: (1) The average of historical position sizes held by speculative traders in the contract as a percentage of the contract's open interest; [321] (2) the spot month limit level for the contract; (3) 5,000 contracts (scaled up proportionally to the ratio of the notional quantity per contract to the typical cash market transaction if the notional quantity per contract is smaller than the typical cash market transaction, or scaled down proportionally if the notional quantity per contract is larger than the typical cash market transaction); [322] or (4) 10 percent of open interest in that contract for the most recent calendar year up to 50,000 contracts, with a marginal increase of 2.5 percent of open interest thereafter.[323] When evaluating average position sizes held by speculative traders, the Commission expects exchanges: (i) To be cognizant of speculative positions that are extraordinarily large relative to other speculative positions, and (ii) to not consider any such outliers in their calculations.

These proposed parameters have largely appeared in existing § 150.5 for many years in connection with non-spot month limits, either for initial or subsequent levels.[324] The Commission is of the view that these parameters would be useful, flexible standards to carry forward as acceptable practices. For example, the Commission expects that the 5,000-contract acceptable practice would be a useful benchmark for exchanges because it would allow them to establish limits and demonstrate compliance with Commission regulations in a relatively efficient manner, particularly for new contracts that have yet to establish open interest. Similarly, for purposes of exchange-set limits on physical commodity contracts that are not subject to federal limits, the Commission proposes to maintain the baseline 10, 2.5 percent formula as an acceptable practice. Because these parameters are simply acceptable practices, exchanges may, after evaluation, propose higher non-spot month limits or accountability levels.

Along those lines, the Commission recognizes that other parameters may be preferable and/or just as effective, and would be open to considering alternative parameters submitted pursuant to part 40 of the Commission's regulations, provided, at a minimum, that the parameter complies with § 150.5(b)(2)(i). The Commission encourages exchanges to submit potential new parameters to Commission staff in draft form prior to submitting them under part 40.

For exchanges that choose to adopt position accountability, rather than limits, outside of the spot month, proposed paragraph (a)(2) of Appendix F to part 150 would set forth a non-exclusive acceptable practice that would permit exchanges to comply with proposed § 150.5(b)(2)(i) by adopting rules establishing ''position accountability'' as defined in proposed § 150.1. ''Position accountability'' would mean rules, submitted to the Commission pursuant to part 40, that require traders to, upon request by the exchange, consent to: (i) Provide information to the exchange about their position, including, but not limited to, information about the nature of the their positions, trading strategies, and hedging information; and (ii) halt further increases to their position or to reduce their position in an orderly manner.[325]

Proposed § 150.5(b)(3) addresses a circumstance where multiple exchanges list contracts that are substantially the same, including physically-settled contracts that have the same underlying commodity and delivery location, or cash-settled contracts that are directly or indirectly linked to a physically-settled contract. Under proposed § 150.5(b)(3), exchanges listing contracts that are substantially the same in this manner must either adopt ''comparable'' limits for such contracts, or demonstrate to the Commission how the non-comparable levels comply with the standards set forth in proposed § 150.5(b)(1) and (2). Such a determination also must address how the levels are necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index. Proposed § 150.5(b)(3) would apply equally to cash-settled and physically-settled contracts, and to limits during and outside of the spot month, as

[320] The acceptable practices proposed in Appendix F to part 150 herein reflect non-exclusive methods of compliance. Accordingly, the language of this proposed acceptable practice, along with the other acceptable practices proposed herein, uses the word ''shall'' not to indicate that the acceptable practice is a required method of compliance, but rather to indicate that in order to satisfy the acceptable practice, a market participant must (*i.e.,* shall) establish compliance with that particular acceptable practice.

[321] For example, if speculative traders in a particular contract typically make up 12 percent of open interest in that contract, the exchange could set limit levels no greater than 12 percent of open interest.

[322] For exchanges that choose to adopt a non-spot month limit level of 5,000 contracts, this level assumes that the notional quantity per contract is set at a level that reflects the size of a typical cash market transaction in the underlying commodity. However, if the notional quantity of the contract is larger/smaller than the typical cash market transaction in the underlying commodity, then the DCM must reduce/increase the 5,000 contract non-spot month limit until it is proportional to the notional quantity of the contract relative to the typical cash market transaction. These required adjustments to the 5,000 contract metric are intended to avoid a circumstance where an exchange could allow excessive speculation by setting excessively large notional quantities relative to typical cash-market transaction sizes. For example, if the notional quantity per contract is set at 30,000 units, and the typical observed cash market transaction is 2,500 units, the notional quantity per contract would be 12 times larger than the typical cash market transaction. In that case, the non-spot month limit would need to be 12 times smaller than 5,000 (*i.e.,* at 417 contracts.). Similarly, if the notional quantity per contract is 1,000 contracts, and the typical observed cash market transaction is 2,500 units, the notional quantity per contract would be 2.5 times smaller than the typical cash market transaction. In that case, the non-spot month limit would need to be 2.5 times larger than 5,000, and would need to be set at 12,500 contracts.

[323] In connection with the proposed Appendix F to part 150 acceptable practices, open interest should be calculated by averaging the month-end open positions in a futures contract and its related option contract, on a delta-adjusted basis, for all months listed during the most recent calendar year.

[324] 17 CFR 150.5(b) and (c). Proposed § 150.5(b) would address physical commodity contracts that are not subject to federal limits.

[325] While existing § 150.5(e) includes open-interest and volume-based limitations on the use of accountability, the Commission opts not to include such limitations in this proposal. Under the rules proposed herein, if an exchange submitted a part 40 filing seeking to adopt position accountability, the Commission would determine on a case-by-case basis whether such rules are consistent with the Act and the Commission's regulations. The Commission does not want to use one-size-fits-all volume-based limitations for making such determinations.

applicable.[326] Proposed § 150.5(b)(3) is intended to help ensure that position limits established on one exchange would not jeopardize market integrity or otherwise harm other markets. Further, proposed § 150.5(b)(3) would be consistent with the Commission's proposal to generally apply equivalent federal limits to linked contracts, including linked contracts listed on multiple exchanges.[327]

Finally, under proposed § 150.5(b)(4), exchanges would be permitted to grant exemptions from any limits established under proposed § 150.5(b). As noted, proposed § 150.5(b) would apply to physical commodity contracts not subject to federal limits; thus, exchanges would be given flexibility to grant exemptions in such contracts, including exemptions for both intramarket and intermarket spread positions,[328] as well as other exemption types not explicitly listed in proposed § 150.3.[329] However, such exchanges must require that traders apply for the exemption. In considering any such application, the exchanges would be required to take into account whether the exemption would result in a position that would not be in accord with ''sound commercial practices'' in the market for which the exchange is considering the application, and/or would ''exceed an amount that may be established and liquidated in an orderly fashion in that market.''

While exchanges would be subject to the requirements of § 150.5(a) and (b) described above, such proposed requirements are not intended to limit the discretion of exchanges to utilize other tools to protect their markets. Among other things, an exchange would have the discretion to: impose additional restrictions on a person with a long position in the spot month of a physical-delivery contract who stands for delivery, takes that delivery, then re-establishes a long position; establish limits on the amount of delivery instruments that a person may hold in a physical-delivery contract; and impose such other restrictions as it deems necessary to reduce the potential threat of market manipulation or congestion, to maintain orderly execution of transactions, or for such other purposes consistent with its responsibilities.

c. Proposed § 150.5(c)—Requirements for Security Futures Products

As the Commission has previously noted, security futures products and security options may serve economically equivalent or similar functions to one another.[330] Therefore, when the Commission originally adopted position limits regulations for security futures products in part 41, it set levels that were generally comparable to, although not identical with, the limits that applied to options on individual securities.[331] The Commission has pointed out that security futures products may be at a competitive disadvantage if position limits for security futures products vary too much from those of security options.[332] As a result, the Commission in 2019 adopted amendments to the position limitations and accountability requirements for security futures products, noting that one goal was to provide a level regulatory playing field with security options.[333] Proposed § 150.5(c), therefore, would include a cross-reference clarifying that for security futures products, position limitations and accountability requirements for exchanges are specified in § 41.25.[334] This would allow the Commission to take into account the position limits regime that applies to security options when considering position limits regulations for security futures products.

d. Proposed § 150.5(d)—Rules on Aggregation

As noted earlier in this release, the Commission adopted in 2016 final aggregation rules under § 150.4 that apply to all contracts subject to federal limits. The Commission recognizes that with respect to contracts not subject to federal limits, market participants may find it burdensome if different exchanges adopt different aggregation standards. Accordingly, under proposed § 150.5(d), all DCMs, and, ultimately, SEFs, that list any physical commodity derivatives, regardless of whether the contract is subject to federal limits, would be required to adopt aggregation rules for such contracts that conform to § 150.4.[335] Exchanges that list excluded commodities would be encouraged to also adopt aggregation rules that conform to § 150.4. Aggregation policies that otherwise vary from exchange to exchange would increase the administrative burden on a trader active on multiple exchanges, as well as increase the administrative burden on the Commission in monitoring and enforcing exchange-set position limits.

e. Proposed § 150.5(e)—Requirements for Submissions to the Commission

Proposed § 150.5(e) reflects that, consistent with the definition of ''rule'' in existing § 40.1, any exchange action establishing or modifying exchange-set position limits or exemptions therefrom, or position accountability, in any case pursuant to proposed § 150.5(a), (b), (c), or Appendix F to part 150, would qualify as a ''rule'' and must be submitted to the Commission as such pursuant to part 40 of the Commission's regulations. Such rules would also include, among other things, parameters used for determining position limit levels, and policies and related processes setting forth parameters addressing, among other things, which types of exemptions are permitted, the parameters for the granting of such exemptions, and any exemption application requirements.

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[326] For reasons discussed elsewhere in this release, this provision would not apply to natural gas contracts. *See supra* Section II.C.2.e. (discussion of proposed conditional spot month exemption in natural gas).

[327] *See supra* Section II.A.16. (discussion of the proposed referenced contract definition and linked contracts).

[328] The Commission understands an intramarket spread position to be a long position in one or more commodity derivative contracts in a particular commodity, or its products or its by-products, and a short position in one or more commodity derivative contracts in the same, or similar, commodity, or its products or by-products, on the same DCM. The Commission understands an intermarket spread position to be a long (or short) position in one or more commodity derivative contracts in a particular commodity, or its products or its by-products, at a particular DCM and a short (or long) position in one or more commodity derivative contracts in that same, or similar, commodity, or its products or its by-products, away from that particular DCM. For instance, the Commission would consider a spread between CBOT Wheat (W) futures and MGEX HRS Wheat (MWE) futures to be an intermarket spread based on the similarity of the commodities.

[329] As noted above, proposed § 150.3 would allow for several exemption types, including: Bona fide hedging positions; certain spreads; financial distress positions; and conditional spot month limit exemption positions in natural gas.

[330] *See* Position Limits and Position Accountability for Security Futures Products, 83 FR at 36799, 36802 (July 31, 2018).

[331] *Id. See also* Listing Standards and Conditions for Trading Security Futures Products, 66 FR at 55078, 55082 (Nov. 1, 2001) (explaining the Commission's adoption of position limits for security futures products).

[332] *See* 83 FR at 36799, 36802 (July 31, 2018).

[333] *See* Position Limits and Position Accountability for Security Futures Products, 84 FR at 51005, 51009 (Sept. 27, 2019).

[334] *See* 17 CFR 41.25. Rule § 41.25 establishes conditions for the trading of security futures products.

[335] Under § 150.4, unless an exemption applies, a person's positions must be aggregated with positions for which the person controls trading or for which the person holds a 10 percent or greater ownership interest. Commission Regulation § 150.4(b) sets forth several permissible exemptions from aggregation. *See* Final Aggregation Rulemaking, 81 FR at 91454. The Division of Market Oversight has issued time-limited no-action relief from some of the aggregation requirements contained in that rulemaking. *See* CFTC Letter No. 19–19 (July 31, 2019), *available at https://www.cftc.gov/csl/19–19/download*.

Proposed § 150.5(e) further provides that exchanges would be required to review regularly [336] any position limit levels established under proposed § 150.5 to ensure the level continues to comply with the requirements of those sections. For example, in the case of § 150.5(b), exchanges would be expected to ensure the limits comply with the requirement that limits be set ''at a level that is necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index.'' Exchanges would also be required to update such levels as needed, including if the levels no longer comply with the proposed rules.

f. Delegation of Authority to the Director of the Division of Market Oversight

The Commission proposes to delegate its authority, pursuant to proposed § 150.5(a)(4)(ii), to the Director of the Commission's Division of Market Oversight, or such other employee(s) that the Director may designate from time to time, to provide instructions regarding the submission of information required to be reported by exchanges to the Commission on a monthly basis, and to determine the manner, format, coding structure, and electronic data transmission procedures for submitting such information.

g. Commission Enforcement of Exchange-Set Limits

As discussed throughout this release, the framework for exchange-set limits operates in conjunction with the federal position limits framework. The Futures Trading Act of 1982 gave the Commission, under CEA section 4a(5) (since re-designated as section 4a(e)), the authority to directly enforce violations of exchange-set, Commission-approved speculative position limits in addition to position limits established directly by the Commission.[337] Since 2008, it has also been a violation of the Act for any person to violate an exchange position limit rule certified to the Commission by such exchange pursuant to CEA section 5c(c)(1).[338] Thus, under CEA section 4a(e), it is a violation of the Act for any person to violate an exchange position limit rule certified to or approved by the Commission, including to violate any subsequent amendments thereto, and the Commission has the authority to enforce those violations.

h. Request for Comment

The Commission requests comment on all aspects of proposed § 150.5.

E. § 150.6—Scope

Existing § 150.6 provides that nothing in this part shall be construed to affect any provisions of the Act relating to manipulation or corners nor to relieve any contract market or its governing board from responsibility under section 5(4) of the Act to prevent manipulation and corners.[339]

Position limits are meant to diminish, eliminate, or prevent excessive speculation and deter and prevent market manipulation, squeezes, and corners. The Commission stresses that nothing in the proposed revisions to part 150 would impact the anti-disruptive, anti-cornering, and anti-manipulation provisions of the Act and Commission regulations, including but not limited to CEA sections 6(c) or 9(a)(2) regarding manipulation, section 4c(a)(5) regarding disruptive practices including spoofing, or sections 180.1 and 180.2 of the Commission's regulations regarding manipulative and deceptive practices. It may be possible for a trader to manipulate or attempt to manipulate the prices of futures contracts or the underlying commodity with a position that is within the federal position limits. It may also be possible for a trader holding a bona fide hedge recognition from the Commission or an exchange to manipulate or attempt to manipulate the markets. The Commission would not consider it a defense to a charge under the anti-manipulation provisions of the Act or the regulations that a trader's position was within position limits.

Like existing § 150.6, proposed § 150.6 is intended to make clear that fulfillment of specific part 150 requirements alone does not necessarily satisfy other obligations of an exchange. Proposed § 150.6 would provide that part 150 of the Commission's regulations shall only be construed as having an effect on position limits set by the Commission or an exchange including any associated recordkeeping and reporting requirements. Proposed § 150.6 would provide further that nothing in part 150 shall affect any other provisions of the Act or Commission regulations including those relating to actual or attempted manipulation, corners, squeezes, fraudulent or deceptive conduct, or to prohibited transactions. For example, proposed § 150.5 would require DCMs, and, ultimately, SEFs, to impose and enforce exchange-set speculative position limits. The fulfillment of the requirements of § 150.5 alone would not satisfy any other legal obligations under the Act or Commission regulations applicable to exchanges to prevent manipulation and corners. Likewise, a market participant's compliance with position limits or an exemption thereto does not confer any type of safe harbor or good faith defense to a claim that the participant had engaged in an attempted or perfected manipulation.

Further, the proposed amendments are intended to help clarify that § 150.6 applies to: Regulations related to position limits found outside of part 150 of the Commission's regulations (*e.g.,* relevant sections of part 1 and part 19); and recordkeeping and reporting regulations associated with speculative position limits.

F. § 150.8—Severability

The Commission proposes to add new § 150.8 to provide for the severability of individual provisions of part 150. Should any provision(s) of part 150 be declared invalid, including the application thereof to any person or circumstance, § 150.8 would provide that all remaining provisions of part 150 shall not be affected to the extent that such remaining provisions, or the application thereof, can be given effect without the invalid provisions.

G. § 150.9—Process for Recognizing Non-Enumerated Bona Fide Hedging Transactions or Positions With Respect to Federal Speculative Position Limits

1. Background and Overview

For the nine legacy agricultural contracts currently subject to federal position limits, the Commission's current processes for recognizing non-enumerated bona fide hedge positions and certain enumerated anticipatory bona fide hedge positions exist in

[336] An acceptable, regular review regime would consist of both a periodic review and an event-specific review (*e.g.,* in the event of supply and demand shocks such as unanticipated shocks to supply and demand of the underlying commodity, geo-political shocks, and other events that may result in congestion and/or other disruptions). The Commission also expects that exchanges would re-evaluate such levels in the event of unanticipated shocks to the supply or demand of the underlying commodity.

[337] *See* Futures Trading Act of 1982, Public Law 97–444, 96 Stat. 2299–30 (1983).

[338] *See* CFTC Reauthorization Act of 2008, Food, Conservation and Energy Act of 2008, Public Law 110–246, 122 Stat. 1624 (June 18, 2008) (also known as the ''Farm Bill'') (amending CEA section 4a(e), among other things, to assure that a violation of position limits, regardless of whether such position limits have been approved by or certified to the Commission, would constitute a violation of the Act that the Commission could independently enforce). *See also* Federal Speculative Position Limits for Referenced Energy Contracts and Associated Regulations, 75 FR at 4144, 4145 (Jan. 26, 2010) (summarizing the history of the Commission's authority to directly enforce violations of exchange-set speculative position limits).

[339] 17 CFR 150.6.

parallel with exchange processes for granting exemptions from exchange-set limits, as described below. The exchange processes for granting exemptions vary by exchange, and generally do not mirror the Commission's processes. Thus, when requesting certain bona fide hedging position recognitions that are not self-effectuating, market participants must currently comply with the exchanges' processes for exchange-set limits and the Commission's processes for federal limits. Although this disparity is currently only an issue for the nine agricultural futures contracts subject to both federal and exchange-set limits, the parallel approaches may become more inefficient and burdensome once the Commission adopts limits on additional commodities.

Accordingly, the Commission is proposing § 150.9 to establish a separate framework, applicable to proposed referenced contracts in all commodities, whereby a market participant who is seeking a bona fide hedge recognition that is not enumerated in proposed Appendix A can file one application with an exchange to receive a bona fide hedging recognition for purposes of both exchange-set limits and for federal limits.[340] Given the proposal to significantly expand the list of enumerated hedges, the Commission expects the use of the proposed § 150.9 non-enumerated process described below would be rare and exceptional. This separate framework would be independent of, and serve as an alternative to, the Commission's process for reviewing exemption requests under proposed § 150.3. Among other things, proposed § 150.9 would help to streamline the process by which non-enumerated bona fide hedge recognition requests are addressed, minimize disruptions by leveraging existing exchange-level processes with which many market participants are already familiar,[341] and reduce inefficiencies created when market participants are required to comply with different federal and exchange-level processes.

For instance, currently, market participants seeking recognitions of non-enumerated bona fide hedges for the nine legacy agricultural commodities must request recognitions from both the Commission under existing § 1.47, and from the relevant exchange. If the recognition is for an ''enumerated'' hedge under existing § 1.3 (other than anticipatory enumerated hedges), the market participant would not need to file an application with the Commission (as the enumerated hedge has a self-effectuating recognition for purposes of federal limits).

If the exemption is for a ''non-enumerated'' hedge or certain enumerated anticipatory hedges under existing § 1.3, the market participant would need to file an application with the Commission pursuant to §§ 1.47 or 1.48, respectively. In either case, the market participant would also still need to seek an exchange exemption and file a Form 204/304 on a monthly basis with the Commission. As discussed more fully in this section, with respect to bona fide hedges that are not self-effectuating for purposes of federal limits, proposed § 150.9 would permit such a market participant to file a single application with the exchange and relieve the market participant from having to separately file an application and/or monthly cash-market reporting information with the Commission.

The existing Commission and exchange level approaches are described in more detail below, followed by a more detailed discussion of proposed § 150.9.

2. Existing Approaches for Recognizing Bona Fide Hedges

The Commission's authority and existing processes for recognizing bona fide hedges can be found in section 4a(c) of the Act, and §§ 1.3, 1.47, and 1.48 of the Commission's regulations.[342] In particular, CEA section 4a(c)(1) provides that no CFTC rule issued under CEA section 4a(a) applies to ''transactions or positions which are shown to be bona fide hedging transactions or positions.''[343] Further, under the existing definition of ''bona fide hedging transactions and positions'' in § 1.3,[344] paragraph (1) provides the Commission's general definition of bona fide hedging transactions or positions; paragraph (2) provides a list of enumerated bona fide hedging positions that, generally, are self-effectuating, and must be reported (along with supporting cash-market information) to the Commission monthly on Form 204 after the positions are taken;[345] and paragraph (3) provides a procedure for market participants to seek recognition from the Commission for non-enumerated bona fide hedging positions. Under paragraph (3), any person that seeks Commission recognition of a position as a non-enumerated bona fide hedge must submit an application to the Commission in advance of taking on the position, and pursuant to the processes found in § 1.47 (30 days in advance for non-enumerated bona fide hedges) or § 1.48 (10 days in advance for enumerated anticipatory hedges), as applicable.

b. Exchanges' Existing Approach for Granting Bona Fide Hedge Exemptions[346] With Respect to Exchange-Set Limits

Under DCM Core Principle 5,[347] DCMs have, for some time, established exchange-set limits for futures contracts that are subject to federal limits, as well as for contracts that are not. In addition, under existing § 150.5(d), DCMs may grant exemptions to exchange-set position limits for positions that meet the Commission's general definition of bona fide hedging transactions or positions as defined in paragraph (1) of § 1.3.[348] As such, with respect to exchange-set limits, exchanges have adopted processes for handling trader requests for bona fide hedging exemptions, and generally have granted such requests pursuant to exchange rules that incorporate the Commission's existing general definition of bona fide hedging transactions or positions in paragraph (1) of § 1.3.[349] Accordingly, DCMs currently have rules and application forms in place to process applications to exempt bona fide

[340] Alternatively, under the proposed framework, a trader could submit a request directly to the Commission pursuant to proposed § 150.3(b). A trader that submitted such a request directly to the Commission for purposes of federal limits would have to separately request an exemption from the applicable exchange for purposes of exchange-set limits. As discussed earlier in this release, the Commission proposes to separately allow for enumerated hedges and spreads that meet the ''spread transaction'' definition to be self-effectuating. *See supra* Section II.C.2. (discussion of proposed § 150.3).

[341] In particular, the Commission recognizes that, in the energy and metals spaces, market participants are familiar with exchange application processes and are not familiar with the Commission's processes since, currently, there are no federal position limits for those commodities.

[342] *See* 7 U.S.C. 6a(c) and 17 CFR 1.3, 1.47, and 1.48.

[343] 7 U.S.C. 6a(c)(1).

[344] As described above, the Commission proposes to move an amended version of the bona fide hedging definition from § 1.3 to § 150.1. *See supra* Section II.A. (discussion of proposed § 150.1).

[345] As described below, the Commission proposes to eliminate Form 204 and to rely instead on the cash-market information submitted to exchanges pursuant to proposed §§ 150.5 and 150.9. *See infra* Section II.H.3. (discussion of proposed amendments to part 19).

[346] Exchange rules typically refer to ''exemptions'' in connection with bona fide hedging and spread positions, whereas the Commission uses the nomenclature ''recognition'' with respect to bona fide hedges, and ''exemption'' with respect to spreads.

[347] 7 U.S.C. 7(d)(5).

[348] 17 CFR 150.5(d).

[349] *See, e.g.,* CME Rule 559 and ICE Rule 6.29 (addressing position limits and exemptions).

hedging positions with respect to exchange-set position limits.[350]

Separately, under SEF Core Principle 6, currently SEFs are required to adopt, as is necessary and appropriate, position limits or position accountability levels for each swap contract to reduce the potential threat of market manipulation or congestion.[351] For contracts that are subject to a federal position limit, the SEF must set its position limits at a level that is no higher than the federal limit, and must monitor positions established on or through the SEF for compliance with both the Commission's federal limit and the exchange-set limit.[352] Section 37.601 further implements SEF Core Principle 6 and specifies that until such time that SEFs are required to comply with the Commission's position limits regulations, a SEF may refer to the associated guidance and/or acceptable practices set forth in Appendix B to part 37 of the Commission's regulations.[353] Currently, in practice, there are no federal position limits on swaps for which SEFs would be required to establish exchange-set limits.

As noted above, the application processes currently used by exchanges are different than the Commission's processes. In particular, exchanges typically use one application process to grant all exemption types, whereas the Commission has different processes for different exemptions, as explained below. Also, exchanges generally do not require the submission of monthly cash-market information, whereas the Commission has various monthly reporting requirements under Form 204 and part 17 of the Commission's regulations. Finally, exchanges generally require exemption applications to include cash-market information supporting positions that exceed the limits, to be filed annually prior to exceeding a position limit, and to be updated on an annual basis.[354]

The Commission, on the other hand, currently has different processes for permitting enumerated bona fide hedges and for recognizing positions as non-enumerated bona fide hedges. Generally, for bona fide hedges enumerated in paragraph (2) of the bona fide hedge definition in § 1.3, no formal process is required by the Commission. Instead, such enumerated bona fide hedge recognitions are self-effectuating and Commission staff reviews monthly reporting of cash-market positions on existing Form 204 and part 17 position data to monitor such positions. Recognition requests for non-enumerated bona fide hedging positions and for certain enumerated anticipatory bona fide hedge positions, as explained above, must be submitted to the Commission pursuant to the processes in existing §§ 1.47 and 1.48 of the regulations, as applicable.

3. Proposed § 150.9

Under the proposed procedural framework, an exchange's determination to recognize a non-enumerated bona fide hedge in accordance with proposed § 150.9 with respect to exchange-set limits would serve to inform the Commission's own decision as to whether to recognize the exchange's determination for purposes of federal speculative position limits set forth in proposed § 150.2. Among other conditions, the exchange would be required to base its determination on standards that conform to the Commission's own standards for recognizing bona fide hedges for purposes of federal position limits. Further, the exchange's determination with respect to its own position limits and application process would be subject to Commission review and oversight. These requirements would facilitate Commission review and determinations by ensuring that any bona fide hedge recognized by an exchange for purposes of exchange-set limits and in accordance with proposed § 150.9 conforms to the Commission's standards.

For a given referenced contract, proposed § 150.9 would potentially allow a person to exceed federal position limits if the exchange listing the contract has recognized the position as a bona fide hedge with respect to exchange-set limits. Under this framework, the exchange would make such determination with respect to its own speculative position limits, set in accordance with proposed § 150.5(a), and, unless the Commission denies or stays the application within ten business days (or two business days for applications, including retroactive applications, filed due to sudden or unforeseen circumstances), the exemption would be deemed approved for purposes of federal positions limits.

The exchange's exemption would be valid only if the exchange meets the following additional conditions, each described in greater detail below: (1) The exchange maintains rules, approved by the Commission pursuant to § 40.5, that establish application processes for recognizing bona fide hedges in accordance with § 150.9; (2) the exchange meets specified prerequisites for granting such recognitions; (3) the exchange satisfies specified recordkeeping requirements; and (4) the exchange notifies the Commission and the applicant upon determining to recognize a bona fide hedging transaction or position. A person may exceed the applicable federal position limit ten business days (for new and annually renewed exemptions) or two business days (for applications, including retroactive applications, submitted due to sudden and unforeseen circumstances) after the exchange makes its determination, unless the Commission notifies the exchange and the applicant otherwise.

The above-described elements of the proposed approach differ from the regulations proposed in the 2016 Reproposal, which did not require a 10-day Commission review period. The 2016 Reproposal allowed DCMs and SEFs to recognize non-enumerated bona fide hedges for purposes of federal position limits.[355] However, the 2016 Reproposal may not have conformed to the legal limits on what an agency may delegate to persons outside the agency.[356] The 2016 Reproposal

[350] *Id.*

[351] 7 U.S.C. 7b–3(f)(6). The Commission codified Core Principle 6 under § 37.600. 17 CFR 37.600.

[352] *Id.*

[353] 17 CFR 37.601. Under Appendix B to part 37, for Required Transactions, as defined in § 37.9, SEFs may demonstrate compliance with SEF Core Principle 6 by setting and enforcing position limits or position accountability levels only with respect to trading on the SEF's own market. For Permitted Transactions, as defined in § 37.9, SEFs may demonstrate compliance with SEF Core Principle 6 by setting and enforcing position accountability levels or by sending the Commission a list of Permitted Transactions traded on the SEF.

[354] *Id.*

[355] Proposed § 150.9(a)(5) of the 2016 Reproposal provided that an applicant's derivatives position shall be deemed to be recognized as a non-enumerated bona fide hedging position exempt from federal position limits at the time that a designated contract market or swap execution facility notifies an applicant that such designated contract market or swap execution facility will recognize such position as a non-enumerated bona fide hedging position.

[356] In *U.S. Telecom Ass'n* v. *FCC,* the D.C. Circuit held ''that, while federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities—private or sovereign—absent affirmative evidence of authority to do so.'' *U.S. Telecom Ass'n* v. *FCC,* 359 F.3d 554, 565–68 (D.C. Cir. 2004) (citing *Shook* v. *District of Columbia Fin. Responsibility & Mgmt. Assistance Auth.,* 132 F.3d 775, 783–84 & n. 6 (D.C. Cir.1998); *Nat'l Ass'n of Reg. Util. Comm'rs (''NARUC'')* v. *FCC,* 737 F.2d 1095, 1143–44 & n. 41 (D.C. Cir.1984); *Nat'l Park and Conservation Ass'n* v. *Stanton,* 54 F.Supp.2d 7, 18–20 (D.D.C.1999). Nevertheless, the D.C. Circuit recognized three circumstances that the agency may ''delegate'' its authority to an outside party because they do not involve subdelegation of decision-making authority: (1) Establishing a reasonable condition for granting federal approval; (2) fact gathering; and (3) advice giving. The first instance involves conditioning of obtaining a permit on the approval by an outside entity as an element of its

Continued

delegated to the DCMs and SEFs a significant component of the Commission's authority to recognize bona fide hedges for purposes of federal position limits. Under that proposal, the Commission did not have a substantial role in reviewing the DCMs' or SEFs' recognitions of non-enumerated bona fide hedges for purposes of federal position limits. Upon further reflection, the Commission believes that the 2016 Reproposal may not have retained enough authority with the Commission under case law on sub-delegation of agency decision making authority. Under the new proposed model, the Commission would be informed by the exchanges' determinations to make the Commission's own determination for purposes of federal position limits within a 10-day review period. Accordingly, the Commission would retain its decision-making authority with respect to the federal position limits and provide legal certainty to market participants of their determinations.

Both DCMs and SEFs would be eligible to allow traders to utilize the processes set forth under proposed § 150.9. However, as a practical matter, the Commission expects that upon implementation of § 150.9, the process proposed therein will likely be used primarily by DCMs, rather than by SEFs, given that most economically equivalent swaps that would be subject to federal position limits are expected to be traded OTC and not executed on SEFs.

The Commission emphasizes that proposed § 150.9 is intended to serve as a separate, self-contained process that is related to, but independent of, the proposed regulations governing: (1) The process in proposed § 150.3 for traders to apply directly to the Commission for a bona fide hedge recognition; and (2) exchange processes for establishing exchange-set limits and granting exemptions therefrom in proposed § 150.5. Proposed § 150.9 is intended to serve as a voluntary process exchanges can implement to provide additional flexibility for their market participants seeking non-enumerated bona fide hedges to file one application with an exchange to receive a recognition or exemption for purposes of both exchange-set limits and for federal limits. Proposed § 150.9 is discussed in greater detail below.

Request for Comment

The Commission requests comment on all aspects of proposed § 150.9. The Commission also invites comments on the following:

(35) Considering that the Commission's proposed position limits would apply to OTC economically equivalent swaps, should the Commission develop a mechanism for exchanges to be involved in the review of non-enumerated bona fide hedge applications for OTC economically equivalent swaps?

(36) If so, what, if any, role should exchanges play in the review of non-enumerated bona fide hedge applications for OTC economically equivalent swaps?

a. Proposed § 150.9(a)—Approval of Rules

Under proposed § 150.9(a), the exchange must have rules, adopted pursuant to the rule approval process in § 40.5 of the Commission's regulations, establishing processes and standards in accordance with proposed § 150.9, described below. The Commission would review such rules to ensure that the exchange's standards and processes for recognizing bona fide hedges from its own exchange-set limits conform to the Commission's standards and processes for recognizing bona fide hedges from the federal limits.

b. Proposed § 150.9(b)—Prerequisites for an Exchange To Recognize Non-Enumerated Bona Fide Hedges in Accordance With This Section

This section sets forth conditions that would require an exchange-recognized bona fide hedge to conform to the corresponding definitions or standards the Commission uses in proposed §§ 150.1 and 150.3 for purposes of the federal position limits regime.

An exchange would be required to meet the following prerequisites with respect to recognizing bona fide hedging positions under proposed § 150.9(b): (i) The exchange lists the applicable referenced contract for trading; (ii) the position is consistent with both the definition of bona fide hedging transaction or position in proposed § 150.1 and section 4a(c)(2) of the Act; and (iii) the exchange does not recognize as bona fide hedges any positions that include commodity index contracts and one or more referenced contracts, nor does the exchange grant risk management exemptions for such contracts.[357]

Request for Comment

The Commission requests comment on all aspects of proposed § 150.9. The Commission also invites comments on the following:

(37) Does the proposed compliance date of twelve-months after publication of a final federal position limits rulemaking in the **Federal Register** provide a sufficient amount of time for exchanges to update their exemption application procedures, as needed, and begin reviewing exemption applications in accordance with proposed § 150.9? If not, please provide an alternative longer timeline and reasons supporting a longer timeline.

c. Proposed § 150.9(c)—Application Process

Proposed § 150.9(c) sets forth the information and representations that the exchange, at a minimum, would be required to obtain from applicants as part of the application process for granting bona fide hedges. In this connection, exchanges may rely upon their existing application forms and processes in making such determinations, provided they collect the information outlined below. The Commission believes the information set forth below is sufficient for the exchange to determine, and the Commission to verify, whether a particular transaction or position satisfies the federal definition of bona fide hedging transaction for purposes of federal position limits.

i. Proposed § 150.9(c)(1)—Required Information for Bona Fide Hedging Positions

With respect to bona fide hedging positions in referenced contracts, proposed § 150.9(c)(1) would require that any application include: (i) A description of the position in the commodity derivative contract for which the application is submitted (which would include the name of the underlying commodity and the position size); (ii) information to demonstrate why the position satisfies section 4a(c)(2) of the Act and the definition of bona fide hedging transaction or position in proposed § 150.1, including factual and legal analysis; (iii) a

decision process. The second provides the agency with nondiscretionary information gathering. The third allows a federal agency to turn to an outside entity for advice and policy recommendations, provided the agency makes the final decisions itself. *Id.* at 568. ''An agency may not, however, merely 'rubber-stamp' decisions made by others under the guise of seeking their 'advice,' [ ], nor will vague or inadequate assertions of final reviewing authority save an unlawful subdelegation, [ ].'' *Id.*

[357] The Commission finds that financial products are not substitutes for positions taken or to be taken in a physical marketing channel. Thus, the offset of financial risks arising from financial products would be inconsistent with the definition of bona fide hedging transactions or positions for physical commodities in proposed § 150.1. *See supra* Section II.A.1.c.ii.(1) (discussion of the temporary substitute test and risk-management exemptions).

statement concerning the maximum size of all gross positions in derivative contracts for which the application is submitted (in order to provide a view of the true footprint of the position in the market); (iv) information regarding the applicant's activity in the cash markets for the commodity underlying the position for which the application is submitted; [358] and (v) any other information the exchange requires, in its discretion, to enable the exchange to determine, and the Commission to verify, whether such position should be recognized as a bona fide hedge.[359] These proposed application requirements are similar to current requirements for recognizing a bona fide hedging position under existing §§ 1.47 and 1.48.

Market participants have raised concerns that such requirements, even if administered by the exchanges, would require hedging entities to change internal books and records to track which category of bona fide hedge a position would fall under. The Commission notes that, as part of this current proposal, exchanges would not need to require the identification of a hedging need against a particular identified category. So long as the requesting party satisfies all applicable requirements in proposed § 150.9, including demonstrating with a factual and legal analysis that a position would fit within the bona fide hedge definition, the Commission is not intending to require the hedging party's books and records to identify the particular type of hedge being applied.

ii. Proposed § 150.9(c)(2)—Timing of Application

The Commission does not propose to prescribe timelines (*e.g.,* a specified number of days) for exchanges to review applications because the Commission believes that exchanges are in the best position to determine how to best accommodate the needs of their market participants. Rather, under proposed § 150.9(c)(2), the exchange must separately require that applicants submit their application in advance of exceeding the applicable federal position limit for any given referenced contract. However, an exchange may adopt rules that allow a person to submit a bona fide hedge application within five days after the person has exceeded federal speculative limits if such person exceeds the limits due to sudden or unforeseen increases in its bona fide hedging needs. Where an applicant claims a sudden or unforeseen increase in its bona fide hedging needs, the proposed rules would require exchanges to require that the person provide materials demonstrating that the person exceeded the federal speculative limit due to sudden or unforeseen circumstances. Further, the Commission would caution exchanges that applications submitted after a person has exceeded federal position limits should not be habitual and should be reviewed closely. Finally, if the Commission finds that the position does not qualify as a bona fide hedge, then the applicant would be required to bring its position into compliance, and could face a position limits violation if it does not reduce the position within a commercially reasonable time.

iii. Proposed § 150.9(c)(3)—Renewal of Applications

Under proposed § 150.9(c)(3), the exchange must require that persons with bona fide hedging recognitions in referenced contracts granted pursuant to proposed § 150.9 reapply at least on an annual basis by updating their original application, and receive a notice of approval from the exchange prior to exceeding the applicable position limit.

iv. Proposed § 150.9(c)(4)—Exchange Revocation Authority

Under proposed § 150.9(c)(4), the exchange retains its authority to limit, condition, or revoke, at any time, any recognition previously issued pursuant to proposed § 150.9, for any reason, including if the exchange determines that the recognition is no longer consistent with the bona fide hedge definition in proposed § 150.1 or section 4a(c)(2) of the Act.

Request for Comment

The Commission requests comment on all aspects of proposed § 150.9. The Commission also invites comments on the following:

(38) As described above, the Commission does not propose to prescribe timelines for exchanges to review applications. Please comment on what, if any, timing requirements the Commission should prescribe for exchanges' review of applications pursuant to proposed § 150.9.

(39) Currently, certain exchanges allow for the submission of exemption requests up to five business days after the trader established the position that exceeded the exchange-set limit. Under proposed § 150.9, should exchanges continue to be permitted to recognize bona fide hedges and grant spread exemptions retroactively—up to five days after a trader has established a position that exceeds federal position limits?

d. Proposed § 150.9(d)—Recordkeeping

Proposed § 150.9(d) would set forth recordkeeping requirements for purposes of § 150.9. The required records would form a critical element of the Commission's oversight of the exchanges' application process and such records could be requested by the Commission as needed. Under proposed § 150.9(d), exchanges must maintain complete books and records of all activities relating to the processing and disposition of applications in a manner consistent with the Commission's existing general regulations regarding recordkeeping.[360] Such records must include all information and documents submitted by an applicant in connection with its application; records of oral and written communications between the exchange and the applicant in connection with the application; and information and documents in connection with the exchange's analysis of and action on such application.[361] Exchanges would also be required to maintain any documentation submitted by an applicant after the disposition of an application, including, for example, any reports or updates the applicant filed with the exchange.

Exchanges would be required to store and produce records pursuant to existing § 1.31,[362] and would be subject

[358] The Commission would expect that exchanges would require applicants to provide cash market data for at least the prior year.

[359] Under proposed § 150.9(c)(1)(iv) and (v), exchanges, in their discretion, could request additional information as necessary, including information for cash market data similar to what is required in the Commission's existing Form 204. *See infra* Section II.H.3. (discussion of Form 204 and proposed amendments to part 19). Exchanges could also request a description of any positions in other commodity derivative contracts in the same commodity underlying the commodity derivative contract for which the application is submitted. Other commodity derivatives contracts could include other futures, options, and swaps (including OTC swaps) positions held by the applicant.

[360] Requirements regarding the keeping and inspection of all books and records required to be kept by the Act or the Commission's regulations are found at § 1.31, 17 CFR 1.31. DCMs are already required to maintain records of their business activities in accordance with the requirements of § 1.31 of § 38.951, 17 CFR 38.951.

[361] The Commission does not intend, in proposed § 150.9(d), to create any new obligation for an exchange to record conversations with applicants or their representatives; however, the Commission does expect that an exchange would preserve any written or electronic notes of verbal interactions with such parties.

[362] Consistent with existing § 1.31, the Commission expects that these records would be readily available during the first two years of the required five year recordkeeping period for paper records, and readily accessible for the entire five-year recordkeeping period for electronic records. In addition, the Commission expects that records required to be maintained by an exchange pursuant

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to requests for information pursuant to other applicable Commission regulations, including, for example, existing § 38.5.[363]

Request for Comment

The Commission requests comment on all aspects of proposed § 150.9. The Commission also invites comments on the following:

(40) Do the proposed recordkeeping requirements set forth in § 150.9 comport with existing practice? Are there any ways in which the Commission could streamline the proposed recordkeeping requirements while still maintaining access to sufficient information to carry out its statutory responsibilities?

e. Proposed § 150.9(e)—Process for a Person To Exceed Federal Position Limits

Under proposed § 150.9(e), once an exchange recognizes a bona fide hedge with respect to its own speculative position limits established pursuant to § 150.5(a), a person could rely on such determination for purposes of exceeding federal position limits provided that specified conditions are met, including that the exchange provide the Commission with notice of any approved application as well as a copy of the application and any supporting materials, and the Commission does not object to the exchange's determination. The exchange is only required to provide this notice to the Commission with respect to its initial (and not renewal) determinations for a particular application. Under proposed § 150.9(e), the exchange must provide such notice to the Commission concurrent with the notice provided to the applicant, and, except as provided below, a trader can exceed federal position limits ten business days after the exchange issues the required notification, provided the Commission does not notify the exchange or applicant otherwise.

However, for a person with sudden or unforeseen bona fide hedging needs that has filed an application, pursuant to proposed § 150.9(c)(2)(ii), after they already exceeded federal speculative position limits, the exchange's retroactive approval of such application would be deemed approved by the Commission two business days after the exchange issues the required notification, provided the Commission does not notify the exchange or applicant otherwise. That is, the bona fide hedge recognition would be deemed approved by the Commission two business days after the exchange issues the required notification, unless the Commission notifies the exchange and the applicant otherwise during this two business day timeframe.

Once those ten (or two) business days have passed, the person could rely on the bona fide hedge recognition both for purposes of exchange-set and federal limits, with the certainty that the Commission (and not Commission staff) would only revoke that determination in the limited circumstances set forth in proposed § 150.9(f)(1) and (2) described further below.

However, under proposed § 150.9(e)(5), if, during the ten (or two) business day timeframe, the Commission notifies the exchange and applicant that the Commission (and not staff) has determined to stay the application, the person would not be able to rely on the exchange's approval of the application for purposes of exceeding federal position limits, unless the Commission approves the application after further review.

Separately, under proposed § 150.9(e)(5), the Commission (or Commission staff) may request additional information from the exchange or applicant in order to evaluate the application, and the exchange and applicant would have an opportunity to provide the Commission with any supplemental information requested to continue the application process. Any such request for additional information by the Commission (or staff), however, would not stay or toll the ten (or two) business day application review period.

Further, under proposed § 150.9(e)(6), the applicant would not be subject to any finding of a position limits violation during the Commission's review of the application. Or, if the Commission determines (in the case of retroactive applications) that the bona fide hedge is not approved for purposes of federal limits after a person has already exceeded federal position limits, the Commission would not find that the person has committed a position limits violation so long as the person brings the position into compliance within a commercially reasonable time.

The Commission believes that the ten (or two) business day period to review exchange determinations under proposed § 150.9 would allow the Commission enough time to identify applications that may not comply with the proposed bona fide hedging position definition, while still providing a mechanism whereby market participants may exceed federal position limits pursuant to Commission determinations.

Request for Comment

The Commission requests comment on all aspects of proposed § 150.9. The Commission also invites comments on the following:

(41) The Commission has proposed, in § 150.9(e)(3), a ten business day period for the Commission to review an exchange's determination to recognize a bona fide hedge for purposes of the Commission approving such determination for federal position limits. Please comment on whether the review period is adequate, and if not, please comment on what would be an appropriate amount of time to allow the Commission to review exchange determinations while also providing a timely determination for the applicant.

(42) The Commission has proposed a two business day review period for retroactive applications submitted to exchanges after a person has already exceeded federal position limits. Please comment on whether this time period properly balances the need for the Commission to oversee the administration of federal position limits with the need of hedging parties to have certainty regarding their positions that are already in excess of the federal position limits.

(43) With respect to the Commission's review authority in § 150.9(e)(5), if the Commission stays an application during the ten (or two) business-day review period, the Commission's review, as would be the case for an exchange, would not be bound by any time limitation. Please comment on what, if any, timing requirements the Commission should prescribe for its review of applications pursuant to proposed § 150.9(e)(5).

(44) Please comment on whether the Commission should permit a person to exceed federal position limits during the ten business day period for the Commission's review of an exchange-granted exemption.

(45) Under proposed § 150.9(e), an exchange is only required to notify the Commission of its initial approval of an exemption application (and not any renewal approvals). Should the Commission require that exchanges submit approved renewals of applications to the Commission for review and approval if there are material changes to the facts and circumstances underlying the renewal application?

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to this section would be readily accessible during the pendency of any application, and for two years following any disposition that did not recognize a derivative position as a bona fide hedge.

[363] *See* 17 CFR 38.5 (requiring, in general, that upon request by the Commission, a DCM must file responsive information with the Commission, such as information related to its business, or a written demonstration of the DCM's compliance with one or more core principles).

f. Proposed § 150.9(f)—Commission Revocation of an Approved Application

Proposed § 150.9(f) sets forth the limited circumstances under which the Commission would revoke a bona fide hedge recognition granted pursuant to proposed § 150.9. The Commission expects such revocation to be rare, and this authority would not be delegated to Commission staff. First, under proposed § 150.9(f)(1), if an exchange revokes its recognition of a bona fide hedge, then such bona fide hedge would also be deemed revoked for purposes of federal limits.

Second, under proposed § 150.9(f)(2), if the Commission determines that an application that has been approved or deemed approved by the Commission is no longer consistent with the applicable sections of the Act and the Commission's regulations, the Commission shall notify the person and exchange, and, after an opportunity to respond, the Commission can require the person to reduce the derivatives position within a commercially reasonable time, or otherwise come into compliance. In determining a commercially reasonable amount of time, the Commission must consult with the applicable exchange and applicant, and may consider factors including, among others, current market conditions and the protection of price discovery in the market.

The Commission expects that it would only exercise its revocation authority under circumstances where the disposition of an application has resulted, or is likely to result, in price anomalies, threatened manipulation, actual manipulation, market disruptions, or disorderly markets. In addition, the Commission's authority to require a market participant to reduce certain positions in proposed § 150.9(f)(2) would not be subject to the requirements of CEA section 8a(9), that is, the Commission would not be compelled to find that a CEA section 8a(9) emergency condition exists prior to requiring that a market participant reduce certain positions pursuant to proposed § 150.9(f)(2).

If the Commission determines that a person must reduce its position or otherwise bring it into compliance, the Commission would not find that the person has committed a position limit violation so long as the person comes into compliance within the commercially reasonable time identified by the Commission in consultation with the applicable exchange and applicant. The Commission intends for persons to be able to rely on recognitions and exemptions granted pursuant to § 150.9 with the certainty that the exchange decision would only be reversed in very limited circumstances. Any action compelling a market participant to reduce its position pursuant to § 150.9(f)(2) would be a Commission action, and would not be delegated to Commission staff. [364]

g. Proposed § 150.9(g)—Delegation of Authority to the Director of the Division of Market Oversight

The Commission proposes to delegate certain of its authorities under proposed § 150.9 to the Director of the Commission's Division of Market Oversight, or such other employee(s) that the Director may designate from time to time. Proposed § 150.9(g)(1) would delegate the Commission's authority, in § 150.9(e)(5), to request additional information from the exchange and applicant.

The Commission does not propose, however, to delegate its authority, in proposed § 150.9(e)(5) and (6) to stay or reject such application, nor proposed § 150.9(f)(2), to revoke a bona fide hedge recognition granted pursuant to § 150.9 or to require an applicant to reduce its positions or otherwise come into compliance. The Commission believes that if an exchange's disposition of an application raises concerns regarding consistency with the Act, presents novel or complex issues, or requires remediation, then the Commission, and not Commission staff, should make the final determination, after taking into consideration any supplemental information provided by the exchange or the applicant.

As with all authorities delegated by the Commission to staff, the Commission would maintain the authority to consider any matter which has been delegated, including the proposed delegations in §§ 150.3 and 150.9 described above. The Commission will closely monitor staff administration of the proposed processes for granting bona fide hedge recognitions.

H. Part 19 and Related Provisions—Reporting of Cash-Market Positions

1. Background

Key reports currently used for purposes of monitoring compliance with federal position limits include Form 204 [365] and Form 304,[366] known collectively as the ''series '04'' reports. Under existing § 19.01, market participants that hold bona fide hedging positions in excess of limits for the nine commodities currently subject to federal limits must justify such overages by filing the applicable report each month: Form 304 for cotton, and Form 204 for the other commodities.[367] These reports are generally filed after exceeding the limit, show a snapshot of such traders' cash positions on one given day each month, and are used by the Commission to determine whether a trader has sufficient cash positions that justify futures and options on futures positions above the speculative limits.

2. Proposed Elimination of Form 204 and Cash-Reporting Elements of Form 304

For the reasons set forth below, the Commission proposes to eliminate Form 204 and Parts I and II of existing Form 304, which requests information on cash-market positions for cotton akin to the information requested in Form 204.[368]

First, the Commission would no longer need the cash-market information currently reported on Forms 204 and 304 because the exchanges would collect, and make available to the Commission, cash-market information needed to assess whether any such position is a bona fide hedge.[369] Further, the Commission would continue to have access to information, including cash-market information, by issuing special calls relating to positions exceeding limits.

Second, Form 204 as currently constituted would be inadequate for the

[364] None of the provisions in proposed § 150.9 would compromise the Commission's emergency authorities under CEA section 8a(9), including the Commission's authority to fix ''limits that may apply to a market position acquired in good faith prior to the effective date of the Commission's action.'' CEA section 8a(9). 7 U.S.C. 12a(9).

[365] *CFTC Form 204: Statement of Cash Positions in Grains, Soybeans, Soybean Oil, and Soybean Meal,* U.S. Commodity Futures Trading Commission website, *available at https://www.cftc.gov/sites/default/files/idc/groups/public/@forms/documents/file/cftcform204.pdf* (existing Form 204).

[366] *CFTC Form 304: Statement of Cash Positions in Cotton,* U.S. Commodity Futures Trading Commission website, *available at http://www.cftc.gov/ucm/groups/public/@forms/documents/file/cftcform304.pdf* (existing Form 204). Parts I and II of Form 304 address fixed-price cash positions used to justify cotton positions in excess of federal limits. As described below, Part III of Form 304 addresses unfixed-price cotton ''on-call'' information, which is not used to justify cotton positions in excess of limits, but rather to allow the Commission to prepare its weekly cotton on-call report.

[367] 17 CFR 19.01.

[368] Proposed amendments to Part III of the Form 304, which addresses cotton on-call, are discussed below.

[369] The cash-market reporting regime discussed in this section of the release only pertains to bona fide hedges, not to spread exemptions, because the Commission has not traditionally relied on cash-market information when reviewing requests for spread exemptions.

reporting of cash-market positions relating to certain energy contracts which would be subject to federal limits for the first time under this proposal. For example, when compared to agricultural contracts, energy contracts generally expire more frequently, have a shorter delivery cycle, and have significantly more product grades. The information required by Form 204, as well as the timing and procedures for its filing, reflects the way agricultural contracts trade, but is inadequate for purposes of reporting cash-market information involving energy contracts.

While the Commission considered proposing to modify Form 204 to cover energy and metal contracts, the Commission has opted instead to propose a more streamlined approach to cash-market reporting that reduces duplication between the Commission and the exchanges. In particular, to obtain information with respect to cash market positions, the Commission proposes to leverage the cash-market information reported to the exchanges, with some modifications. When granting exemptions from their own limits, exchanges do not use a monthly cash-market reporting framework akin to Form 204. Instead, exchanges generally require market participants who wish to exceed exchange-set limits, including for bona fide hedging positions, to submit an annual exemption application form in advance of exceeding the limit.[370] Such applications are typically updated annually and generally include a month-by-month breakdown of cash-market positions for the previous year supporting any position-limits overages during that period.[371]

To ensure that the Commission continues to have access to the same information on cash-market positions that is already provided to exchanges, the Commission proposes several reporting and recordkeeping requirements in §§ 150.3, 150.5, and 150.9, as discussed above.[372] First, exchanges would be required to collect applications, updated at least on an annual basis, for purposes of granting bona fide hedge recognitions from exchange-set limits for contracts subject to federal limits,[373] and for recognizing bona fide hedging positions for purposes of federal limits.[374] Among other things, such applications would be required to include: (1) Information regarding the applicant's activity in the cash markets for the underlying commodity; and (2) any other information to enable the exchange to determine, and the Commission to verify, whether the exchange may recognize such position as a bona fide hedge.[375] Second, consistent with existing industry practice for certain exchanges, exchanges would be required to file monthly reports to the Commission showing, among other things, for all bona fide hedges (whether enumerated or non-enumerated), a concise summary of the applicant's activity in the cash markets.[376]

Collectively, these proposed §§ 150.5 and 150.9 rules would provide the Commission with monthly information about all recognitions and exemptions granted for purposes of contracts subject to federal limits, including cash-market information supporting the applications, and annual information regarding all month-by-month cash-market positions used to support a bona fide hedging recognition. These reports would help the Commission verify that any person who claims a bona fide hedging position can demonstrate satisfaction of the relevant requirements. This information would also help the Commission perform market surveillance in order to detect and deter manipulation and abusive trading practices in physical commodity markets.

While the Commission would no longer receive the monthly snapshot data currently included on Form 204, the Commission would have broad access, at any time, to the cash-market information described above, as well as any other data or information exchanges collect as part of their application processes.[377] This would include any updated application forms and periodic reports that exchanges may require applicants to file regarding their positions. To the extent that the Commission observes market activity or positions that warrant further investigation, § 150.9 would also provide the Commission with access to any supporting or related records the exchanges would be required to maintain.[378]

Furthermore, the proposed changes would not impact the Commission's existing provisions for gathering information through special calls relating to positions exceeding limits and/or to reportable positions. Accordingly, as discussed further below, the Commission proposes that all persons exceeding the proposed limits set forth in § 150.2, as well as all persons holding or controlling reportable positions pursuant to § 15.00(p)(1), must file any pertinent information as instructed in a special call.[379]

Finally, the Commission understands that the exchanges maintain regular dialogue with their participants regarding cash-market positions, and that it is common for exchange surveillance staff to make informal inquiries of market participants, including if the exchange has questions about market events or a participant's use of an exemption. The Commission encourages exchanges to continue this practice. Similarly, the Commission anticipates that its own staff would engage in dialogue with market participants, either through the use of informal conversations or, in limited circumstances, via special call authority.

For market participants who are accustomed to filing Form 204s with information supporting classification as a federally enumerated hedging position, the proposed elimination of Form 204 would result in a slight change in practice. Under the proposed rules, such participants' bona fide hedge recognitions could still be self-effectuating for purposes of federal limits, provided the market participant also separately applies for a bona fide hedge exemption from exchange-set limits established pursuant to proposed § 150.5(a), and provided further that the participant submits the requisite cash-market information to the exchange as required by proposed § 150.5(a)(2)(ii)(A)(*1*).

[370] *See, e.g.,* ICE Rule 6.29 and CME Rule 559.

[371] For certain physically-delivered agricultural contracts, some exchanges may require that spot month exemption applications be renewed several times a year for each spot month, rather than annually.

[372] As discussed earlier in this release, proposed § 150.9 also includes reporting and recordkeeping requirements pertaining to spread exemptions. Those requirements will not be discussed again in this section of the release, which addresses cash-market reporting in connection with bona fide hedges. This section of the release focuses on the cash-market reporting requirements in § 150.9 that pertain to bona fide hedges.

[373] *See* proposed § 150.5(a)(2)(ii)(A)*(1).*

[374] As discussed above in connection with proposed § 150.9, market participants who wish to request a bona fide hedge recognition under § 150.9 would not be required to file such applications with both the exchange and the Commission. They would only file the applications with the exchange, which would then be subject to recordkeeping requirements in proposed § 150.9(d), as well as proposed §§ 150.5 and 150.9 requirements to provide certain information to the Commission on a monthly basis and upon demand.

[375] *See* proposed § 150.9(c)(1)(iv)–(v).

[376] *See* proposed § 150.5(a)(4).

[377] *See, e.g.,* proposed § 150.9(d) (requiring that all such records, including cash-market information submitted to the exchange, be kept in accordance with the requirements of § 1.31) and proposed § 19.00(b) (requiring, among other things, all persons exceeding speculative limits who have received a special call to file any pertinent information as specified in the call).

[378] *See* proposed § 150.9(d).

[379] *See* proposed § 19.00(b).

3. Proposed Changes to Parts 15 and 19 To Implement the Proposed Elimination of Form 204 and Portions of Form 304

The market and large-trader reporting rules are contained in parts 15 through 21 of the Commission's regulations. Collectively, these reporting rules effectuate the Commission's market and financial surveillance programs by enabling the Commission to gather information concerning the size and composition of the commodity derivative markets and to monitor and enforce any established speculative position limits, among other regulatory goals.

To effectuate the proposed elimination of Form 204 and the cash-market reporting components of Form 304, the Commission proposes corresponding amendments to certain provisions in parts 15 and 19. These amendments would eliminate: (i) Existing § 19.00(a)(1), which requires persons holding reportable positions which constitute bona fide hedging positions to file a Form 204; and (ii) existing § 19.01, which, among other things, sets forth the cash-market information required on Forms 204 and 304.[380] Based on the proposed elimination of existing § 19.00(a)(1) and Form 204, the Commission also proposes to remove related provisions from: (i) The ''reportable position'' definition in § 15.00(p); (ii) the list of ''persons required to report'' in § 15.01; and (iii) the list of reporting forms in § 15.02.

4. Special Calls

Notwithstanding the proposed elimination of Form 204, the Commission does not propose to make any significant substantive changes to information requirements relating to positions exceeding limits and/or to reportable positions. Accordingly, in proposed § 19.00(b), the Commission proposes that all persons exceeding the proposed limits set forth in § 150.2, as well as all persons holding or controlling reportable positions pursuant to § 15.00(p)(1), must file any pertinent information as instructed in a special call. This proposed provision is similar to existing § 19.00(a)(3), but would require any such person to file the information as instructed in the special call, rather than to file a series '04 report.[381]

The Commission also proposes to add language to existing § 15.01(d) to clarify that persons who have received a special call are deemed ''persons required to report'' as defined in § 15.01.[382] The Commission proposes this change to clarify an existing requirement found in § 19.00(a)(3), which requires persons holding or controlling positions that are reportable pursuant to § 15.00(p)(1) who have received a special call to respond.[383] The proposed changes to part 19 operate in tandem with the proposed additional language for § 15.01(d) to reiterate the Commission's existing special call authority without creating any new substantive reporting obligations. Finally, proposed § 19.03 would delegate authority to issue such special calls to the Director of the Division of Enforcement, and proposed § 19.03(b) would delegate to the Director of the Division of Enforcement the authority in proposed § 19.00(b) to provide instructions or to determine the format, coding structure, and electronic data transmission procedures for submitting data records and any other information required under part 19.

5. Form 304 Cotton On-Call Reporting

With the proposed elimination of the cash-market reporting elements of Form 304 as described above, Form 304 would be used exclusively to collect the information needed to publish the Commission's weekly cotton on call report, which shows the quantity of unfixed-price cash cotton purchases and sales that are outstanding against each cotton futures month.[384] The requirements pertaining to that report would remain in proposed §§ 19.00(a) and 19.02, with minor modifications to existing provisions. The Commission proposes to update cross references (including to renumber § 19.00(a)(2) as § 19.00(a)) and to clarify and update the procedures and timing for the submission of Form 304. In particular, proposed § 19.02(b) would require that each Form 304 report be made weekly, dated as of the close of business on Friday, and filed not later than 9 a.m. Eastern Time on the third business day following that Friday using the format, coding structure, and electronic data transmission procedures approved in writing by the Commission. The Commission also proposes some modifications to the Form 304 itself, including conforming and technical changes to the organization, instructions, and required identifying information.[385]

Request for Comment

The Commission requests comment on all aspects of the proposed amendments to Part 19 and related provisions. The Commission also invites comments on the following:

(46) To what extent, and for what purpose, do market participants and others rely on the information contained in the Commission's weekly cotton on-call report?

(47) Does publication of the cotton on-call report create any informational advantages or disadvantages, and/or otherwise impact competition in any way?

(48) Should the Commission stop publishing the cotton on-call report, but continue to collect, for internal use only, the information required in Part III of Form 304 (Unfixed-Price Cotton ''On Call'')?

(49) Alternatively, should the Commission stop publishing the cotton on-call report and also eliminate the Form 304 altogether, including Part III?

6. Proposed Technical Changes to Part 17

Part 17 of the Commission's regulations addresses reports by reporting markets, FCMs, clearing members, and foreign brokers.[386] The Commission proposes to amend existing § 17.00(b), which addresses information to be furnished by FCMs, clearing members, and foreign brokers, to delete certain provisions related to aggregation, because those provisions have become duplicative of aggregation provisions that were adopted in § 150.4 in the 2016 Final Aggregation Rulemaking.[387] The Commission also proposes to add a new provision, § 17.03(i), which delegates certain authority under § 17.00(b) to the Director of the Office of Data and Technology.[388]

[380] 17 CFR 19.01.

[381] 17 CFR 19.00(a)(3).

[382] 17 CFR 15.01.

[383] 17 CFR 19.00(a)(3).

[384] *Cotton On-Call,* U.S. Commodity Futures Trading Commission website, *available at https://www.cftc.gov/MarketReports/CottonOnCall/index.htm* (weekly report).

[385] Among other things, the proposed changes to the instructions would clarify that traders must identify themselves on Form 304 using their Public Trader Identification Number, in lieu of the CFTC Code Number required on previous versions of Form 304. This proposed change would help Commission staff to connect the various reports filed by the same market participants. This release includes a representation of the proposed Form 304, which would be submitted in an electronic format published pursuant to the proposed rules, either via the Commission's web portal or via XML-based, secure FTP transmission.

[386] 17 CFR part 17.

[387] *See* Final Aggregation Rulemaking. Specifically, the Commission proposes to delete paragraphs (1), (2), and (3) from § 17.00(b). 17 CFR 17.00(b).

[388] Under § 150.4(e)(2), which was adopted in the 2016 Final Aggregation Rulemaking, the Director of the Division of Market Oversight is delegated authority to, among other things, provide instructions relating to the format, coding structure, and electronic data transmission procedures for submitting certain data records. 17 CFR 150.4(e)(2). A subsequent rulemaking changed this delegation

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I. Removal of Part 151

Finally, the Commission is proposing to remove and reserve part 151 in response to its *vacatur* by the U.S. District Court for the District of Columbia,[389] as well as in light of the proposed revisions to part 150 that conform part 150 to the amendments made to the CEA section 4a by the Dodd-Frank Act.

III. Legal Matters

A. Introduction

Section 737 (a)(4) of the Dodd-Frank Act,[390] codified as section 4a(a)(2)(A) of the Commodity Exchange Act,[391] states in relevant part that ''the Commission shall'' establish position limits for contracts in physical commodities other than excluded commodities ''[i]n accordance with the standards set forth in'' section 4a(a)(1), which primarily contains the Commission's preexisting authority to establish such position limits as it ''finds are necessary.'' [392] In connection with the 2011 Final Rulemaking, the Commission determined that section 4a(a)(2)(A) is an unambiguous mandate to establish position limits for all physical commodities. In *ISDA,*[393] however, the U.S. District Court for the District of Columbia held that the term ''standards set forth in paragraph (1)'' is ambiguous as to whether it includes the requirement under section 4a(a)(1) that before the Commission establishes a position limit, it must first find it ''necessary'' to do so. The court therefore vacated the 2011 Final Rulemaking and directed the Commission to determine, in light of the Commission's ''experience and expertise'' '' and the ''competing interests at stake,'' whether section 4a(a)(2)(A) requires the Commission to make a necessity finding before establishing the relevant limits, or if section 4a(a)(2)(A) is a mandate from Congress to do so without that antecedent finding.

Following the court's order, the Commission subsequently determined that the ''standards set forth in paragraph (1)'' do not include the requirement in that paragraph that the Commission find position limits ''necessary.'' [394] Rather, the Commission determined, ''the standards set forth in paragraph (1)'' refer only to what the Commission called the ''aggregation standard'' and the ''flexibility standard.'' [395] The ''aggregation standard'' referred to directions under section 4a(a)(1)(A) that in determining whether any person has exceeded an applicable position limit, the Commission must aggregate the positions a party controls directly or indirectly, or held by two persons acting in concert ''the same as if the positions were held by, or the trading were done by, a single person.'' [396] The ''flexibility standard'' referred to the statement in section 4a(a)(1)(A) that ''[n]othing in this section shall be construed to prohibit'' the Commission from fixing different limits for different commodities, markets, futures, delivery months, numbers of days remaining on the contract, or for buying and selling operations.[397]

The Commission here preliminarily reaches a different conclusion. In light of its experience with and expertise in position limits and the competing interests at stake, the Commission now determines that it should interpret ''the standards set forth in paragraph (1)'' to include the traditional necessity and aggregation standards. The Commission also preliminarily determines that the ''flexibility standard'' is not an accurate way of describing the statute's lack of a prohibition on differential limits, and therefore is not included in ''the standards set forth in paragraph (1)'' with which position limits must accord. However, even if that were not so, the Commission would still preliminarily determine that ''the standards set forth in paragraph (1)'' should be interpreted to include necessity.

B. Key Statutory Provisions

The Commission's authority to establish position limits dates back to the Commodity Exchange Act of 1936.[398] The relevant CEA language, now codified in its present form as section 4a(a)(1), states, among other things that the Commission ''shall, from time to time . . . proclaim and fix such limits on the amounts of trading which may be done or positions which may be held by any person under such contracts'' as the Commission ''finds are necessary to diminish, eliminate, or prevent such burden.'' Thus, the Commission's original authority to establish a position limit required it first to find that it was necessary to do so. Section 4a(a)(1) also includes what the Commission has referred to as the aggregation and flexibility standards.

Section 4a(a)(2)(A) provides, in relevant part, that ''[i]n accordance with the standards set forth in paragraph (1) of this subsection,'' *i.e.,* paragraph 4a(a)(1) discussed above, the Commission shall, by rule, regulation, or order establish limits on the amount of positions, as appropriate, other than bona fide hedge positions, that may be held by any person with respect to contracts of sale for future delivery or with respect to options on the contracts or commodities traded on or subject to the rules of a DCM. This direction applies only to physical commodities other than excluded commodities. Paragraph 4a(a)(2)(B) states that the limits for exempt physical commodities ''required'' under subparagraph (A) ''shall'' be established within 180 days, and for agricultural commodities the limits ''required'' under subparagraph (A) ''shall'' be established within 270 days. Paragraph 4a(a)(2)(C) establishes as a ''goal'' that the Commission ''shall strive to ensure that trading on foreign boards of trade in the same commodity will be subject to comparable limits'' and that any limits imposed by the Commission not cause price discovery to shift to foreign boards of trade.

Next, paragraph 4a(a)(3) establishes certain requirements for position limits set pursuant to paragraph 4a(a)(2). It directs that when the Commission establishes ''the limits required in paragraph (2),'' it shall, ''as appropriate,'' set limits on the number of positions that may be held in the spot month, each other month, and the aggregate number of positions that may be held by any person for all months; and ''to the extent practicable, in its discretion'' the Commission shall fashion the limits to (i) ''diminish, eliminate, or prevent excessive speculation as described under this section;'' (ii) ''deter and prevent market manipulation, squeezes, and corners;'' (iii) ''ensure sufficient market liquidity for bona fide hedgers;'' and (iv) ''ensure that the price discovery function of the underlying market is not disrupted.''

Paragraph 4a(a)(5) adds a further requirement that when the Commission establishes limits under paragraph 4a(a)(2), the Commission must establish limits on the amount of positions, ''as appropriate,'' on swaps that are ''economically equivalent'' to futures

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of authority from the Director of the Division of Market Oversight to the Director of the Office of Data and Technology, with the concurrence of the Director of the Division of Enforcement. *See* 82 FR at 28763 (June 26, 2017). The proposed addition of § 17.03(i) would conform § 17.03 to that change in delegation.

[389] *See supra* note 11 and accompanying discussion.

[390] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, § 737(a)(4), Public Law 111–203, 124 Stat. 1376, 1723 (July 21, 2010).

[391] 7 U.S.C. 6a(a)(2)(A).

[392] 7 U.S.C. 6a(a)(1).

[393] 887 F. Supp.2d 259.

[394] *See, e.g.,* 2013 Proposal, 78 FR at 75680, 75684.

[395] *See, e.g., id.*

[396] 7 U.S.C. 6a(a)(1).

[397] *Id.*

[398] Public Law 74–675 § 5, 49 Stat. 1491, 1492 (June 15, 1936).

and options contracts subject to paragraph 4a(a)(2).

C. Ambiguity of Section 4a With Respect to Necessity Finding

The district court held that section 4a(a)(2) is ambiguous as to whether, before the Commission establishes a position limit, it must first find that a limit is ''necessary.'' The court found the phrase ''[i]n accordance with the standards set forth in paragraph (1) of this subsection'' unclear as to whether it includes the proviso in paragraph (1) that position limits be established only ''as the Commission finds are necessary.'' [399] The court noted that, by some definitions of ''standard,'' a requirement that position limits be ''necessary'' could qualify.[400]

The district court found the ambiguity compounded by the phrase ''as appropriate'' in sections 4a(a)(2)(A), 4a(a)(3), and 4a(a)(5).[401] It was unclear to the court whether this phrase gives the Commission discretion not to impose position limits at all if it finds them not appropriate, or if the discretion extends only to determining ''appropriate'' levels at which to set the limits.[402] Neither the grammar of the relevant provisions nor the available legislative history resolved these issues to the court's satisfaction.[403] In sum, ''the Dodd-Frank amendments do not constitute a clear and unambiguous mandate to set position limits.'' [404] The court therefore directed the Commission to resolve the ambiguity, not by ''rest[ing] simply on its parsing of the statutory language,'' but by ''bring[ing] its experience and expertise to bear in light of the competing interests at stake.'' [405]

D. Resolution of Ambiguity

The Commission has applied its experience and expertise in light of the competing interests at stake and preliminarily determined that paragraph 4a(a)(2) should be interpreted as incorporating the requirement of paragraph 4a(a)(1) that position limits be established only ''as the Commission finds are necessary.'' This is based on a number of considerations.

First, while the Commission has previously taken the position that necessity does not fall within the definition of the word ''standard,'' that view relied on only one of the many dictionary definitions of ''standard,'' [406] and the Commission now believes it was an overly narrow interpretation. The word ''standard'' is used in different ways in different contexts, and many reasonable definitions would encompass ''necessity.'' [407] In legal contexts, ''necessity'' is routinely called a ''standard.'' [408] The Commission preliminarily believes that the more natural reading of ''standard'' in section 4a(a)(2)(A) does include the requirement of a necessity finding.

Second, and relatedly, the Commission believes the term ''standard'' is a less natural fit for the language in subparagraph 4a(a)(1) that the Commission has previously called the ''flexibility standard.'' The sentence provides that ''[n]othing in this section shall be construed to prohibit the Commission from fixing different trading or position limits for different'' contracts or situations.[409] Typically a legal standard constrains an agency's discretion.[410] But nothing in the so-called ''flexibility'' language constrains the Commission at all. In other words, the express lack of any prohibition of differential limits under section 4a(a)(1) is better understood as the absence of any standard.[411] And if flexibility is not a standard, then necessity must be, because section 4a(a)(2)(A) refers to ''standards,'' plural.

Third, the requirement that position limits be ''appropriate'' is an additional ground to interpret the statute as lacking an across-the board-mandate. In the past, the Commission has taken the view that the word ''appropriate'' as used in section 4a(a)(2)(A)—and in sections 4a(a)(3) and 4a(a)(5) in connection with position limits established pursuant to section 4a(a)(2)(A)—refers to position limit levels but not to the determination of whether to establish a limit.[412] However, the Supreme Court has opined in the context of the Clean Air Act that ''[n]o regulation is 'appropriate' if it does significantly more harm than good.'' [413] That was not a CEA case, but the Commission finds the Court's reasoning persuasive in this context.

It is reasonable to interpret the direction to set a position limit ''as appropriate'' to mean that in a given context, it may be that no position limit is justified. Under an across-the-board mandate, however, the Commission would be compelled to impose some limit even if any level of position limit would do significantly more harm than good, including with respect to the public interests Congress set forth in section 4a(a)(1) itself and elsewhere in section 4a and the CEA generally.[414] The Commission does not believe that is the best reading of section 4a(a)(2)(A). Rather, Congress's use of ''appropriate'' in that section and elsewhere in the Dodd-Frank amendments is more consistent with a directive that the

[399] *ISDA,* 887 F.Supp.2d at 274.

[400] *Id.*

[401] *Id.* at 276–278.

[402] *Id.*

[403] *Id.*

[404] *Id.* at 280.

[405] *Id.* at 281.

[406] *ISDA,* Defendant Commodity Futures Trading Commission's Cross-Motion for Summary Judgment at 24–25, (quoting definition of ''standard'' as ''something set up and established by authority as a rule for the measure of quantity, weight, extent, value, or quality'' from *Merriam-Webster's Collegiate Dictionary* 1216 (11th ed. 2011)).

[407] *Black's Law Dictionary* 1624 (10th ed. 2014) (''A criterion for measuring acceptability, quality, or accuracy.''); *The American Heritage Dictionary of the English Language* (5th ed. 2011) (''A degree or level of requirement, excellence, or attainment.''); *New Oxford American Dictionary* 1699 (3rd ed. 2010) (''an idea or thing used as a measure, norm, or model in comparative evaluations''); *The Random House Unabridged Dictionary* 1857 (2d ed. 1993) (''rule or principle that is used as a basis for judgment''); XVI *The Oxford English Dictionary* 505 (2d ed. 1989) (''A rule, principle, or means of judgment or estimation; a criterion, measure.'').

[408] *Home Buyers Warranty Corp.* v. *Hanna,* 750 F.3d 427, 435 (4th Cir. 2014) (applying a '''necessity' standard'' under Fed. R. Civ. P. 19(a)(1)(A)); *United States* v. *Cartagena,* 593 F.3d 104, 111 n.4 (1st Cir. 2010) (discussing a ''necessity standard'' under the Omnibus Crime Control and Safe Streets Act of 1968); *Fones4All Corp.* v. *F.C.C.,* 550 F.3d 811, 820 (9th Cir. 2008) (applying a ''necessity standard'' under the Telecommunications Act of 1996); *Swonger* v. *Surface Transp. Bd.,* 265 F.3d 1135, 1141–42 (10th Cir. 2001) (applying a ''necessity standard'' under transportation law); *see also Minnesota* v. *Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 205 (1999) (''conservation necessity standard''); *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW* v. *Johnson Controls, Inc.,* 499 U.S. 187, 198 (1991) (''business necessity standard'').

[409] 7 U.S.C. 6a(a)(1)(A).

[410] *See, e.g., OSU Student Alliance* v. *Ray,* 699 F.3d 1053, 1064 (9th Cir. 2012) (holding that the First Amendment was violated by enforcement of a rule that ''created no standards to cabin discretion''); *Lenis* v. *U.S. Attorney General,* 525 F.3d 1291, 1294 (11th Cir. 2008) (dismissing petition for review where agency procedural regulation ''specifie[d] no standards for a court to use to cabin'' the agency's discretion); *Tamenut* v. *Mukasey,* 521 F.3d 1000, 1004 (8th Cir. 2008); *Drake* v. *FAA,* 291 F.3d 59, 71 (D.C. Cir. 2002) (similar).

[411] *Tamenut* v. *Mukasey,* 521 F.3d 1000, 1004 (8th Cir. 2008) (explaining that a statute placing ''no constraints on the [agency's] discretion . . . specifie[d] no standards''); *United States* v. *Gonzalez-Aparicio,* 663 F.3d 419, 435 (9th Cir. 2011) (Tashima, J., dissenting) (''If we can pick whatever standard suits us, free from the direction of binding principles, then there is no standard at all.''); *Downs* v. *Am. Emp. Ins. Co.,* 423 F.2d 1160, 1163 (5th Cir. 1970) (''best judgment is no standard at all'').

[412] *E.g., ISDA,* Commission Appellate Brief at 37–38.

[413] *Michigan* v. *EPA,* 135 S.Ct. 2699, 2707 (2015). Because *Michigan* was not a CEA case, the Commission does not mean to imply that *Michigan* would be controlling or compels any particular result in determining when a position limit is appropriate. To the contrary, the court in *ISDA* held that the CEA is ambiguous in that regard. The Commission merely finds the Supreme Court's discussion in *Michigan* useful in reasonably resolving that ambiguity.

[414] 7 U.S.C. 5, 6a(a)(2)(C) and (a)(3)(B).

Commission consider all relevant factors and, on that basis, set an appropriate limit level—or no limit at all, if to establish one would contravene the public interests Congress articulated in section 4a(a)(1) and the CEA generally. That is also better policy. To be clear, this does not mean the Commission must conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value. To the contrary, the Commission retains broad discretion to decide how to determine whether a position limit is appropriate.[415]

Fourth, mandatory federal position limits for all physical commodities would be a sea change in derivatives regulation, and the Commission does not believe it should infer that Congress would have acted so dramatically without speaking clearly and unequivocally.[416] It is important to understand the reach of the proposition that the Commission must impose position limits for every physical commodity. The Commission estimates, based on information from the Commission's surveillance system, that currently there are over 1,200 contracts on physical commodities listed on DCMs. Some of these contracts have little or no active trading.[417] Absent clearer statutory language than is present in the statute, the Commission does not believe it should interpret the statute as though Congress had concerns about or even considered each and every one of the similar number of contracts listed at the time of Dodd-Frank. In a similar vein, the Commission previously has cited Senate Subcommittee's staff studies of potential excessive speculation that preceded the enactment of section 4a(a)(2).[418] But those studies covered only a few commodities—oil, natural gas, and wheat.[419] While these studies demonstrate that Senate subcommittee's concern with potential excessive speculation, the Commission does not believe it should interpret a statute by extrapolating from one Senate subcommittee's interest in three specific commodities to a requirement to impose limits on all of the many hundreds of physical futures contracts listed on exchanges, where Congress as a whole has not said so unambiguously.

DCMs also regularly create new contracts. If Congress intended federal position limits to apply to all physical commodity contracts, the Commission would expect there to be a provision directing it to establish position limits on a continuous basis. There is no such provision—and Congress directed the Commission to complete its position-limits rulemaking within 270 days.[420] The only other relevant provision is the preexisting and broadly discretionary requirement that the Commission make an assessment ''from time to time.'' That structure is inconsistent, both as a statutory and policy matter, with an across-the-board mandate.

Fifth, the Commission believes as a matter of policy judgment that requiring a necessity finding better carries out the purposes of section 4a. As Congress presumably was aware, position limits create costs as well as potential benefits.

The Commission has recognized, and Congress also presumably understood, that there are costs even for well-crafted position limits. As discussed below in the Commission's consideration of costs and benefits, market participants must monitor their positions and have safeguards in place to ensure compliance with limits. In addition to compliance costs, position limits may constrain some economically beneficial uses of derivatives, because a limit calculated to prevent excessive speculation or to restrict opportunities for manipulation may, in some circumstances, affect speculation that is desirable. While the Commission has designed limits to avoid interference with normal trading, certain negative effects cannot be ruled out.

For example, to interpret section 4a(a)(2) as a mandate even where unnecessary could pose risks to liquidity and hedging. Well-calibrated position limits can protect liquidity by checking excessive speculation, but unnecessary limits can have the opposite effect by drawing capital out of markets. Indeed, the liquidity of a futures contract, upon which hedging depends, is directly related to the amount of speculation that takes place. Speculators contribute valuable liquidity to commodity markets, and section 4a(a)(1) identified ''*excessive speculation*''—not all speculation—as ''an undue burden on interstate commerce.'' To needlessly reduce liquidity, impair price discovery, and make hedging more difficult for commodity end-users without sufficient beneficial effects on interstate commerce is unsound policy, as Congress has defined the policy. If Congress had drafted the statute unambiguously to reflect the judgment that these costs of position limits are justified in all instances, the Commission of course would follow it. Without such clarity, the Commission does not believe it should interpret the statute to impose those costs regardless of whether and to what extent doing so advances Congress' stated goals.

Sixth, while Congress has deemed position limits an effective tool, it is sound regulatory policy for the Commission to apply its experience and expertise to determine whether economic conditions with respect to a given commodity at a given point in time render it likely that position limits will achieve positive outcomes. A mandate without the requirement of a necessity finding would eliminate the Commission's expertise and experience from the process and could lead to position limits that do not have significantly positive effects, or even position limits that are counterproductive. Necessity findings may also enhance public confidence that position limits in place are necessary to their statutory purposes, potentially improving public confidence in the markets themselves. It is therefore sound policy to construe the statute in a way that requires the Commission to make a necessity finding before establishing position limits.[421]

Finally, also as a matter of policy, the Commission's approach will prevent market participants from suffering the costs of statutory ambiguity. Mandating position limits across all products would automatically impose costs on market participants regardless of whether doing so fulfills the purpose of section 4a. The associated compliance costs remain as long as those limits are in place. Reading a mandate into section 4a would exchange regulatory convenience, with or without any public benefit, for long-term burdens on market participants. The Commission does not believe that ambiguity should

[415] 135 S.Ct. at 2707, 2711.

[416] *E.g., Whiteman* v. *American Trucking Assns., Inc.,* 531 U.S. 457, 468 (2000) (Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms. . . .''); *EEOC* v. *Staten Island Sav. Bank,* 207 F.3d 144, (2d Cir. 2000) (''we are reluctant to infer . . . a mandate for radical change absent a clearer legislative command''); *Canup* v. *Chipman-Union, Inc.,* 123 F.3d 1440, (11th Cir. 1997) (''We would expect Congress to speak more clearly if it intended such a radical change. . . .'').

[417] *See, e.g., Daily Agricultural Volume and Open Interest,* CME Group website, *available at https://www.cmegroup.com/market-data/volume-open-interest/agriculture-commodities-volume.html* (tables of daily trading volume and open interest for CME futures contracts).

[418] *E.g.,* 2013 Proposal, 78 FR at 75787 nn.122–124; *ISDA,* Brief for Appellant Commodity Futures Trading Commission at 14–15.

[419] *Id.*

[420] 7 U.S.C. 6a(a)(2)(B).

[421] The Commission also does not believe that establishing and enforcing position limits for all contracts on physical commodities, regardless of their importance to the price or delivery process of the underlying commodities or to the economy more broadly, would be a productive use of the public resources Congress has appropriated to the Commission.

be resolved reflexively in a manner that shifts costs to market participants. Rather, the Commission believes that where an agency has discretion to choose from among reasonable alternative interpretations, it should not impose costs without a strong justification, which in this context would be lacking without a necessity finding.

E. Evaluation of Considerations Relied Upon by the Commission in Previous Interpretation of Paragraph 4a(a)(2)

As noted above, the Commission previously has identified a number of considerations it believed supported interpreting paragraph 4a(a)(2) to mandate position limits for all physical commodities other than excluded commodities, without the need for a necessity finding. Although the Administrative Procedure Act does not require the Commission to rebut those previous points, the Commission believes it is useful to discuss them. While certain of these considerations could support such an interpretation, the Commission is no longer persuaded that, on balance, they support interpreting paragraph 4a(a)(2) as an across-the-board mandate. Considerations on which the Commission previously relied include the following:

1. When Congress enacted paragraph 4a(a)(2), the text of what previously was paragraph 4a(a),[422] already provided that the Commission ''shall . . . proclaim and fix'' position limits ''as the Commission finds are necessary'' to diminish, eliminate, or prevent the burdens on commerce associated with excessive speculation. This directive applied—and still applies—to all exchange-traded commodities, including the physical commodities that are the subject of paragraph 4a(a)(2). The Commission has previously reasoned that if paragraph 4a(a)(2) were not a mandate to establish position limits *without* such a necessity finding, it would be a nullity.[423] That is, the Commission already had the *authority* to issue position limits, so 4a(a)(2) would add nothing were it not a mandate. The Commission is no longer convinced that is correct.

Whereas the Commission's preexisting authority under the predecessor to paragraph 4a(a)(1) directed the Commission to establish position limits ''from time to time,'' new paragraph 4a(a)(2) directed the Commission to consider position limits promptly within two specified time limits after Congress passed the Dodd-Frank Act. That is a new directive, and it is consistent with maintaining the requirement for, and preserving the benefits of, a necessity finding. This interpretation is also consistent with the Commission's belief that Congress would not have intended a drastic mandate without a clear statement to that effect. This interpretation is likewise consistent with Congress' addition of swaps to the Commission's jurisdiction—it makes sense to direct the Commission to give prompt consideration to whether position limits are necessary at the same time Congress was expanding the Commission's oversight responsibilities to new markets, and the Commission believes that is sound policy to ensure that the regime works well as a whole. Rather than leave it to the Commission's preexisting discretion to set limits ''from time to time,'' it is reasonable to believe that Congress found it important for the Commission to focus on this issue at a time certain.

In addition, paragraph 4a(a)(2) triggers other requirements added to section 4a(a) by Dodd-Frank and not included in paragraph 4a(a)(1). For example, as described above, paragraph 4a(a)(3)(B) identifies objectives the Commission is required to pursue in establishing position limits, including three, set forth in subparagraphs 4a(a)(3)(B)(ii)–(iv), that are not explicitly mentioned in paragraph 4a(a)(1). The Commission previously opined that paragraph 4a(a)(5), which directs the Commission to establish, position limits on swaps ''economically equivalent'' to futures subject to new position limits, would add nothing to paragraph 4a(a)(1), because if there were no mandate. The Commission no longer finds that reasoning persuasive. Paragraph 4a(a)(5) goes beyond paragraph 4a(a)(1), because it separately requires that *when* the Commission imposes limits on futures pursuant to paragraph 4a(a)(2), it also does so on economically equivalent swaps. Without that text, the Commission would have no such obligation to issue both types of limits at the same time.

2. The Commission has also previously been influenced by the requirements of paragraph 4a(a)(3), which directs the Commission, ''as appropriate'' when setting limits, to establish them for the spot month, each other month, and all months; and sets forth four policy objectives the Commission must pursue ''to the maximum extent practicable.'' [424] The Commission described these as ''constraints'' and found it ''unlikely'' that Congress intended to place new constraints on the Commission's preexisting authority to establish position limits, given the background of the amendments and in particular the studies that preceded their enactment.[425] However, on further consideration of this statutory language, the Commission does not interpret that language as a set of constraints in the sense of directing the Commission to make less use of limits or to impose higher limits than in the past. Rather, it focuses the Commission's decision process by identifying relevant objectives and directing the Commission to achieve them to the maximum extent practicable. Requiring the Commission to prioritize, to the extent practicable, preventing excessive speculation and manipulation, ensuring liquidity, and avoiding disruption of price discovery is reasonable regardless of whether there is an across-the-board mandate.

In past releases the Commission has also suggested that it is unclear why Congress would have imposed the decisional ''constraints'' of paragraph 4a(a)(3) ''with respect to physical commodities but not excluded commodities or others'' unless this provision was enacted as part of a mandate to impose limits without a necessity finding.[426] However, all of these relevant amendments pertain only to physical commodities other than excluded commodities. The Congressional studies that preceded the enactment of paragraph 4a(a)(2) demonstrated concern specifically with problems in markets for physical commodities such as oil and natural gas.[427] It therefore is not surprising that Congress enacted provisions specifically addressing limits for physical commodities and not others, whether or not Congress intended a necessity finding. Those physical commodities were the focus of Congress' concern.

3. The Commission has previously stated that the time requirements for establishing limits set forth in subparagraph 4a(a)(2)(B) are inconsistent with a necessity finding because, based on past experience, necessity findings for individual commodity markets cannot be made

[422] 7 U.S.C. 6a(a).

[423] *E.g.,* 2016 Reproposal, 81 FR at 96715, 96716 (discussing comments on past releases); 2013 Proposal, 78 FR at 75684.

[424] 7 U.S.C. 6a(a)(3).

[425] *E.g.,* 2016 Reproposal, 81 FR at 96716 (discussing comments on earlier releases).

[426] *Id.*

[427] *See, e.g.,* 2013 Proposal, 78 FR at 75682 and nn.24–26 (describing Congressional studies).

within the specified time periods.[428] However, the fact that many decades ago a number of months may have elapsed between proposals and final position limits does not mean that much time was necessary then or is necessary now. There are a number of possible reasons, such as limits on agency resources and why the agency took that amount of time. It is not a like-to-like comparison, because the agencies acting many decades ago were not acting pursuant to a mandate. The speed with which an agency could or would enact discretionary position limits is not necessarily a good proxy for how long would be required under a mandate.[429] There is accordingly no inconsistency, and thus the deadlines do not necessarily imply that Congress intended to eliminate a necessity finding for limits under paragraph 4a(a)(2).

4. The Commission previously has stated that Congress appears to have modeled the text of paragraph 4a(a)(2) on the text of the Commission's 1981 rule requiring exchanges to set speculative position limits for all contracts.[430] The Commission has further stated that the 1981 rule treated aggregation and flexibility as ''standards,'' and Congress therefore likely did the same in paragraph 4a(a)(2).[431] The Commission no longer agrees with that description or that reasoning.

Under the 1981 rule, former section 1.61(a) of the Commission's regulations required exchanges to adopt position limits for all contracts listed to trade.[432] The rule also established requirements similar to the current statutory aggregation requirements: Section 1.61(a) required that limits apply to positions a person may either ''hold'' or ''control,''[433] section 1.61(g) established more detailed aggregation requirements.[434] Section 1.61(a)(1) contained language the Commission has called the ''flexibility standard,'' *i.e.,* that ''nothing'' in section 1.61 ''shall be construed to prohibit a contract market from fixing different and separate position limits for different types of futures contracts based on the same commodity, different position limits for different futures, or for different delivery months, or from exempting positions which are normally known in the trade as 'spreads, straddles or arbitrage' or from fixing limits which apply to such positions which are different from limits fixed for other positions.''[435] Section 1.61(d)(1) of the rule required every exchange to submit information to the Commission demonstrating that it had ''complied with the purpose and standards set forth in paragraph (a).''[436] In the 2013 and 2016 proposals, the Commission concluded that the cross-reference to the ''standards set forth in paragraph (a)'' meant both the aggregation and flexibility language, because both of those sets of language appear in paragraph (a). By contrast, paragraph (a) did not include a requirement for a necessity finding, since the 1981 rule required position limits on all actively traded contracts.[437]

On further review, the Commission does not find this reasoning persuasive. The ''flexibility'' language gave the exchange unfettered discretion to set different limits for different kinds of positions—there was expressly ''nothing'' in that language to limit the exchange's discretion.[438] In other words, there is nothing in that flexibility text with which to ''comply,'' so it cannot be part of what section 1.61(d)(1) referenced as a ''standard'' for which compliance must be demonstrated.

As discussed above, ''standard'' is an ill-fitting label for this lack of a prohibition. Indeed, the 1981 release and associated 1980 NPRM did use the word ''standard'' to refer to certain language directing and constraining the discretion of the exchanges, a much more natural use of that word. For example, the preambles to both releases called requirements to aggregate certain holdings ''aggregation standards.''[439] And, in both the 1980 NPRM (in the preamble) and the 1981 Final Rule (in rule text), the Commission used the word ''standard'' to describe factors, such as position sizes customarily held by speculative traders, that exchanges were required to consider in setting the level of position limits.[440]

Although the wording of the 1981 rule and paragraph 4a(a)(2) have similarities, there are also differences. These differences weaken the inference that Congress intended the statute to hew closely to the rule. There is no legislative history articulating any relationship between the two. And even if Congress in Dodd-Frank did borrow concepts from the 1981 rule, there is little reason to infer that Congress was borrowing the precise meaning of any individual word—much less that the use of ''standards'' includes what ''nothing in this section shall be construed to prohibit . . . .''

5. In past releases the Commission has also observed that, in 1983, as part of the Futures Trading Act of 1982, Public Law 96–444, 96 Stat. 2294 (1983), Congress added a provision to the CEA making it a violation of the Act to violate exchange-set position limits, thus, in effect, ratifying the Commission's 1981 rule.[441] The Commission reasoned that this history supports the possibility that Congress could reasonably have followed an across-the-board approach here.[442] But while that may be so, the Commission today does not find that mere possibility helpful in interpreting the ambiguous term ''standards,'' because there is no evidence that Congress in 1982 considered the lack of a prohibition on different position limit levels in the rule to be a ''standard.'' By extension, the Futures Trading Act does not bear on the Commission's preliminary interpretation of ''standards'' in section 4a(a)(2)(A) today.

6. In briefs in the *ISDA* case, the Commission pointed out that CEA paragraphs 4a(a)(2)(B) and 4a(a)(3) repeatedly use the word ''required'' in connection with position limits established pursuant to paragraph 4a(a)(2), implying that the Commission is required to establish those limits regardless of whether it finds them to be necessary.[443] But that is not the only way to interpret the word ''required.'' Position limits are required under certain circumstances even if there is no across-the-board mandate—*i.e.,* when the Commission finds that they are ''necessary.'' Under the Commission's current preliminary interpretation, the Commission was required to assess within a specified timeframe if position limits were ''necessary'' and, if so, section 4a(a)(2) states that the Commission ''shall'' establish them.

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[428] *E.g.,* 2016 Reproposal, 81 FR at 96708; 2013 Proposal, 78 FR at 75682, 75683.

[429] The Commission's reasoning in this respect has also assumed that a necessity finding means a granular market-by-market study of whether position limits will be useful for a given contract. As explained below, however, the Commission here preliminarily determines that such an analysis is not required. Under the Commission's current preliminary interpretation of the necessity finding requirement, it would have been plausible to complete the required findings under the deadlines Congress established.

[430] *E.g.,* 2013 Proposal, 78 FR at 75683, 75684.

[431] *Id.*

[432] Establishment of Speculative Position Limits, 46 FR at 50945 (Oct. 16, 1981).

[433] *Id.*

[434] *Id.* at 50946.

[435] *Id.* at 50945.

[436] *Id.*

[437] *Id.*

[438] 46 FR at 50945 (section 1.61(a)(1)).

[439] *Id.* at 50943; Speculative Position Limits, 45 FR at 79834.

[440] 46 FR at 50945 (in section 1.61(a)(2)); 45 FR at 79833, 79834.

[441] *See, e.g.,* 2016 Reproposal, 81 FR at 96709, 96710.

[442] *Id.* at 96710.

[443] *E.g., ISDA,* Brief for Appellant Commodity Futures Trading Commission at 26–27.

Thus, the word ''required'' in paragraphs 4a(a)(2)(B) and 4a(a)(3) leaves open the question of whether paragraph 4a(a)(2) itself requires position limits for all physical commodity contracts or, on the other hand, only requires them where the Commission finds them necessary under the standards of paragraph 4a(a)(1). The use of the word ''required'' in paragraphs 4a(a)(2)(B) and 4a(a)(3) therefore does not resolve the ambiguity in the statute. For the same reason, the evolution of the statutory language during the legislative process, during which the word ''may'' was changed to ''shall'' in a number of places, also does not resolve the ambiguity.[444]

7. The Commission has pointed out that section 719 of the Dodd-Frank Act required the Commission to ''conduct a study of the effects (if any) of the position limits imposed'' pursuant to paragraph 4a(a)(2) and report the results to Congress within twelve months after the imposition of limits.[445] The Commission has suggested that Congress would not have required such a study if paragraph 4a(a)(2) left the Commission with discretion to find that limits were unnecessary so that there would be nothing for the Commission to study and report on to Congress.[446] However, while the study requirement implies that Congress perhaps anticipated that at least some limits would be imposed pursuant to paragraph 4a(a)(2), it leaves open the question of whether Congress mandated limits for every physical commodity without the need for a necessity finding. In addition, the phrase ''the effects (if any)'' language does not imply that Congress expected position limits on all physical commodities. This language simply recognizes that new position limits could be imposed, but have no demonstrable effects.

8. In past releases and court filings, the Commission has stated that the legislative history of section 4a, as amended by the Dodd-Frank Act, supports the conclusion that paragraph 4a(a)(2) requires the establishment of position limits for all physical commodities whether or not the Commission finds them necessary to achieve the objectives of the statute.[447] However, the most relevant legislative history, taken as a whole, does not resolve the ambiguity in the statutory language or compel the conclusion that Congress intended to drop the necessity finding requirement when it enacted paragraph 4a(a)(2) as part of the Dodd-Frank Act.

The language of paragraph 4a(a)(2) derives from section 6(a) of a bill, the Derivatives Markets Transparency and Accountability Act of 2009, H.R. 977 (111th Cong.), which was approved by the House Committee on Agriculture in February of 2009.[448] The committee report on this bill included explanatory language stating that the relevant provision required the Commission to set position limits ''for all physical commodities other than excluded commodities.'' [449] However, H.R. 977 was never approved by the full House of Representatives.[450]

The relevant language concerning position limits was incorporated into the House of Representatives version of what became the Dodd-Frank Act, H.R. 4173 (111th Cong.), as part of a floor amendment that was introduced by the chairman of the Committee on Agriculture.[451] In explaining the amendment's language regarding position limits, the chairman stated that it ''strengthens confidence in position limits on physically deliverable commodities as a way to prevent excessive speculation trading'' but did not specify that limits would be required for all physical commodities without the need for a necessity finding.[452] The House of Representatives language regarding position limits was ultimately incorporated into the Dodd-Frank Act by a conference committee. However, the explanatory statement in the Conference report states, with respect to position limits, only that the act's ''regulatory framework outlines provisions for: . . . [p]osition limits on swaps contracts that perform or affect a significant price discovery function and requirements to aggregate limits across markets.'' [453]

In subsequent floor debate, the chairman of the House Agriculture Committee alluded to position limits provisions deriving from earlier bills reported by that committee, but did not describe them with specificity.[454] In the Senate, the chairman of the Senate Committee on Agriculture, Nutrition, and Forestry stated that the conference bill would ''grant broad authority to the Commodity Futures Trading Commission to once and for all set aggregate position limits across all markets on non-commercial market participants.'' [455] The statement that the bill would grant ''authority'' to set position limits implies an exercise of judgement by the Commission in determining whether to set particular limits.[456] Thus, this legislative history is itself ambiguous on the question of whether federal position limits are now mandatory on all physical commodities in the absence of a finding of necessity.

Looking at legislative history in more general terms, the Commission, in past releases, has pointed out that the enactment of paragraph 4a(a)(2) followed congressional investigations in the late 1990s and early 2000s that concluded that excessive speculation accounted for volatility and prices increases in the markets for a number of commodities.[457] However, while the history of congressional investigations supports the conclusion that Congress intended the Commission to take action with respect to position limits, it does not resolve the specific interpretive issue of whether the ''[i]n accordance with the standards set forth in paragraph (1)'' language that was ultimately enacted by Congress incorporates a necessity finding. As discussed above, the congressional investigations focused on only a few commodities, which weakens the inference that Congress considered the question of what speculative positions to limit a closed question.

Overall, in past releases the Commission has expressed the view that construing section 4a as an ''integrated whole'' leads to the conclusion that paragraph 4a(a)(2) does not require a

[444] *See, e.g.,* 2013 Proposal, 78 FR at 75684, 75685 (discussing evolution of statutory language as supporting mandate).

[445] *See, e.g., id.* at 75684.

[446] *See, e.g., id.*

[447] *See, e.g.,* 2016 Reproposal, 81 FR at 96709.

[448] *See* H.R. Rep. 111–385 part 1 at 4 (Dec. 19, 2009).

[449] *Id.* at 19.

[450] *See Actions—H.R.977—111th Congress (2009–2010) Derivatives Markets Transparency and Accountability Act of 2009,* Congress website, *available at https://www.congress.gov/bill/111th-congress/house-bill/977/all-actions?overview=closed#tabs* (bill history).

[451] 155 Cong. Rec. H14682, H14692 (daily ed. Dec. 10, 2009).

[452] *Id.* at H14705.

[453] Dodd-Frank Wall Street Reform and Consumer Protection Act, Conference Report to Accompany H.R. 4173 at 969 (H.R. Rep. 111–517 June 29, 2010).

[454] He stated, ''This conference report includes the tools we authorized [in response to concerns about excessive speculation] and the direction to the CFTC to mitigate outrageous price spikes we saw 2 years ago.'' 156 Cong. Rec. H5245 (daily ed. June 30, 2010).

[455] 156 Cong. Rec. S5919 (daily ed. July 15, 2010).

[456] In addition, the remainder of the Senate chairman's floor statement with regard to position limits focused on volatility and price discovery problems arising from the use of commodity swaps, implying that her reference to setting position limits ''across all markets'' refers to Dodd-Frank's extension of position limits authority to swaps markets. 156 Cong. Rec. at S5919–20 (daily ed. July 15, 2010).

[457] *See, e.g.,* 2016 Reproposal, 81 FR at 96711–96713.

necessity finding.[458] However, for reasons explained above, the Commission preliminarily believes that the better interpretation is that prior to imposing position limits, it must make a finding that the position limits are necessary.

F. Necessity Finding

The Commission preliminarily finds that federal speculative position limits are necessary for the 25 core referenced futures contracts, and any associated referenced contracts. This preliminary finding is based on a combination of factors including: The particular importance of these contracts in the price discovery process for their respective underlying commodities; the fact that they require physical delivery of the underlying commodity; and, in some cases, the especially acute economic burdens that would arise from excessive speculation causing sudden or unreasonable fluctuations or unwarranted changes in the price of the commodities underlying these contracts. The Commission has preliminarily determined that the benefit of advancing the statutory goal of preventing those undue burdens with respect to these commodities in interstate commerce justifies the potential burdens or negative consequences associated with establishing these targeted position limits.[459]

1. Meaning of ''Necessary'' Under Section 4a(a)(1)

Section 4a(a)(1) of the Act contains a congressional finding that ''[e]xcessive speculation . . . causing sudden or unreasonable fluctuations or unwarranted changes in . . . price . . . is an undue and unnecessary burden on interstate commerce in such commodity.'' [460] For the purpose of ''diminishing, eliminating, or preventing'' that burden, section 4a(a)(1) tasks the Commission with establishing such position limits as it finds are ''necessary.'' [461] The Commission's analysis, therefore, proceeds on the basis of these legislative findings that excessive speculation threatens negative consequences for interstate commerce and the accompanying proposition that position limits are an effective tool to diminish, eliminate, or prevent the undue and unnecessary burdens Congress has targeted in the statute.[462] The Commission will therefore determine whether position limits are necessary for a given contract, in light of those premises, considering facts and circumstances and economic factors.

The statute does not define ''necessary.'' In legal contexts, the term can have ''a spectrum of meanings.'' [463] ''At one end, it may 'import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other;' at the opposite, it may simply mean 'no more than that one thing is convenient, or useful, or essential to another.' '' [464] The Commission does not believe Congress intended either end of this spectrum in section 4a(a)(1). On one hand, ''necessary'' in this context cannot mean that position limits must be the only means capable of addressing the burdens associated with excessive speculation. The Act contains numerous provisions designed to prevent, diminish, or eliminate price disruptions or distortions or unreasonable volatility. For example, the Commission's anti-manipulation authority is designed to stop, redress, and deter intentional acts that may give rise to uneconomic prices or unreasonable volatility.[465] Other examples include prohibitions on disruptive trading practices,[466] certain core principles for contract markets,[467] and the Commission's emergency powers.[468]

Yet the Commission is directed by section 4a(a)(1) not only to impose position limits to diminish or eliminate sudden and unwarranted fluctuations in price caused by excessive speculation once those other protections have failed, it is directed to establish position limits as necessary to ''prevent'' those burdens on interstate commerce from arising in the first place. It makes little sense to suppose that Congress meant for the Commission to ''prevent'' unreasonable fluctuations or unwarranted price changes caused by excessive speculation only after they have already begun to occur, or when the Commission can somehow predict with confidence that the Act's other tools will be absolutely ineffective.[469] The Act uses the word ''necessary'' in a number of places to authorize measures it is highly unlikely Congress meant to apply only where the relevant policy goals will otherwise certainly fail.[470]

On the other hand, the Commission also does not believe that Congress intended position limits where they are merely ''useful'' or ''convenient.'' As explained above, Congress has already determined that position limits are useful in preventing undue burdens on interstate commerce associated with excessive speculation, but requires the Commission to make the further finding that they are also necessary. A ''convenience'' standard would be similarly toothless.

Rather than accepting either extreme, the Commission preliminarily interprets that sections 4a(a)(1) and 4a(a)(2) direct the Commission to establish position

[458] *See, e.g.,* 2016 Reproposal, 81 FR at 96713, 96714.

[459] As discussed, the Commission is not proposing non-spot-month limits apart from the legacy agricultural contracts. Non-spot-month prices serve as references for cash-market transactions much less frequently than spot-month prices. Accordingly, the burdens of excessive speculation in non-spot-months on commodities in interstate commerce would be substantially less than the burdens of excessive speculation in spot-months. It is also not possible to execute a corner or squeeze in non-spot-months. And because there generally are fewer market participants in non-spot-months, holders of large speculative positions may play a more important role in providing liquidity to bona fide hedgers.

[460] 7 U.S.C. 6a(a)(1).

[461] 7 U.S.C. 6a(a)(1).

[462] It is not the Commission's role to determine if these findings are correct. *See Public Citizen* v. *FTC,* 869 F.2d 1541, 1557 (D.C. Cir. 1989) (''[A]gencies surely do not have inherent authority to second-guess Congress' calculations.''); *see also* 46 FR at 50938, 50940 (''Section 4a(1) [now 4a(a)(1)] represents an express Congressional finding that excessive speculation is harmful to the market, and a finding that speculative limits are an effective prophylactic measure.'').

[463] *Jewell* v. *Life Ins. Co. of N. Am.,* 508 F.3d 1303, 1310 (10th Cir. 2007).

[464] *Jewell* v. *Life Ins. Co. of N. Am.,* 508 F.3d 1303, 1310 (10th Cir. 2007); *see also Black's Law Dictionary* 1227 (3d ed. 1933) (''As used in jurisprudence, the word 'necessary' does not always import an actual physical necessity, so strong that one thing, to which another may be termed 'necessary,' cannot exist without the other. . . . To employ the means *necessary* to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable.'' (citing *McCullouch* v. *Maryland,* 4 Wheat. 216, 4 L. Ed. 579 (1819)).

[465] 7 U.S.C. 9(1), 9(3), 13(a)(2).

[466] 7 U.S.C. 6c(a).

[467] 7 U.S.C. 7(d).

[468] 7 U.S.C. 12a(9).

[469] *See Nat. Res. Def. Council, Inc.* v. *Thomas,* 838 F.2d 1224, 1236–37 (D.C. Cir. 1988) (''[A] measure may be 'necessary' even though acceptable alternatives have not been exhausted.''); *F.T.C.* v. *Rockefeller,* 591 F.2d 182, 188 (2d Cir. 1979) (rejecting ''the notion that 'necessary' means that the [Federal Trade Commission] must pursue all other 'reasonably available alternatives''' before undertaking the measure at issue). Indeed, where the Commission considers setting such prophylactic limits, it is unlikely to be knowable whether position limits will be the only effective tool. The existence of other tools to prevent unwarranted volatility and price changes may be relevant, but cannot be dispositive in all cases.

[470] *See, e.g.,* 7 U.S.C. 2(h)(4)(A) (empowering the Commission to prescribe rules ''as determined by the Commission to be necessary to prevent evasions of the mandatory clearing requirements''); 7 U.S.C. 2(h)(4)(B)(iii) (requiring that the Commission ''shall'' take such actions ''as the Commission determines to be necessary'' when it finds that certain swaps subject to the clearing requirement are not listed by any derivatives clearing organization); 7 U.S.C. 21(e) (subjecting registered persons to such ''rules and regulations as the Commission may find necessary to protect the public interest and promote just and equitable principles of trade.'').

limits where the Commission finds, based on the relevant facts and circumstances, that position limits would be an efficient mechanism to advance the congressional goal of preventing undue burdens on interstate commerce in the given underlying commodity caused by excessive speculation. For example, it may be that for a given commodity, volatility in derivatives markets would be unlikely to cause high levels of sudden or unreasonable fluctuations or unwarranted changes in the price of the underlying commodity and would have little overall impact on the national economy/interstate commerce. Under those circumstances, the Commission may find that position limits are unnecessary. There are, however, also contract markets in which volatility would be highly likely to cause sudden or unreasonable fluctuations or unwarranted changes in the price of the underlying commodity or have significantly negative effects on the broader economy. Even if such disruptions would be unlikely due to the characteristics of an individual market, the Commission may nevertheless determine that position limits are necessary as a prophylactic measure given the potential magnitude or impact of the event.[471]

Most commodities lie somewhere in between, with varying degrees of linkage between derivative contracts and cash-market prices, and differences in importance to the overall economy. There is no mathematical formula to make this determination, though the Commission will consider relevant data where it is available. The Commission must instead exercise its judgment in light of facts and circumstances, including its experience and expertise, to determine what limits are economically justified.[472] In all instances, the Commission will consider the applicable costs and benefits as required under section 15(a) of the Act.[473] With this interpretation of ''necessary'' in mind, the Commission below explains its selection of the 25 core referenced futures contracts, and any associated referenced contracts. Going forward, the Commission will make this assessment ''from time to time'' as required under section 4a(a)(1).

The Commission recognizes that this approach differs from that taken in earlier necessity findings. For example, when the Commission's predecessor agency, the Commodity Exchange Commission (''CEC''), established position limits, it would publish them in the **Federal Register** along with necessity findings that were generally conclusory recitations of the statutory language.[474] The published basis would be a recitation that trading of a given commodity for future delivery by a person who holds or controls a net position in excess of a given amount tends to cause sudden or unreasonable fluctuations or changes in the price of that commodity, not warranted by changes in the conditions of supply and demand.[475] Apart from that, the CEC typically would refer to a public hearing, but provide no specifics of the evidence presented or what the CEC found persuasive.[476] The CEC variously imposed limits one commodity at a time, or for several commodities at once.[477]

In 1981, the Commission issued a rule directing all exchanges to establish position limits for each contract not already subject to federal limits, and for which delivery months were listed to trade.[478] There, as here, the Commission explained that section 4a(a)(1) represents an ''express Congressional finding that excessive speculation is harmful to the market, and a finding that speculative limits are an effective prophylactic measure.'' [479] The Commission observed that all futures markets share the salient characteristics that make position limits a useful tool to prevent the potential burdens of excessive speculation. Specifically, ''it appears that the capacity of any contract market to absorb the establishment and liquidation of large speculative positions in an orderly manner is related to the relative size of such positions, *i.e.,* the capacity of the market is not unlimited.'' [480]

In 2013, the Commission proposed a necessity finding applicable to all physical commodities, and then reproposed it in 2016. In that finding, the Commission discussed incidents in which the Hunt family in 1979 and 1980 accumulated unusually large silver positions, and in which Amaranth Advisors L.L.C. in 2006 accumulated unusually large natural gas positions.[481] The Commission preliminarily determined that the size of those positions contributed to unwarranted volatility and price changes in those respective markets, which imposed undue burdens on interstate commerce, and that position limits could have prevented this.[482] The Commission here preliminarily finds those parts of the 2013 and 2016 proposed necessity finding to be beside the point, because Congress has already determined that excessive speculation can place undue burdens on interstate commerce in a commodity, and that position limits can diminish, eliminate, or prevent those burdens. In 2013 and 2016, the Commission also considered numerous studies concerning position limits.[483] To the extent that those studies merely examined whether or not position limits are an effective tool, the Commission here does not find them directly relevant, again because Congress has already determined that position limits can be effective to diminish, eliminate, or prevent sudden or unreasonable fluctuations or unwarranted changes in commodity prices.[484]

In the 2013 and 2016 necessity findings, the Commission stated again that ''all markets in physical commodities'' are susceptible to the burdens of excessive speculation because all such markets have a finite ability to absorb the establishment and liquidation of large speculative positions in an orderly manner.[485] The

[471] The Commission will also be mindful that the undue burdens Congress tasked the Commission with diminishing, eliminating, or preventing would not generally be borne exclusively by speculators or other participants in futures and swaps markets, but instead the public at large or a certain industry or sector of the economy. In a given context, the Commission may find that this factor supports a finding that position limits are necessary.

[472] The Commission is well positioned to select from among all commodities within the scope of 4a(a)(1) and (2)(A), from its ongoing regulatory activities, including but not limited to market surveillance and product review.

[473] 7 U.S.C. 19(a).

[474] *See, e.g.,* Limits on Position and Daily Trading in Soybeans for Future Delivery, 16 FR at 8107 (Aug. 16, 1951); Findings of Fact, Conclusions, and Order in the Matter of Limits on Position and Daily Trading in Cotton for Future Delivery, 5 FR at 3198 (Aug. 28, 1940); In re Limits on Position and Daily Trading in Wheat, Corn, Oats, Barley, Rye, and Flaxseed, for Future Delivery, 3 FR at 3146, 3147 (Dec. 24, 1938).

[475] *See, e.g.,* Limits on Position and Daily Trading in Soybeans for Future Delivery, 16 FR at 8107 (Aug. 16, 1951); Findings of Fact, Conclusions, and Order in the Matter of Limits on Position and Daily Trading in Cotton for Future Delivery, 5 FR at 3198 (Aug. 28, 1940); In re Limits on Position and Daily Trading in Wheat, Corn, Oats, Barley, Rye, and Flaxseed, for Future Delivery, 3 FR at 3146, 3147 (Dec. 24, 1938).

[476] The records available from the National Archives during this period are sparse.

[477] *Compare* 5 FR at 3198 (cotton) *with* 3 FR at 3146, 3147 (six types of grain).

[478] 46 FR at 50945.

[479] *Id.* at 50938, 50940. Section 4a(a)(1) was at the time numbered 4a(1).

[480] 46 FR at 50940 (Oct. 16, 1981). The Commission based this finding in part upon then-recent events in the silver market, an apparent reference to the corner and squeeze perpetrated by members of the Hunt family in 1979 and 1980.

[481] 2013 Proposal, 78 FR at 75686, 75693.

[482] *Id.* at 75691, 75193.

[483] *See* 2016 Reproposal, 81 FR at 96894, 96924.

[484] In any event, the Commission found those studies inconclusive. 2016 Reproposal, 81 FR at 96723.

[485] 2016 Reproposal, 81 FR at 96722; *see also Corn Products Refining Co.* v. *Benson,* 232 F.2d 554,

Continued

Commission here, however, preliminarily determines that this characteristic is not sufficient to support a finding that position limits are ''necessary'' for all physical commodities, within the meaning of section 4a(a)(1). Congress has already determined that excessive speculation can give rise to unwarranted burdens on interstate commerce and that position limits can be an effective tool to eliminate, diminish, or prevent those burdens. Yet the statute directs the Commission to establish position limits only when they are ''necessary.'' In that context, the Commission considers it unlikely that Congress intended the Commission to find that position limits are ''necessary'' even where facts and circumstances show the significant potential that they will cause disproportionate negative consequences for markets, market participants, or the commodity end users they are intended to protect. Similarly, because the Commission has preliminarily determined that section 4a(a)(2) does not mandate federal speculative position limits for all physical commodities,[486] it cannot be that federal position limits are ''necessary'' for all physical commodities, within the meaning of section 4a(a)(1), on the basis of a property shared by all of them, *i.e.,* a limited capacity to absorb the establishment and liquidation of large speculative positions in an orderly fashion.

The Commission requests comments on all aspects of this interpretation of the requirement in section 4a(a)(1) of a necessity finding.

2. Necessity Findings as to the 25 Core Referenced Futures Contracts

As noted above, the proposed rule would impose federal position limits on: 25 core referenced futures contracts, including 16 agricultural products, five metals products, and four energy products; any futures or options on futures directly or indirectly linked to the core referenced futures contracts; and any economically equivalent swaps. As discussed above, the Commission's necessity analysis proceeds on the basis of certain propositions reflected in the text of section 4a(a)(1): First, that excessive speculation in derivatives markets can cause sudden or unreasonable fluctuations or unwarranted changes in the price of an underlying commodity, *i.e.,* fluctuations not attributable to the forces of supply of and demand for that underlying commodity; second, that such price fluctuations and changes are an undue and unnecessary burden on interstate commerce in that commodity, and; third, that position limits can diminish, eliminate, or prevent that burden. With those propositions established by Congress, the Commission's task is to make the further determination of whether it is necessary to use position limits, Congress's prescribed tool to address those burdens on interstate commerce, in light of the facts and circumstances. Unlike prior preliminary necessity findings which focused on evidence of excessive speculation in just wheat and natural gas, this necessity finding addresses all 25 core referenced futures contracts and focuses on two interrelated factors: (1) The importance of the derivatives markets to the underlying cash markets, including whether they call for physical delivery of the underlying commodity; and (2) the importance of the cash markets underlying the referenced futures contracts to the national economy. The Commission will apply the relevant facts and circumstances holistically rather than formulaically, in light of its experience and expertise.

With respect to the first factor, the markets for the 25 core referenced futures contracts are large in terms of notional value and open interest, and are critically important to the underlying cash markets. These derivatives markets enable food processors, farmers, mining operations, utilities, textile merchants, confectioners, and others to hedge the risks associated with volatile changes in price that are the hallmark of cash commodity markets.

Futures markets were established to allow industries that are vital to the U.S. economy and critical to the American public to accurately manage future receipts, expenses, and financial obligations with a high level of certainty. In general, futures markets perform valuable functions for society such as ''price discovery'' and by allowing counterparties to transfer price risk to their counterparty. The risk transfer function that the futures markets facilitate allows someone to hedge against price movements by establishing a price for a commodity for a time in the future. Prices in derivatives markets can inform the cash market prices of, for example, energy used in homes, cars, factories, and hospitals. More than 90 percent of Fortune 500 companies use derivatives to manage risk, and over 50 percent of all companies use derivatives in physical commodity markets such as the 25 core referenced futures contracts.[487]

The 25 core referenced futures contracts are vital for establishing reliable commodity prices and enabling the beneficial risk transfer between buyers and sellers of commodities, allowing participants to hedge risk and undertake planning with greater certainty. By providing a highly efficient marketplace for participants to offset risks, the 25 core referenced futures contracts attract a broad range of participants, including farmers, ranchers, producers, utilities, retailers, investors, banking institutions, and others. These participants hedge production costs and delivery prices so that, among other things, consumers can always find plenty of food at reliable prices on the grocery store shelves.

Futures prices are used for pricing of cash market transactions but also serve as economic signals that help various members of society plan. These signals help farmers decide which crops to plant as well as assist producers to decide how to implement their production processes given the anticipated costs of various inputs and the anticipated prices of any anticipated finished products, and they serve similar functions in other areas of the economy. For the commodities that are the subject of this necessity finding, the Commission preliminarily has determined that there is a significant amount of participation in these commodity markets, both directly and indirectly, through price discovery signals.[488]

Two key features of the 25 core referenced futures contracts are the role they play in the price discovery process for their respective underlying commodities and the fact that they

560 (1956) (finding it ''obvious that transactions in such vast amounts as those involved here might cause 'sudden or unreasonable fluctuations in the price' of corn and hence be an undue and unnecessary burden on interstate commerce'' (alteration omitted)).

[486] *See supra* Section III.D.

[487] ISDA Survey of the Derivatives Usage by the World's Largest Companies 2009. It has also been estimated that the use of commercial derivatives added 1.1 percent to the size of the U.S. economy between 2003 and 2012. *See* Apanard Prabha et al., *Deriving the Economic Impact of Derivatives,* (Mar. 2014), *available at http://assets1b.milkeninstitute.org/assets/Publication/ResearchReport/PDF/Derivatives-Report.pdf.*

[488] The Commission observes that there has been much written in the academic literature about price discovery of the 25 core referenced futures contracts. This demonstrates the importance of the commodities underlying such contracts in our society. The Commission's Office of the Chief Economist conducted a preliminary search on the JSTOR and Science Direct academic research databases for journal articles that contain the key words: Price Discovery <Commodity Name> Futures. While the articles made varying conclusions regarding aspects of the futures markets, and in some cases position limits, almost all articles agreed that the futures markets in general are important for facilitating price discovery within their respective markets.

require physical delivery of the underlying commodity. Price discovery is the process by which markets, through the interaction of buyers and sellers, produce prices that are used to value underlying futures contracts that allow society to infer the value of underlying physical commodities. Adjustments in futures market requirements and valuations by a diverse array of futures market participants, each with different perspectives and access to supply and demand information, can result in adjustments to the pricing of the commodities underlying the futures contract. The futures markets are generally the first to react to such price-moving information, and price movements in the futures markets reflect a judgment of what is likely to happen in the future in the underlying cash markets. The 25 core referenced futures contracts were selected in part because they generally serve as reference prices for a large number of cash-market transactions, and the Commission knows from large trader reporting that there is a significant presence of commercial traders in these contracts, many of whom may be using the contracts for hedging and price discovery purposes.

For example, a grain elevator may use the futures markets as a benchmark for the price it offers local farmers at harvest. In return, farmers look to futures prices to determine for themselves whether they are getting fair value for their crops. The physical delivery mechanism further links the cash and futures markets, with cash and futures prices expected to converge at settlement of the futures contract.[489] In addition to facilitating price convergence, the physical delivery mechanism allows the 25 core referenced futures contracts to be an alternative means of obtaining or selling the underlying commodity for market participants. While most physically-settled futures contracts are rolled-over or unwound and are not ultimately settled using the physical delivery mechanism, because the futures contracts have standardized terms and conditions that reflect the cash market commodity, participants can reasonably expect that the commodity sold or purchased will meet their needs.[490] This physical delivery and price discovery process contributes to the complexity of the markets for the 25 core referenced futures contracts. If these markets function properly, American producers and consumers enjoy reliable commodity prices. Excessive speculation causing sudden or unreasonable fluctuations or unwarranted changes in the price of those commodities could, in some cases, have far reaching consequences for the U.S. economy by interfering with proper market functioning.

The cash markets underlying the 25 core referenced futures contracts are to varying degrees vitally important to the U.S. economy, driving job growth, stimulating economic activity, and reducing trade deficits while impacting everyone from consumers to automobile manufacturers and farmers to financial institutions. These 25 cash markets include some of the largest cash markets in the world, contributing together, along with related industries, approximately 5 percent to the U.S. gross domestic product (''GDP'') directly and a further 10 percent indirectly.[491] As described in detail below, the cash markets underlying the 25 core referenced futures contracts are critical to consumers, producers, and, in some cases, the overall economy.

By ''excessive speculation,'' the Commission here refers to the accumulation of speculative positions of a size that threaten to cause the ills Congress addressed in Section 4a—sudden or unreasonable fluctuations or unwarranted changes in the price of the underlying commodity. These potentially violent price moves in the futures markets could impact producers such as utilities, farmers, ranchers, and other hedging market participants. Such unwarranted volatility could result in significant costs and price movements, compromising budgeting and planning, making it difficult for producers to manage the costs of farmlands and oil refineries, and impacting retailers' ability to provide reliable prices to consumers for everything from cereal to gasoline. To be clear, volatility is sometimes warranted in the sense that it reflects legitimate forces of supply and demand, which can sometimes change very quickly. The purpose of this proposed rule is not to constrain those legitimate price movements. Instead, the Commission's purpose is to prevent volatility caused by excessive speculation, which Congress has deemed a potential burden on interstate commerce.

Further, excessive speculation in the futures market could result in price uncertainty in the cash market, which in turn could cause periods of surplus or shortage that would not have occurred if prices were more reliable. Properly functioning futures markets free from excessive speculation are essential for hedging the volatility in cash markets for these commodities that are the result of real supply and demand. Specific attributes of the cash and derivatives markets for these 25 commodities are discussed below.

3. Agricultural Commodities

Futures contracts on the 16 agricultural commodities are essential tools for hedging against price moves of these widely grown crops, and are key instruments in helping to smooth out volatility and to ensure that prices remain reliable and that food remains on the shelves. These agricultural futures contracts are used by grain elevators, farmers, merchants, and others and are particularly important because prices in the underlying cash markets swing regularly depending on factors such as crop conditions, weather, shipping issues, and political events.

Settlement prices of futures contracts are made available to the public by exchanges in a process known as ''price discovery.'' To be an effective hedge for cash market prices, futures contracts should converge to the spot price at expiration of the futures contract. Otherwise, positions in a futures contract will be a less effective tool to hedge price risk in the cash market since the futures positions will less than perfectly offset cash market positions. Convergence is so important for the 16 agricultural contracts that exchanges have deliveries occurring during the spot month, unlike for the energy commodities covered by this proposal.[492] This delivery mechanism helps to force convergence because shorts who can deliver cheaper than the futures prices may do so, and longs can stand in for delivery if it's cheaper to

[489] Futures contracts are traded for settlement at a date in the future. At a contract's delivery month and date, a commodity cash market price and its futures price converge, allowing an efficient transfer of physical commodities between buyers and sellers of the futures contract.

[490] Standardized terms and conditions for physically-settled futures contracts typically include delivery quantities, qualities, sizes, grades and locations for delivery that are commonly used in the commodity cash market.

[491] *See* The Bureau of Economic Analysis, U.S. Department of Commerce, Interactive Access to Industry Economic Accounts Data: GDP by Industry (Historical) that includes GDP contributions by U.S. Farms, Oil & Gas extraction, pipeline transportation, petroleum and coal products, utilities, mining and support activities, primary and fabricated metal products and finance in securities, commodity contracts and investments.

[492] For energy contracts, physical delivery of the underlying commodity does not occur during the spot month. This allows time to schedule pipeline deliveries and so forth. Instead, a shipping certificate (a financial instrument claim to the physical product), not the underlying commodity, is the delivery instrument that is exchanged at expiration of the futures contract.

obtain the underlying through the futures market than the cash market. The Commission does not collect information on all cash market transactions. Nevertheless, the Commission understands that futures prices are often used by counterparties to settle many cash-market transactions due to approximate convergence of the futures contract price to the cash-market price at expiration.

Agricultural futures markets are some of the most active, and open interest on agricultural futures have some of the highest notional value. The CBOT Corn (C) and CBOT Soybean (S) contracts, for example, trade over 350,000 and 200,000 contracts respectively per day.[493] Outstanding futures and options notional values range anywhere from approximately $ 71 billion for CBOT Corn (C) to approximately $ 70 million for CBOT Oats (O), with the other core referenced futures contracts on agricultural commodities all falling somewhere in between.[494]

The American agricultural market, including markets for the commodities underlying the 16 agricultural core referenced contracts, is foundational to the U.S. economy. Agricultural, food, and related industries contributed $ 1.053 trillion to the U.S. economy in 2017, representing 5.4 percent of U.S. GDP.[495] In 2017, agriculture provided 21.6 million full and part time jobs, or 11 percent of total U.S. employment.[496] Agriculture's contribution to international trade is also sizeable. For fiscal year 2019, it was projected that agricultural exports would exceed $ 137 billion, with imports at $ 129 billion for a net balance of trade of $ 8 billion.[497] This balance of trade is good for the nation and for American farmers. The U.S. commodity futures markets have provided risk mitigation and pricing that reflects the economic value of the underlying commodity to farmers, ranchers, and producers.

The 16 agricultural core referenced futures contracts [498] are key drivers to the success of the American agricultural industry. The commodities underlying these markets are used in a variety of consumer products including: Ingredients in animal feeds for production of meat and dairy (soybean meal and corn); margarine, shortening, paints, adhesives, and fertilizer (soybean oil); home furnishings and apparel (cotton); and food staples (corn, soybeans, wheat, oats, frozen orange juice, cattle, rough rice, cocoa, coffee, and sugar).

The cash markets underlying the 16 agricultural core referenced futures contracts help create jobs and stimulate economic activity. The soybean meal market alone has an implied value to the U.S. economy through animal agriculture which contributed more than 1.8 million American jobs,[499] and wheat remains the largest produced food grain in the United States, with planted acreage, production, and farm receipts ranking third after corn and soybeans.[500] The United States is the world's largest producer of beef, and also produced 327,000 metric tons of frozen orange juice in 2018.[501] Total economic activity stimulated by the cotton crop is estimated at over $ 75 billion.[502] Many of these markets are also significant export commodities, helping to reduce the trade deficit. The United States exports between 10 and 20 percent of its corn crop and 47 percent of its soybean crop, generating tens of billions of dollars in annual economic output.[503]

Many of these agricultural commodities are also crucial to rural areas. In Arkansas alone, which ranks first among rice-producing states, the annual rice crop contributes $1.3 billion to the state's economy and accounts for tens of thousands of jobs to an industry that contributes more than $35 billion to the U.S. economy on an annual basis.[504] Similarly, the U.S. meat and poultry industry, which includes cattle, accounts for $1.02 trillion in total economic output equaling 5.6 percent of GDP, and is responsible for 5.4 million jobs.[505] Coffee-related economic activity comprises 1.6 percent of total U.S. GDP,[506] and U.S. sugar producers generate nearly $20 billion per year for the U.S. economy, supporting 142,000 jobs in 22 states.[507] Even some of the smaller agricultural markets have a noteworthy economic impact.[508] For example, oats are planted on over 2.6 million acres in the United States, with the total U.S. supply in the order of 182 million bushels,[509] and in 2010 the United States exported chocolate and chocolate-type confectionary products worth $799 million to more than 50 countries around the world. [510]

4. Metal Commodities

The core referenced futures contracts on metal commodities play an important role in the price discovery process and are some of the most active and valuable in terms of notional value.

[493] CME Group website, *available at https://www.cmegroup.com/trading/products/#pageNumber=1&sortAsc=false&sortField=oi.*

[494] Notional values here and throughout this section of the release are derived from CFTC internal data obtained from the Commitments of Traders Reports. Notional value means the U.S. dollar value of both long and short contracts without adjusting for delta in options. Data is as of June 30, 2019.

[495] *What is Agriculture's Share of the Overall U.S. Economy,* USDA Economic Research Services, *available at https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58270.*

[496] *Ag and Food Sales and the Economy,* USDA Economic Research Services, *available at https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy.*

[497] *Outlook for U.S. Agricultural Trade,* USDA Economic Research Services, *available at https://www.ers.usda.gov/topics/international-markets-us-trade/us-agricultural-trade/outlook-for-us-agricultural-trade.*

[498] The 16 agricultural core referenced futures contracts are: CBOT Corn (C), CBOT Oats (O), CBOT Soybeans (S), CBOT Soybean Meal (SM), CBOT Soybean Oil (SO), CBOT Wheat (W), CBOT KC HRW Wheat (KW), ICE Cotton No. 2 (CT), MGEX HRS Wheat (MWE), CBOT Rough Rice (RR), CME Live Cattle (LC), ICE Cocoa (CC), ICE Coffee C (KC), ICE FCOJ–A (OJ), ICE U.S. Sugar No. 11 (SB), and ICE U.S. Sugar No. 16 (SF).

[499] Decision Innovation Solutions, *2018 Soybean Meal Demand Assessment,* United Soybean Board, *available at https://www.unitedsoybean.org/wp-content/uploads/LOW-RES-FY2018-Soybean-Meal-Demand-Analysis-1.pdf.*

[500] *Wheat Sector at a Glance,* USDA Economic Research Service, *available at https://www.ers.usda.gov/topics/crops/wheat/wheat-sector-at-a-glance.*

[501] *Cattle & Beef Sector at a Glance,* USDA Economic Research Service, *available at https://www.ers.usda.gov/topics/animal-products/cattle-beef/sector-at-a-glance.*

[502] *World of Cotton,* National Cotton Council of America, *available at http://www.cotton.org/econ/world/index.cfm.*

[503] *Feedgrains Sector at a Glance,* USDA Economic Research Service, *available at https://www.ers.usda.gov/topics/crops/corn-and-other-feedgrains/feedgrains-sector-at-a-glance.*

[504] *Where is Rice Grown,* Think Rice website, *available at http://www.thinkrice.com/on-the-farm/where-is-rice-grown.*

[505] *The United States Meat Industry at a Glance,* North American Meat Institute website, *available at https://www.meatinstitute.org/index.php?ht=d/sp/i/47465/pid/47465.*

[506] *The Economic Impact of the Coffee Industry,* National Coffee Association, *available at http://www.ncausa.org/Industry-Resources/Economic-Impact.*

[507] *U.S. Sugar Industry,* The Sugar Association, *available at https://www.sugar.org/about/us-industry.* While Sugar No. 11 (SB) is primarily an international benchmark, the contract is still used for price discovery and hedging within the United States and has significantly more open interest and daily volume than the domestic Sugar No. 16 (SF). As a pair, these two contracts are crucial tools for risk management and for ensuring reliable pricing, with much of the price discovery occurring in the higher-volume Sugar No. 11 (SB) contract.

[508] Although the macroeconomic impact of these markets is smaller, the Commission reiterates that it has selected the 25 core referenced futures contracts also based on the importance of derivatives in these commodities to cash-market pricing.

[509] *Feed Outlook: May 2019,* USDA Economic Research Service, *available at https://www.ers.usda.gov/publications/pub-details/?pubid=93094.*

[510] *Economic Profile of the U.S. Chocolate Industry,* World Cocoa Foundation, *available at https://www.worldcocoafoundation.org/wp-content/uploads/Economic_Profile_of_the_US_Chocolate_Industry_2011.pdf.*

The Gold (GC) contract, for example, trades the equivalent of nearly 27 million ounces and 170,000 contracts daily. [511] Outstanding futures and options notional values range from approximately $234 billion in the case of Gold (GC), to approximately $2.34 billion in the case of Palladium (PA), with the other metals core referenced futures contracts all falling somewhere in between.[512] Metals futures are used by a diverse array of commercial end-users to hedge their operations, including mining companies, merchants and refiners.

The underlying commodities are also important to the U.S. economy. In 2018, U.S. mines produced $82.2 billion of raw materials, including the commodities underlying the five metals core referenced futures contracts: COMEX Gold (GC), COMEX Silver (SI), COMEX Copper (HG), NYMEX Platinum (PL), and NYMEX Palladium (PA).[513] U.S. mines produced 6.6 million ounces of gold in 2018 worth around $9.24 billion as of July 1, 2019, and the United States holds the largest official gold reserves of any country, worth around $366 billion and representing 75 percent of the value of total U.S. foreign reserves.[514] U.S. silver refineries produced around 52.5 million ounces of silver worth around $800 million in 2018 at current prices.[515]

Major industries, including steel, aerospace, and electronics, process and transform these materials, creating about $3.02 trillion in value-added products.[516] The five metals commodities are key components of these products, including for use in: Batteries, solar panels, water purification systems, electronics, and chemical refining (silver); jewelry, electronics, and as a store of value (gold); building construction, transportation equipment, and industrial machinery (copper); automobile catalysts for diesel engines and in chemical, electric, medical and biomedical applications, and petroleum refining (platinum); and automobile catalysts for gasoline engines and in dental and medical applications (palladium). A disruption in any of these markets would impact highly important and sensitive industries, including those critical to national security, and would also impact the price of consumer products.

The underlying metals markets also create jobs and contribute to GDP. Over 20,000 people were employed in U.S. gold and copper mines and mills in 2017 and 2018, metal ore mining contributed $54.5 billion to U.S. GDP in 2015, and the global copper mining industry drives more than 45 percent of the world's GDP, either on a direct basis or through the use of products that facilitate other industries.[517]

The gold and silver markets are especially important because they serve as financial assets and a store of value for individual and institutional investors, including in times of economic or political uncertainty. Several exchange-traded funds (''ETFs'') that are important instruments for U.S. retail and institutional investors also hold significant quantities of these metals to back their shares. A disruption to any of these metals markets would thus not only impact producers and retailers, but also potentially retail and institutional investors. The iShares Silver Trust ETF, for example, holds around 323.3 million ounces of silver worth $4.93 billion, and the largest U.S. listed gold-backed ETF holds around 25.5 million ounces to back its shares worth around $35.7 billion.[518] Platinum and palladium ETFs are worth hundreds of millions of dollars as well.[519]

5. Energy Commodities

The energy core referenced futures markets are crucial tools for hedging price risk for commodities which can be highly volatile due to changes in weather, economic health, demand-related price swings, and pipeline and supply availability or disruptions. These futures contracts are used by some of the largest refiners, exploration and production companies, distributors, and by other key players in the energy industry, and are some of the most widely traded and valuable contracts in the world in terms of notional value. The NYMEX Light Sweet Crude Oil (CL) contract, for example, is the world's most liquid and actively traded crude oil contract, trading nearly 1.2 million contracts a day, and the NYMEX Henry Hub Natural Gas (NG) contract trades 400,000 contracts daily.[520] Futures and option notional values range from $ 53 billion in the case of NYMEX NY Harbor RBOB Gasoline (RB) and NYMEX NY Harbor ULSD Heating Oil (HO), to $ 498 billion for NYMEX Light Sweet Crude Oil (CL).[521]

Some of the energy core referenced futures contracts also serve as key benchmarks for use in pricing cash-market and other transactions. NYMEX NY Harbor RBOB Gasoline (RB) is the main benchmark used for pricing gasoline in the U.S. petroleum products market, a huge physical market with total U.S. refinery capacity of approximately 9.5 million barrels per day of gasoline.[522] Similarly, the NYMEX NY Harbor ULSD Heating Oil (HO) contract is the main benchmark used for pricing the distillate products market, which includes diesel fuel, heating oil, and jet fuel. [523]

The U.S. energy markets are some of the most important and complex in the world, contributing over $ 1.3 trillion to the U.S. economy.[524] Crude oil, heating oil, gasoline, and natural gas, the commodities underlying the four energy core reference futures contracts,[525] are key contributors to job growth and GDP. In 2015, the natural gas and oil industries supported 10.3 million jobs directly and indirectly, accounting for 5.6 percent of total U.S. employment, and generating $ 714 billion in wages to

[511] *Gold Futures Quotes,* CME Group website, *available at https://www.cmegroup.com/trading/metals/precious/gold_quotes_globex.html.*

[512] Calculations based on data submitted to the Commission pursuant to part 16 of the Commission's regulations.

[513] *Mineral Commodity Summaries 2019,* U.S. Geological Survey, *available at http://prd-wret.s3-us-west-2.amazonaws.com/assets/palladium/production/atoms/files/mcs2019_all.pdf.*

[514] *CPM Gold Yearbook 2019,* CPM Group, *available at https://www.cpmgroup.com/store/cpm-gold-yearbook-2019; Goldhub,* World Gold Council, *available at https://www.gold.org/goldhub.*

[515] *World Silver Survey 2019,* The Silver Institute, *available at https://www.silverinstitute.org/wp-content/uploads/2019/04/WSS2019V3.pdf.*

[516] *Id.*

[517] Creamer, Martin, *Global Mining Derives 45%-Plus of World GDP,* Mining Weekly (July. 4, 2012), *available at https://www.miningweekly.com/print-version/global-mining-drives-45-plus-of-world-gdp-cutifani-2012-07-04.* Platinum and palladium mine production in 2018 was less substantial, worth $114 million and $695 million, respectively (All such valuations throughout this release are at current prices as of July 2, 2019.). *See* Bloxham, Lucy, *et al., Pgm Market Report May 2019,* Johnson Matthey, *available at http://www.platinum.matthey.com/documents/new-item/pgm%20market%20reports/pgm_market_report_may_19.pdf.* However, derivatives contracts in those commodities do play a role in price discovery.

[518] *Historical Data,* SPDR Gold Shares, *available at http://www.spdrgoldshares.com/usa/historical-data.* Data as of July 1, 2019.

[519] *iShares Silver Trust Fund,* iShares, *available at https://www.ishares.com/us/products/239855/ishares-silver-trust-fund/1521942788811.ajax?fileType=xls&fileName=iShares-Silver-Trust_fund&dataType=fund, https://www.aberdeenstandardetfs.us/institutional/us/en-us/products/product/etfs-physical-platinum-shares-pplt-arca#15.*

[520] Calculations based on data submitted to the Commission pursuant to part 16 of the Commission's regulations.

[521] Calculations based on data submitted to the Commission pursuant to part 16 of the Commission's regulations.

[522] CME Comment letter dated April 24, 2015 at 79.

[523] *Id.* at 136.

[524] *Natural Gas and Oil National Factsheet,* API Energy, *available at https://www.api.org/~/media/Files/Policy/Jobs/National-Factsheet.pdf.*

[525] The four energy core referenced futures contracts are: NYMEX Light Sweet Crude Oil (CL), NYMEX NY Harbor ULSD Heating Oil (HO), NYMEX NY Harbor RBOB Gasoline (RB), and NYMEX Henry Hub Natural Gas (NG).

account for 6.7 percent of national income.[526] Crude oil alone, which is a key component in making gasoline, contributes 7.6 percent of total U.S. GDP. RBOB gasoline, which is a byproduct of crude oil that is used as fuel for vehicles and appliances, contributes $ 35.5 billion in income and $57 billion in economic activity.[527] ULSD comprises all on-highway diesel fuel consumed in the United States, and is also commonly used as heating oil.[528]

Natural gas is similarly important, serving nearly 69 million homes, 185,400 factories, and 5.5 million businesses such as hotels, restaurants, hospitals, schools, and supermarkets. More than 2.5 million miles of pipeline transport natural gas to more than 178 million Americans.[529] Natural gas is also a key input for electricity generation and comprises more than one quarter of all primary energy used in the United States. [530] U.S. agricultural producers also rely on an affordable, dependable supply of natural gas, as fertilizer used to grow crops is composed almost entirely of natural gas components.

6. Consistency With Commodity Indices

The criteria underlying the Commission's necessity finding is consistent with the criteria used by several widely tracked third party commodity index providers in determining the composition of their indices. Bloomberg selects commodities for its Bloomberg Commodity Index that in its view are ''sufficiently significant to the world economy to merit consideration,'' that are ''tradeable through a qualifying related futures contract'' and that generally are the ''subject of at least one futures contract that trades on a U.S. exchange.'' [531] Similarly, S&P's GSCI index is, among other things, ''designed to reflect the relative significance of each of the constituent commodities to the world economy.'' [532] Applying these criteria, Bloomberg and S&P have deemed eligible for inclusion in their indices lists of commodities that overlap significantly with the Commission's proposed list of 25 core referenced futures contracts. Independent index providers thus appear to have arrived at similar conclusions to the Commission's preliminary necessity finding regarding the relative importance of certain commodity markets.

7. Conclusion

This proposal only sets limits for referenced contracts for which a DCM currently lists a physically-settled core referenced futures contract. As discussed above, there are currently over 1,200 contracts on physical commodities listed on DCMs, and there are physical commodities other than those underlying the 25 core referenced futures contracts that are important to the national economy, including, for example, steel, butter, uranium, aluminum, lead, random length lumber, and ethanol. However, unlike the 25 core referenced futures contracts, the derivatives markets for those commodities are not as large as the markets for the 25 core referenced futures contracts and/or play a less significant role in the price discovery process.

For example, the futures contracts on steel, butter, and uranium were not included as core referenced futures contracts because they are cash-settled contracts that settle to a third party index. Among the agricultural commodity futures listed on CME that are cash-settled only to an index are: class III milk, feeder cattle, and lean hogs. All three of these were included in the 2011 Final Rulemaking. Because there are no physically-settled futures contracts on these commodities, these cash-settled contracts would not qualify as referenced contracts are would not be subject to the proposed rule. While the futures contracts on aluminum, lead, random length lumber, and ethanol are physically settled contracts, their open interest and trading volume is lower than that of the CBOT Oats contract, which is the smallest market included among the 25 core referenced futures contracts as measured by open interest and volume. In that regard, based on FIA end of month open interest data and 12-month total trading volume data for December 2019, CBOT Oats had end of month open interest of 4,720 contracts and 12-month total trading volume ending in December 2019 of 162,682 round turn contracts.[533] In comparison, the end of month December 2019 open interest and 12-month total trading volume ending in December 2019 for the other commodity futures contracts that were not selected to be included as core referenced futures contracts were as follows: COMEX Aluminum (267 OI/2,721 Vol), COMEX Lead (0 OI/0 Vol), CME Random Length Lumber (3,275 OI/11,893 Vol), and CBOT Ethanol (708 OI/2,686 Vol.). It would be impracticable for the Commission to analyze in comprehensive fashion all contracts that have either feature, so the Commission has chosen commodities for which the underlying and derivatives markets both play important economic roles, including the potential for especially acute burdens on a given commodity in interstate commerce that would arise from excessive speculation in derivatives markets. Line drawing of this nature is inherently inexact, and the Commission will revisit these and other contracts ''from time to time'' as the statute requires.[534] Depending on facts and circumstances, including the Commission's experience administering the proposed limits with respect to the 25 core referenced futures contracts, the Commission may determine that additional limits are necessary within the meaning of section 4a(a)(1).

As discussed in the cost benefit consideration below, the Commission's proposed limits are not without costs, and there are potential burdens or negative consequences associated with establishing the proposed limits.[535] In particular, if the levels are set too high, there is a greater risk of excessive speculation that could harm market participants and the public. If the levels are set too low, transaction costs may rise and liquidity could be reduced.[536] Nevertheless, the Commission preliminarily believes that the specific proposed limits applicable to the 25 core referenced futures contracts would

[526] *Natural Gas and Oil National Factsheet,* API Energy, *available at https://www.api.org/~/media/Files/Policy/Jobs/National-Factsheet.pdf;* PricewaterhouseCoopers, *Impacts of the Natural Gas and Oil Industry on the US Economy in 2015,* API Energy, *available at https://www.api.org/~/media/Files/Policy/Jobs/Oil-and-Gas-2015-Economic-Impacts-Final-Cover-07-17-2017.pdf.*

[527] PricewaterhouseCoopers, *Impacts of the Natural Gas and Oil Industry on the US Economy in 2015,* API Energy, at 12, *available at https://www.api.org/~/media/Files/Policy/Jobs/Oil-and-Gas-2015-Economic-Impacts-Final-Cover-07-17-2017.pdf.*

[528] CME Comment Letter dated April 24, 2015 at 135.

[529] *Natural Gas: The Facts,* American Gas Association, *available at https://www.aga.org/globalassets/2019-natural-gas-factsts-updated.pdf.*

[530] *Id.*

[531] *The Bloomberg Commodity Index Methodology,* Bloomberg, at 17 (Dec. 2018) *available at https://data.bloomberglp.com/professional/sites/10/BCOM-Methodology-December-2019.pdf.* The list of commodities that Bloomberg deems eligible for inclusion in its index overlaps significantly with the Commission's proposed list of 25 core referenced futures contracts.

[532] *S&P GSCI Methodology,* S&P Dow Jones Indices, at 8 (Oct. 2019) *available at https://us.spindices.com/documents/methodologies/methodology-sp-gsci.pdf?force_download=true.*

[533] FIA notes that volume for exchange-traded futures is measured by the number of contracts traded on a round-trip basis to avoid double-counting. Furthermore, FIA notes that open interest for exchange-traded futures is measured by the number of contracts outstanding at the end of the month.

[534] CEA section 4a(a)(1).

[535] *See infra* Section IV.A. (discussion of cost-benefit considerations for the proposed changes).

[536] *See infra* Section IV.A.2.a. (cost-benefit discussion of market liquidity and integrity).

limit such potential costs, and that the significant benefits associated with advancing the statutory goal of preventing the undue burdens associated with excessive speculation in these commodities justify the potential costs associated with establishing the proposed limits.

G. Request for Comment

The Commission requests comment on all aspects of the proposed necessity finding. The Commission also invites comments on the following:

(50) Does the proposed necessity finding take into account the relevant factors to ascertain whether position limits would be necessary on a core referenced futures contract?

(51) Does the proposed necessity finding base its analysis on the correct levels of trading volume and open interest? If not, what would be a more appropriate minimum level of trading volume and/or open interest upon which to evaluate whether federal position limits are necessary to prevent excessive speculation?

(52) Are there particular attributes of any of the 25 proposed core referenced futures contracts that the Commission should consider when determining whether federal position limits are or are not necessary for that particular product?

IV. Related Matters

A. Cost-Benefit Considerations

1. Introduction

Section 15(a) of the Commodity Exchange Act (''CEA'' or ''Act'') requires the Commodity Futures Trading Commission (''Commission'') to consider the costs and benefits of its actions before promulgating a regulation under the CEA.[537] Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations (collectively, the ''section 15(a) factors'').[538]

The Commission interprets section 15(a) to require the Commission to consider only those costs and benefits of its proposed changes that are attributable to the Commission's discretionary determinations (*i.e.,* changes that are not otherwise required by statute) compared to the existing status quo requirements. For this purpose, the status quo requirements include the CEA's statutory requirements as well as any applicable Commission regulations that are consistent with the CEA.[539] As a result, any proposed changes to the Commission's regulations that are required by the CEA or other applicable statutes would not be deemed to be a discretionary change for purposes of discussing related costs and benefits.

The Commission anticipates that the proposed position limits regulations will affect market participants differently depending on their business model and scale of participation in the commodity contracts that are covered by the proposal.[540] The Commission also anticipates that the proposal may result in ''programmatic'' costs to some market participants. Generally, affected market participants may incur increased costs associated with developing or revising, implementing, and maintaining compliance functions and procedures. Such costs might include those related to the monitoring of positions in the relevant referenced contracts; related filing, reporting, and recordkeeping requirements, and the costs of changes to information technology systems.

The Commission has preliminarily determined that it is not feasible to quantify the costs or benefits with reasonable precision and instead has identified and considered the costs and benefits qualitatively.[541] The Commission believes that for many of the costs and benefits that quantification is not feasible with reasonable precision because doing so would require understanding all market participants' business models, operating models, cost structures, and hedging strategies, including an evaluation of the potential alternative hedging or business strategies that could be adopted under the proposal. Further, while Congress has tasked the Commission with establishing such position limits as the Commission finds are ''necessary,'' some of the benefits, such as mitigating or eliminating manipulation or excessive speculation, may be very difficult or infeasible to quantify. These benefits, moreover, would likely manifest over time and be distributed over the entire market.

In light of these limitations, to inform its consideration of costs and benefits of the proposed regulations, the Commission in its discretion relies on: (1) Its experience and expertise in regulating the derivatives markets; (2) information gathered through public comment letters[542] and meetings with a broad range of market participants; and (3) certain Commission data, such as the Commission's Large Trader Reporting System and data reported to swap data repositories.

In addition to the specific questions included throughout the discussion below, the Commission generally requests comment on all aspects of its consideration of costs and benefits, including: Identification and assessment of any costs and benefits not discussed herein; data and any other information to assist or otherwise inform the Commission's ability to quantify or qualify the costs and benefits of the proposed rules; and substantiating data, statistics, and any other information to support positions posited by commenters with respect to the Commission's consideration of costs and benefits.

The Commission preliminarily considers the benefits and costs discussed below in the context of international markets, because market participants and exchanges subject to the Commission's jurisdiction for purposes of position limits may be organized outside of the United States; some industry leaders typically conduct operations both within and outside the United States; and market participants may follow substantially similar business practices wherever located.

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[537] 7 U.S.C. 19(a).

[538] *Id.*

[539] This cost-benefit consideration section is divided into seven parts, including this introductory section, each discussing their respective baseline benchmarks with respect to any applicable CEA or regulatory provisions.

[540] For example, the proposal could result in increased costs to market participants who may need to adjust their trading and hedging strategies to ensure that their aggregate positions do not exceed federal position limits, particularly those who will be subject to federal position limits for the first time (*i.e.,* those who may trade contracts for which there are currently no federal limits). On the other hand, existing costs could decrease for those existing traders whose positions would fall below the new proposed limits and therefore would not be forced to adjust their trading strategies and/or apply for exemptions from the limits, particularly if the Commission's proposal improves market liquidity or other metrics of market health. Similarly, for those market participants who would become subject to the federal position limits, general costs would be lower to the extent such market participants can leverage their existing compliance infrastructure in connection with existing exchange position limit regimes relative to those market participants that do not currently have such systems.

[541] With respect to the Commission's analysis under its discussion of its obligations under the Paperwork Reduction Act (''PRA''), the Commission has endeavored to quantify certain costs and other burdens imposed on market participants related to collections of information as defined by the PRA. *See generally* Section IV.B. (discussing the Commission's PRA determinations).

[542] While the general themes contained in comments submitted in response to prior proposals informed this rulemaking, the Commission is withdrawing the 2013 Proposal, the 2016 Supplemental Proposal, and the 2016 Reproposal. *See supra* Section I.A.

Where the Commission does not specifically refer to matters of location, the discussion of benefits and costs below refers to the effects of this proposal on all activity subject to the proposed regulations, whether by virtue of the activity's physical location in the United States or by virtue of the activity's connection with or effect on U.S. commerce under CEA section 2(i).[543]

The Commission will identify and discuss the costs and benefits organized conceptually by topic, and certain topics may generally correspond with a specific proposed regulatory section. The Commission's discussion is organized as follows: (1) The scope of the commodity derivative contracts that would be subject to the proposed position limits framework, including with respect to the 25 proposed core referenced futures contracts and the proposed definitions of ''referenced contract'' and ''economically equivalent swaps;'' (2) the proposed federal position limit levels (proposed § 150.2); (3) the proposed federal bona fide hedging definition (proposed § 150.1) and other Commission exemptions from federal position limits (proposed § 150.3); (4) proposed streamlined process for the Commission and exchanges to recognize bona fide hedges and to grant exemptions for purposes of federal position limits (proposed §§ 150.3 and 150.9) and related reporting changes to part 19 of the Commission's regulations; (5) the proposed exchange-set position limits framework and exchange-granted exemptions thereto (proposed § 150.5); and (6) the section 15(a) factors.

2. ''Necessity Finding'' and Scope of Referenced Futures Contracts Subject to Proposed Federal Position Limit Levels

Federal spot and non-spot month limits currently apply to futures and options on futures on the nine legacy agricultural commodities.[544] The Commission's proposal would expand the scope of commodity derivative contracts currently subject to the Commission's existing federal position limits framework [545] so that federal spot-month limits would apply to futures and options on futures on 16 additional physical commodities, for a total of 25 physical commodities.[546]

The Commission has preliminarily interpreted CEA section 4a to require that the Commission must make an antecedent ''necessity'' finding that establishing federal position limits is ''necessary'' to diminish, eliminate, or prevent certain burdens on interstate commerce with respect to the physical commodities in question.[547] As the statute does not define the term ''necessary,'' the Commission must apply its expertise in construing such term, and, as discussed further below, must do so consistent with the policy goals articulated by Congress, including in CEA sections 4a(a)(2)(C) and 4a(a)(3), as noted throughout this discussion of the Commission's cost-benefit considerations.[548] As discussed in greater detail in the preamble, the Commission proposes to establish position limits on futures and options on futures for these 25 commodities on the basis that position limits on such contracts are ''necessary.'' In determining to include the proposed 25 core referenced futures contracts within the proposed federal position limit framework, the Commission considered the effects that these contracts have on the underlying commodity, especially with respect to price discovery; the fact that they require physical delivery of the underlying commodity and therefore may be more affected by manipulation such as corners and squeezes compared to cash-settled contracts; and, in some cases, the especially acute economic burdens on interstate commerce that could arise from excessive speculation in these contracts causing sudden or unreasonable fluctuations or unwarranted changes in the price of the commodities underlying these contracts.[549]

More specifically, the 25 core referenced futures contracts were selected because they: (i) Physically settle, (ii) have high levels of open interest [550] and significant notional value of open interest,[551] (iii) serve as a reference price for a significant number of swaps and/or cash market transactions, and/or (iv) have, in most cases, relatively higher average trading volumes.[552] These factors reflect the important and varying degrees of linkage between the derivatives markets and the underlying cash markets. The Commission preliminarily acknowledges that there is no mathematical formula that would be dispositive, though the Commission has considered relevant data where it is available.

As a result, the Commission preliminarily has concluded that it must exercise its judgment in light of facts and circumstances, including its experience and expertise, to determine whether federal position limit levels are economically justified. For example, based on its general experience, the Commission preliminarily recognizes that contracts that physically settle can, in certain circumstances during the spot month, be at risk of corners and squeezes, which could distort pricing and resource allocation, make it more costly to implement hedge strategies, and harm the underlying cash market. Similarly, certain contracts with higher

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[543] 7 U.S.C. 2(i).

[544] The nine legacy agricultural contracts currently subject to federal spot and non-spot month limits are: CBOT Corn (C), CBOT Oats (O), CBOT Soybeans (S), CBOT Wheat (W), CBOT Soybean Oil (SO), CBOT Soybean Meal (SM), MGEX Hard Red Spring Wheat (MWE), ICE Cotton No. 2 (CT), and CBOT KC Hard Red Winter Wheat (KW).

[545] 17 CFR 150.2. Because the Commission has not yet implemented the Dodd-Frank Act's amendments to the CEA regarding position limits, except with respect to aggregation (*see generally* Final Aggregation Rulemaking, 81 FR at 91454) and the vacated 2011 Position Limits Rulemaking's amendments to 17 CFR 150.2 (*see International Swaps and Derivatives Association* v. *United States Commodity Futures Trading Commission,* 887 F. Supp. 2d 259 (D.D.C. 2012)), the baseline or status quo consists of the provisions of the CEA relating to position limits immediately prior to effectiveness of the Dodd-Frank Act amendments to the CEA and the relevant provisions of existing parts 1, 15, 17, 19, 37, 38, 140, and 150 of the Commission's regulations, subject to the aforementioned exceptions.

[546] The 16 proposed new products that would be subject to federal spot month limits would include seven agricultural (CME Live Cattle (LC), CBOT Rough Rice (RR), ICE Cocoa (CC), ICE Coffee C (KC), ICE FCOJ–A (OJ), ICE U.S. Sugar No. 11 (SB), and ICE U.S. Sugar No. 16 (SF)), four energy (NYMEX Light Sweet Crude Oil (CL), NYMEX New York Harbor ULSD Heating Oil (HO), NYMEX New York Harbor RBOB Gasoline (RB), NYMEX Henry Hub Natural Gas (NG)), and five metals (COMEX Gold (GC), COMEX Silver (SI), COMEX Copper (HG), NYMEX Palladium (PA), and NYMEX Platinum (PL)) contracts.

[547] *See supra* Section III.F. (discussion of the necessity finding).

[548] In promulgating the position limits framework, Congress instructed the Commission to consider several factors: First, CEA section 4a(a)(3) requires the Commission when establishing position limits, to the maximum extent practicable, in its discretion, to (i) diminish, eliminate, or prevent excessive speculation; (ii) deter and prevent market manipulation, squeezes, and corners; (iii) ensure sufficient market liquidity for bona fide hedgers; and (iv) ensure that the price discovery function of the underlying market is not disrupted. Second, CEA section 4a(a)(2)(C) requires the Commission to strive to ensure that any limits imposed by the Commission will not cause price discovery in a commodity subject to position limits to shift to trading on a foreign exchange.

[549] *See supra* Section III.F. (discussion of the necessity finding).

[550] Open interest for this purpose includes the sum of open contracts, as defined in § 1.3 of the Commission's regulations, in futures contracts and in futures option contracts converted to a futures-equivalent amount, as defined in current § 150.1(f) of the Commission's regulations. *See* 17 CFR 1.3 and 150.1(f).

[551] Notional value of open interest for this purpose is open interest multiplied by the unit of trading for the relevant futures contract multiplied by the price of that futures contract.

[552] A combination of higher average trading volumes and open interest is an indicator of a contract's market liquidity. Higher trading volumes make it more likely that the cost of transactions is lower with narrower bid-ask spreads.

open interest and/or trading volume are more likely to serve as benchmarks and/or references for pricing cash market and other transactions, meaning a distortion of the price of any such contract could potentially impact underlying cash markets that are important to interstate commerce.[553]

As discussed in more detail in connection with proposed § 150.2 below, the Commission preliminarily believes that establishing federal position limits at the proposed levels for the proposed 25 core referenced futures contracts and related referenced contracts would result in several benefits, including a reduction in the probability of excessive speculation and market manipulation (*e.g.,* squeezes and corners) and the attendant harms to price discovery that may result. The Commission acknowledges, in connection with establishing federal position limit levels under proposed § 150.2 (discussed below), that position limits, especially if set too low, could adversely affect market liquidity and increase transaction costs, especially for bona fide hedgers, which ultimately might be passed on to the general public. However, the Commission is also cognizant that setting position limit levels too high may result in an increase in the possibility of excessive speculation and the harms that may result, such as sudden or unreasonable fluctuations or unwarranted changes in the price of the commodities underlying these contracts.

For purposes of this discussion, rather than discussing the general potential benefits and costs of the federal position limit framework, the Commission will instead focus on the benefits and costs resulting from the Commission's proposed necessity finding with respect to the 25 core referenced futures contracts.[554] The Commission will address potential benefits and costs of its approach with respect to: (1) The liquidity and integrity of the futures and related options markets and (2) market participants and exchanges.

a. Potential Impact of the Scope of the Commission's Necessity Finding on Market Liquidity and Integrity

The Commission has preliminarily determined that the 25 contracts that the Commission proposes to include in its necessity finding are among the most liquid physical commodity contracts, as measured by open interest and/or trading volume, and therefore, imposing positions limits on these contracts may impose costs on market participants by constraining liquidity. However, the Commission believes that the potential harmful effect on liquidity will be muted, as a result of the generally high levels of open interest and trading volumes of the respective 25 core referenced futures contracts.[555]

The Commission has preliminarily determined that, as a general matter, focusing on the 25 proposed core referenced futures contracts may benefit market integrity since these contracts generally are amongst the largest physically-settled contracts with respect to relative levels of open interest and/or trading volumes. As a result, the Commission preliminarily believes that excessive speculation or potential market manipulation in such contracts would be more likely to affect more market participants and therefore potentially more likely to cause an undue and unnecessary burden (*e.g.,* potential harm to market integrity or liquidity) on interstate commerce. Because each proposed core referenced futures contract is physically-settled, as opposed to cash-settled, the proposal focuses on preventing corners and squeezes in those contracts where such market manipulation could cause significant harm in the price discovery process for their respective underlying commodities.[556]

While the Commission recognizes that market participants may engage in market manipulation through cash-settled futures and options on futures, the Commission preliminarily has determined that focusing on the physically-settled core referenced futures contracts will benefit market integrity by reducing the risk of corners and squeezes in particular. In addition, not imposing position limits on additional commodities may foster non-excessive speculation, leading to better prices and more efficient resource allocation in these commodities. This may ultimately benefit commercial end users and possibly be passed on to the general public in the form of better pricing. As noted above, the scope of the Commission's necessity finding with respect to the 25 proposed core referenced futures contracts will allow the Commission to focus on those contracts that, in general, the Commission preliminarily recognizes as having particular importance in the price discovery process for their respective underlying commodities as well as potentially acute economic burdens that would arise from excessive speculation causing sudden or unreasonable fluctuations or unwarranted changes in the commodity prices underlying these contracts.

To the extent the Commission does not include additional commodities in its necessity finding, the Commission's approach may also introduce additional costs in the form of loss of certain benefits associated with the proposed federal position limits framework, such as stronger prevention of market manipulation, such as corners and squeezes. Accordingly, the greater the potential benefits of the proposed federal position limits framework in general, the greater the potential cost in the reduction in market integrity in general from not including other possible commodities within the federal position limits framework (only to the extent any such additional commodities would be found to be ''necessary'' for purposes of CEA section 4a). Nonetheless, some of the potential harms to market integrity associated with not including additional commodities within the federal position limits framework could be mitigated to an extent by exchanges, which can use tools other than position limits, such as margin requirements or position accountability at lower levels than potential federal limits, to defend against certain market behavior. Similarly, for those contracts that would not be subject to the proposal, exchange-set position limits alternatively may achieve the same benefits discussed in connection with the proposed federal position limits.

b. Potential Impact of the Scope of the Commission's Necessity Finding on Market Participants and Exchanges

The Commission acknowledges that the federal position limits proposed herein could impose certain administrative, logistical, technological, and financial burdens on exchanges and market participants, especially with respect to developing or expanding compliance systems and the adoption of monitoring policies. However, the

[553] *See supra* Section III.F. (discussion of the necessity finding).

[554] *See supra* Section III.F. (discussion of the necessity finding).

[555] The contracts that would be subject to the Commission's proposal generally have higher trading volumes and open interest, which tend to have greater liquidity, including relatively narrower bid-ask spreads and relatively smaller price impacts from larger transaction sizes. Further, all other factors being equal, markets for contracts that are more illiquid tend to be more concentrated, so that a position limit on such contracts might reduce open interest on one side of the market, because a large trader would face the potential of being capped out by a position limit. For this reason, among others, the contracts to which the federal position limits in existing § 150.2 apply include some of the most liquid physical-delivery futures contracts.

[556] The Commission must also make this determination in light of its limited available resources and responsibility to allocate taxpayer resources in an efficient manner to meet the goals of section 4a(a)(1), and the CEA generally.

Commission preliminarily believes that its approach to delaying the effective date by 365 days from publication of any final rule in the **Federal Register** should mitigate compliance costs by permitting the update and build out of technological and compliance systems more gradually. It may also reduce the burdens on market participants not previously subject to position limits, who will have a longer period of time to determine whether they may qualify for certain bona fide hedging recognitions or other exemptions, and to possibly alter their trading or hedging strategies.[557] Further, the delayed effective date will reduce the burdens on exchanges, market participants, and the Commission by providing each with more time to resolve technological and other challenges for compliance with the new regulations. In turn, the Commission preliminarily anticipates that the extra time provided by the delayed effective date will result in more robust systems for market oversight, which should better facilitate the implementation of the Commission's position limits framework and avoid unnecessary market disruptions while exchanges and market participants prepare for its implementation. However, the longer the proposed delay in the proposal's effective date, the longer it will take to realize the benefits identified above.

3. Federal Position Limit Levels (Proposed § 150.2)

a. General Approach

Existing § 150.2 establishes position limit levels that apply net long or net short to futures and futures-equivalent options contracts on nine legacy physically-settled agricultural contracts.[558] The Commission has previously set separate federal position limits for: (i) The spot month, and (ii) the single month and all-months combined limit levels (*i.e.,* ''non-spot months'').[559] For the existing spot month federal limit levels, the contract levels are based on 25 percent, or lower, of the estimated deliverable supply (''EDS'').[560] For the existing single month and all-months combined limit levels, the levels are set at 10 percent of open interest for the first 25,000 contracts of open interest, with a marginal increase of 2.5 percent of open interest thereafter (the ''10, 2.5 percent formula'').

Proposed § 150.2 would revise and expand the current federal position limits framework as follows: First, for spot month levels, proposed § 150.2 would (i) cover 16 additional physically-settled futures and related options contracts, based on the Commission's existing approach of establishing limit levels at 25 percent or lower of EDS, for a total of 25 core referenced futures contracts subject to federal spot month limits (*i.e.,* the nine legacy agricultural contracts plus the proposed 16 additional contracts); [561] and (ii) update the existing spot month levels for the nine legacy agricultural contracts based on revised EDS.[562]

Second, for non-spot month levels, proposed § 150.2 would revise the 10, 2.5 percent formula so that (i) the incremental 2.5 percent increase takes effect after 50,000 contracts of open interest, rather than after 25,000 contracts under the existing rule (the ''marginal threshold level''), and (ii) the limit levels will be calculated by applying the updated 10, 2.5 percent formula to open interest data for the periods from July 2017–June 2018 and July 2018–June 2019 of the applicable futures and delta adjusted futures options.[563]

Third, the proposed position limits framework would expand to cover (i) any cash-settled futures and related options contracts directly or indirectly linked to any of the 25 proposed physically-settled core referenced futures contracts as well as (ii) any economically equivalent swaps.

For spot month positions, the proposed position limits would apply separately, net long or short, to cash-settled contracts and to physically-settled contracts in the same commodity. This would result in a separate net long/short position for each category so that cash-settled contracts in a particular commodity would be netted with other cash-settled contracts in that commodity, and physically-settled contracts in a given commodity would be netted with other physically-settled contracts in that commodity; a cash-settled contract and a physically-settled contract would not net with one another. Outside the spot month, cash and physically-settled contracts in the same commodity would be netted together to determine a single net long/short position.

Fourth, proposed § 150.2 would subject certain pre-existing positions to federal position limits during the spot month but would grandfather certain pre-existing positions outside the spot month.

In setting the federal position limit levels, the Commission seeks to advance the enumerated statutory objectives with respect to position limits in CEA section 4a(a)(3)(B).[564] The Commission recognizes that relatively high limit levels may be more likely to support some of the statutory goals and less likely to advance others. For instance, a relatively higher limit level may be more likely to benefit market liquidity for hedgers or ensure that the price discovery of the underlying market is not disrupted, but may be less likely to benefit market integrity by being less effective at diminishing, eliminating, or preventing excessive speculation or at deterring and preventing market manipulation, corners, and squeezes. In particular, setting relatively high federal position limit levels may result in excessively large speculative positions and/or increased volatility, especially during speculative showdowns, which may cause some market participants to retreat from the commodities markets due to perceived decreases in market integrity. In turn, fewer market participants may result in lower liquidity levels for hedgers and harm to

[557] Commenters on prior proposals have requested a sufficient phase-in period. *See, e.g.,* 2016 Reproposal, 81 FR at 96815 (implementation timeline).

[558] The nine legacy agricultural contracts currently subject to federal spot and non-spot month limits are: CBOT Corn (C), CBOT Oats (O), CBOT Soybeans (S), CBOT Wheat (W), CBOT Soybean Oil (SO), CBOT Soybean Meal (SM), MGEX Hard Red Spring Wheat (MWE), ICE Cotton No. 2 (CT), and CBOT KC Hard Red Winter Wheat (KW).

[559] For clarity, limits for single and all-months combined apply separately. However, the Commission previously has applied the same limit levels to the single month and all-months combined. Accordingly, the Commission will discuss the single and all-months limits, *i.e.,* the non-spot month limits, together.

[560] *See supra* Section II.B.1—Existing § 150.2 (discussing that establishing spot month levels at 25 percent or less of EDS is consistent with past Commission practices).

[561] The 16 proposed new products that would be subject to federal spot month limits would include seven agricultural (CME Live Cattle (LC), CBOT Rough Rice (RR), ICE Cocoa (CC), ICE Coffee C (KC), ICE FCOJ–A (OJ), ICE U.S. Sugar No. 11 (SB), and ICE U.S. Sugar No. 16 (SF)), four energy (NYMEX Light Sweet Crude Oil (CL), NYMEX NY Harbor ULSD Heating Oil (HO), NYMEX NY Harbor RBOB Gasoline (RB), and NYMEX Henry Hub Natural Gas (NG)), and five metals (COMEX Gold (GC), COMEX Silver (SI), COMEX Copper (HG), NYMEX Palladium (PA), and NYMEX Platinum (PL)) contracts.

[562] The proposal would maintain the current spot month limits on CBOT Oats (O).

[563] As discussed below, for most of the legacy agricultural commodities, this would result in a higher non-spot month limit. However, the Commission is not proposing to change the non-spot month limits for either CBOT Oats (O) or MGEX Hard Red Spring Wheat (MWE) based on the revised open interest since this would result in a reduction of non-spot month limits from 2,000 to 700 contracts for CBOT Oats (O) and 12,000 to 5,700 contracts for MGEX HRS Wheat (MWE). Similarly, the Commission also proposed to maintain the current non-spot month limit for CBOT KC Hard Red Winter Wheat (KW).

[564] *See supra* Section II.B.2.c. (for further discussion regarding the CEA's statutory objectives for the federal position limits framework).

the price discovery function in the underlying markets.

Conversely, setting a relatively lower federal limit level may be more likely to diminish, eliminate, or prevent excessive speculation, but may also limit the availability of certain hedging strategies, adversely affect levels of liquidity, and increase transaction costs.[565] Additionally, setting federal position limits too low may cause non-excessive speculation to exit a market, which could reduce liquidity, cause ''choppy'' [566] prices and reduced market efficiency, and increase option premia to compensate for the more volatile prices. The Commission in its discretion has nevertheless endeavored to set federal limit levels, to the maximum extent practicable, to benefit the statutory goals identified by Congress.

As discussed above, the contracts that would be subject to the proposed federal limits are currently subject to either federal- or exchange-set limits (or both). To the extent that the proposed federal position limit levels are higher than the existing federal position limit levels for either the spot or non-spot month, market participants currently trading these contracts could engage in additional trading under the proposed federal limits in proposed § 150.2 that otherwise would be prohibited under existing § 150.2.[567] On the other hand, to the extent an exchange-set limit level would be lower than its proposed corresponding federal limit, the proposed federal limit would not affect market participants since market participants would be required to comply with the lower exchange-set limit level (to the extent that the exchanges maintain their current levels).[568]

b. Spot Month Levels

The Commission proposes to maintain 25 percent of EDS as a ceiling for federal limits. Based on the Commission's experience overseeing federal position limits for decades and overseeing exchange-set position limits submitted to the Commission pursuant to part 40 of the Commission's regulations, none of the proposed levels listed in Appendix E of part 150 of the Commission's regulations appears to be so low as to reduce liquidity for bona fide hedgers or disrupt price discovery function of the underlying market, or so high as to invite excessive speculation, manipulation, corners, or squeezes because, among other things, any potential economic gains resulting from the manipulation may be insufficient to justify the potential costs, including the costs of acquiring, and ultimately offloading, the positions used to effect the manipulation.

c. Levels Outside of the Spot Month

i. The 10, 2.5 Percent Formula

The Commission preliminarily has determined that the existing 10, 2.5 percent formula generally has functioned well for the existing nine legacy agricultural contracts and has successfully benefited the markets by taking into account the competing goals of facilitating both liquidity formation and price discovery while also protecting the markets from harmful market manipulation and excessive speculation. However, since the existing limit levels are based on open interest levels from 2009 (except for CBOT Oats (O), CBOT Soybeans (S), and ICE Cotton No. 2 (CT), for which existing levels are based on the respective open interest from 1999), the Commission is proposing to revise the levels based on the periods from July 2017–June 2018 and July 2018–June 2019 to reflect the general increases in open interest and trading volume that have occurred over time in the nine legacy agricultural contracts (other than CBOT Oats (O), MGEX HRS Wheat (MWE), and CBOT KC HRW Wheat (KW)).[569] Since the proposed increase for most of the federal non-spot position limits is predicated on the increase in open interest and trading volume, as reflected in the revised data reviewed by the Commission, the Commission preliminarily believes that its proposal may enhance, or at least should maintain, general liquidity, which the Commission preliminarily believes may benefit those with bona fide hedging positions, and commercial end users in general. On the other hand, the Commission understands that many market participants, especially commercial end users, generally believe that the existing non-spot month levels for the nine legacy agricultural commodities function well, including promoting liquidity and facilitating bona fide hedging in the respective markets. As a result, the Commission's proposal may increase the risk of excessive speculation without achieving any concomitant benefits of increased liquidity for bona fide hedgers compared to the status quo.

The Commission also preliminarily recognizes that there could be potential costs to keeping the existing 10, 2.5 percent formula (even if revised to reflect current open interest levels) compared to alternative formulae that would result in even higher federal position limit levels. First, while the 10, 2.5 percent formula may have reflected ''normal'' observed market activity through 1999 when the Commission adopted it, it no longer reflects current open interest figures. When adopting the 10, 2.5 percent formula in 1999, the Commission's experience in these markets reflected aggregate futures and options open interest well below 500,000 contracts, which no longer reflects market reality.[570] As the nine legacy agricultural contracts (with the exception of CBOT Oats (O)) all have open interest well above 25,000

[565] For example, relatively lower federal limits may adversely affect potential hedgers by reducing liquidity. In the case of reduced liquidity, a potential hedger may face unfavorable spreads and prices, in which case the hedger must choose either to delay implementing its hedging strategy and hope for more favorable spreads in the near future or to choose immediate execution (to the extent possible) at a less favorable price.

[566] ''Choppy'' prices often refers to illiquidity in a market where transacted prices bounce between the bid and the ask prices. Market efficiency may be harmed in the sense that transacted prices might need to be adjusted for the bid-ask bounce to determine the fundamental value of the underlying contract.

[567] For the spot month, all the legacy agricultural contracts other than CBOT Oats (O) would have higher federal levels. For the non-spot months, all the legacy agricultural contracts other than CBOT Oats (O), MGEX HRS Wheat (MWE), and CBOT KC HRW Wheat (KW), would have higher federal levels.

[568] While the Commission proposes to generally either increase or maintain the federal position limits for both the spot-months and non-spot months compared to existing federal limits, where applicable, and exchange limits, the proposed federal level for COMEX Copper (HG) would be below the existing exchange-set level. Accordingly, market participants may have to change their trading behavior with respect to COMEX Copper (HG), which could impose compliance and transaction costs on these traders, to the extent their existing trading would violate the proposed lower federal limit levels.

[569] For most of the legacy agricultural commodities, this would result in a higher non-spot month limit. However, the Commission is not proposing to change the non-spot month limits for either CBOT Oats (O) or MGEX HRS Wheat (MWE) based on the revised open interest since this would result in a reduction of non-spot month limits from 2,000 to 700 contracts for CBOT Oats (O) and 12,000 to 5,700 contracts for MGEX HRS Wheat (MWE). Similarly, the Commission also proposed to maintain the current non-spot month limit for CBOT KC HRW Wheat (KW). *See supra* Section II.B.2.e. —Methodology for Setting Proposed Non-Spot Month Limit Levels for further discussion.

[570] *See* 64 FR at 24038, 24039 (May 5, 1999). As discussed in the preamble, the data show that by the 2015–2018 period, five of the nine legacy agricultural contracts had maximum open interest greater than 500,000 contracts. The contracts for CBOT Corn (C), CBOT Soybeans (S), and CBOT KC HRW Wheat (KW) saw increased maximum open interest by a factor of four to five times the maximum open interest during the years leading up to the Commission's adoption of the 10, 2.5 percent formula in 1999. Similarly, the contracts for CBOT Soybean Meal (SM), CBOT Soybean Oil (SO), CBOT Wheat (W), and MGEX HRS Wheat (MWE) saw increased maximum open interest by a factor of three to four times. *See supra* Section II.B.2.e. —Methodology for Setting Proposed Non-Spot Month Limit Levels for further discussion.

contracts, and in some cases above 500,000 contracts, the existing formula may act as a negative constraint on liquidity formation relative to the higher proposed formula. Further, if open interest continues to increase over time, the Commission anticipates that the existing 10, 2.5 percent formula could impose even greater marginal costs on bona fide hedgers by potentially constraining liquidity formation (*i.e.,* as the open interest of a commodity contract increase, a greater relative proportion of the commodity's open interest is subject to the 2.5 percent limit level rather than the initial 10 percent limit). In turn, this may increase costs to commercial firms, which may be passed to the public in the form of higher prices.

Further, to the extent there may be certain liquidity constrains, the Commission has determined that this potential concern could be mitigated, at least in part, by the Commission's proposed change to increase the marginal threshold level from 25,000 contracts to 50,000 contracts, which the Commission preliminarily believes should provide a conservative increase in the non-spot month limits for most contracts to better reflect the general increase observed in open interest across futures markets. The Commission acknowledges that the marginal threshold level could be increased above 50,000 contracts, but notes that each increase of 25,000 contracts in the marginal threshold level would only increase the permitted non-spot month level by 1,875 contracts (*i.e.,* (10% of 25,000 contracts)—(2.5% of 25,000 contracts) = 1,875 contracts). The Commission has observed based on current data that this proposed change could benefit several market participants per legacy agricultural commodity who otherwise would bump up against the all-months and/or single month limits with based on the status quo threshold of 25,000 contracts. As a result, the Commission preliminarily has determined that changing the marginal threshold level could result in marginal benefits and costs for many of the legacy agricultural commodities, but the Commission acknowledges the proposed change is relatively minor compared to revising the existing 10, 2.5 percent formula based on updated open interest data.

Second, the Commission preliminarily recognizes that an alternative formula that allows for higher non-spot limits, compared to the existing 10, 2.5 percent formula, could benefit liquidity and market efficiency by creating a framework that is more conducive to the larger liquidity providers that have entered the market over time.[571] Compared to when the Commission first adopted the 10, 2.5 percent formula, today there exist relatively more large non-commercial traders, such as banks, managed money traders, and swap dealers, which generally hold long positions and act as aggregators or market makers that provide liquidity to short positions (*e.g.,* commercial hedgers).[572] These dealers also function in the swaps market and use the futures market to hedge their exposures. Accordingly, to the extent that larger non-commercial market makers and liquidity providers have entered the market—particularly to the extent they are able to take offsetting positions to commercial short interests—a hypothetical alternative formula that would permit higher non-spot month limits might provide greater market liquidity, and possibly increased market efficiency, by allowing for greater market-making activities.[573]

However, the Commission believes that any purported benefits related to a hypothetical alternative formula that would allow for higher non-spot limits would be minimal at best. Specifically, bona fide hedgers and end users generally have not requested a revised formula to allow for significantly higher non-spot limits. Similarly, liquidity providers would still be able to maintain, and possibly increase, market making activities under the Commission's proposal since the non-spot month limits will generally still increase under the existing 10, 2.5 percent formula to reflect the increase in open interest. Further, to the extent that the Commission's proposal to eliminate the risk management exemption could theoretically force liquidity providers to reduce their trading activities, the Commission preliminarily believes that certain liquidity-providing activity of the existing risk management exemption holders may still be permitted under the Commission's proposal, either as a result of the proposed swap pass-through provision or because of the general increase in limits based on the revised open interest levels.[574] The Commission also preliminarily recognizes an additional benefit to market integrity of the current proposal compared to a hypothetical alternative formula: While the Commission believes that the proposed pass-through swap provision is narrowly-tailored to enable liquidity providers to continue providing liquidity to bona fide hedgers, in contrast, an alternative formula that would allow higher limit levels for all market participants would also permit increased excessive speculation and increase the probability of market manipulation or harm the underlying price discovery function.

Additionally, some have voiced general concern that permitting increased federal non-spot month limits in the nine legacy agricultural contracts (at any level), especially in connection with commodity indices, could disrupt price discovery and result in a lack of convergence between futures and cash prices, resulting in increased costs to end users, which ultimately could be borne by the public. The Commission has not seen data demonstrating this causal connection, but acknowledges arguments to that effect.[575]

Third, if the Commission's proposed non-spot position limits would be too

[571] *See supra* Section II.B.2.e.—Methodology for Setting Proposed Non-Spot Month Limit Levels for further discussion.

[572] *Id.*

[573] For example, the Commission is aware of several market makers that either have left particular commodity markets, or reduced their market making activities. *See, e.g.,* McFarlane, Sarah, *Major Oil Traders Don't See Banks Returning to the Commodity Markets They Left,* The Wall Street Journal (Mar. 28, 2017), *available at https://www.wsj.com/articles/major-oil-traders-dont-see-banks-returning-to-the-commodity-markets-they-left-1490715761?mg=prod/com*-wsj (describing how ''Morgan Stanley sold its oil trading and storage business . . . and J.P. Morgan unloaded its physical commodities business . . . .''); Decambre, Mark, *Goldman Said to Plan Cuts to Commodity Trading Desk: WSJ,* MarketWatch website (Feb. 5, 2019), *https://www.marketwatch.com/story/goldman-said-to-plan-cuts-to-commodity-trading-desk-wsj-2019-02-05* (describing how Goldman Sachs ''plans on making cuts within its commodity trading platform. . . .'').

[574] *See supra* Section II.A.1.c.v. (preamble discussion of pass-through swap provision); *see infra* Section IV.A.4.b.i.(2).

[575] As discussed in preamble Section II.B.2.e.—Methodology for Setting Proposed Non-Spot Month Limit Levels, one of the concerns that prompted the 2008 moratorium on granting risk management exemptions was a lack of convergence between futures and cash prices in wheat. Some at the time hypothesized that perhaps commodity index trading was a contributing factor to the lack of convergence, and, some have argued that this could harm price discovery since traders holding these positions may not react to market fundamentals, thereby exacerbating any problems with convergence. However, the Commission has determined for various reasons that risk management exemptions did not lead to the lack of convergence since the Commission understands that many commodity index traders vacate contracts before the spot month and therefore would not influence converge between the spot and futures price at expiration of the contract. Further, the risk-management exemptions granted prior to 2008 remain in effect, yet the Commission is unaware of any significant convergence problems relating to commodity index traders at this time. Additionally, there did not appear to be any convergence problems between the period when Commission staff initially granted risk management exemptions and 2007. Instead, the Commission believes that the convergence issues that started to occur around 2007 were due to the contract specification underpricing the option to store wheat for the long futures holder making the expiring futures price more valuable than spot wheat.

high for a commodity, the proposal might be less effective in deterring excessive speculation and market manipulation for that commodity's market. Conversely, if the Commission's proposed position limit levels would be too low for a commodity, the proposal could unduly constrain liquidity for bona fide hedgers or result in a diminished price discovery function for that commodity's underlying market. In either case, the Commission would view these as costs imposed on market participants. However, to the extent the Commission's proposed non-spot limit levels could be too high, the Commission preliminarily believes these costs could be mitigated because exchanges would be able to establish lower non-spot month levels.[576] Moreover, these concerns may be mitigated further to the extent that exchanges use other tools for protecting markets aside from position limits, such as establishing accountability levels below federal position limit levels or imposing liquidity and concentration surcharges to initial margin if vertically integrated with a derivatives clearing organization. Further, as discussed below, the Commission is proposing to maintain current non-spot limit levels for CBOT Oats (O), MGEX HRS Wheat (MWE), and CBOT KC HRW Wheat (KW), which otherwise would be lower based on current open interest levels for these contracts.

ii. Exceptions to the Proposed 10, 2.5 Percent Formula for CBOT Oats (O), MGEX Hard Red Spring Wheat (MWE), and CBOT Kansas City Hard Red Winter Wheat (KW)

Based on the Commission's experience since 2011 with non-spot month speculative position limit levels for MGEX HRS Wheat (''MWE'') and CBOT KC HRW Wheat (''KW'') core referenced futures contracts, the Commission is proposing to maintain the proposed limit levels for MWE and KW at the existing level of 12,000 contracts rather than reducing them to the lower level that would result from applying the proposed updated 10, 2.5 percent formula. Maintaining the status quo for the MWE and KW non-spot month limit levels would result in partial wheat parity between those two wheat contracts, but not with CBOT Wheat (''W''), which would increase to 19,300 contracts. The Commission preliminarily believes that this will benefit the MWE and KW markets since the two species of wheat are similar to one another; accordingly, decreasing the non-spot month levels for MWE could impose liquidity costs on the MWE market and harm bona fide hedgers, which could further harm liquidity or bona fide hedgers in the KW market. On the other hand, the Commission has determined not to raise the proposed limit levels for either KW or MWE to the limit level for W since the non-spot month level appears to be extraordinarily large in comparison to open interest in KW and MWE markets, and the limit level for the MWE contract is already larger than the limit level would be based on the 10, 2.5 percent formula. While W is a potential substitute for KW and MWE, it is not similar to the same extent that MWE and KW are to one another, and so the Commission has preliminarily determined that this is a reasonable compromise to maintain liquidity and price discovery while not unnecessarily inviting excessive speculation or potential market manipulation in the MWE and KW markets.

Likewise, based on the Commission's experience since 2011 with the non-spot month speculative position limit for CBOT Oats (O), the Commission is proposing the limit level at the current 2,000 contract level rather than reducing it to the lower level that would result from applying the updated 10, 2.5 formula based on current open interest. The Commission has preliminarily determined that there is no evidence of potential market manipulation or excessive speculation, and so there would be no perceived benefit to reducing the non-spot month limit for the CBOT Oats (O) contract, while reducing the level could impose liquidity costs.

d. Core Referenced Futures Contracts and Linked Referenced Contracts; Netting

The definitions of the terms ''core referenced futures contract'' and ''referenced contract'' set the scope of contracts to which federal position limits apply. As discussed below, by applying the federal position limits to ''referenced contracts,'' the Commission's proposal would expand the federal position limits beyond the proposed 25 physically-settled ''core referenced futures contracts'' listed in proposed Appendix E to part 150 by also including any cash-settled ''referenced contracts'' linked thereto as well as swaps that meet the proposed ''economically equivalent swap'' definition and thus qualify as ''referenced contracts.'' [577]

i. Referenced Contracts

The Commission preliminarily has determined that including futures contracts and options thereon that are ''directly'' or ''indirectly linked'' to the core referenced contracts, including cash-settled contracts, under the proposed definition of ''referenced contract'' would help prevent the evasion of federal position limits—especially during the spot month—through the creation of a financially equivalent contract that references the price of a core referenced futures contract. The Commission preliminarily has determined that this will benefit market integrity and potentially reduce costs to market participants that otherwise could result from market manipulation.

The Commission also recognizes that including cash-settled contracts within the proposed federal position limits framework may impose additional compliance costs on market participants and exchanges. Further, the proposed federal position limits—especially outside the spot month—may not provide the benefits discussed above with respect to market integrity and manipulation because there is no physical delivery outside the spot month and therefore there is reduced concern for corners and squeezes. However, to the extent that there is manipulation of such non-spot, cash-settled contracts, the Commission's authority to regulate and oversee futures and related options markets (other than through establishing federal position

[576] On the other hand, relying on exchanges may have potential costs because exchanges may have conflicting interests and therefore may not establish position limit (or accountability) levels lower than the proposed federal limits. For example, exchanges may not be incentivized to lower their limits due to competitive concerns with another exchange, or due to influence from a large customer. Conversely, exchange and Commission interests may be aligned to the extent that exchanges do have a countervailing interest to protect their markets from manipulation and price distortion: If market participants lose confidence in the contract as a tool for hedging, they will look for alternatives, possibly migrating to another product on a different exchange. The Commission is aware of at least one instance in which exchanges adopted spot-month position limits and/or adopted a lower exchange-set limit for particular futures contracts as a result of excessive manipulation and potential market manipulation. Similarly, exchanges remain subject to their core principle obligations to prevent manipulation, and the Commission conducts general market oversight through its own surveillance program. Accordingly, the Commission acknowledges such concerns about conflicting exchange incentives, but preliminarily believes that such concerns are mitigated for the foregoing reasons.

[577] As discussed in the preamble, the proposed position limits framework would also apply to physically-settled swaps that qualify as economically equivalent swaps. However, the Commission preliminarily believes that physically-settled economically equivalent swaps would be few in number.

limits) may also be effective in uncovering or preventing manipulation, especially in the non-spot cash markets, and may result in relatively lower compliance costs incurred by market participants. Similarly, the Commission preliminarily acknowledges that exchange oversight could provide the same benefit to market oversight and prevention of market manipulation, but with lower costs imposed on market participants—given the exchanges' deep familiarity with their own markets and their ability to tailor a response to a particular market disruption—compared to federal position limits.

The proposed ''referenced contract'' definition would also include ''economically equivalent swaps,'' and for the reasons discussed below would include a narrower set of swaps compared to the set of futures and options thereon that would be, under the proposed ''referenced contract'' definition, captured as either ''directly'' or ''indirectly linked'' to a core referenced futures contract.[578]

ii. Netting

The Commission proposes to permit market participants to net positions outside the spot month in linked physically-settled and cash-settled referenced contracts, but during the spot month market participants would not be able to net their positions in cash-settled referenced contracts against their positions in physically-settled referenced contracts. The Commission preliminarily believes that its proposal would benefit liquidity formation and bona fide hedgers outside the spot months since the proposed netting rules would facilitate the management of risk on a portfolio basis for liquidity providers and market makers. In turn, improved liquidity may benefit bona fide hedgers and other end users by facilitating their hedging strategies and reducing related transaction costs (*e.g.,* improving execution timing and reducing bid-ask spreads). On the other hand, the Commission recognizes that allowing such netting could increase transaction costs and harm market integrity by allowing for a greater possibility of market manipulation since market participants and speculators would be able to maintain larger gross positions outside the spot month. However, the Commission preliminarily has determined that such potential costs may be mitigated since concerns about corners and squeezes generally are less acute outside the spot month given there is no physical delivery involved, and because there are tools other than federal position limits for preventing and deterring other types of manipulation, including banging the close, such as exchange-set limits and accountability and surveillance both at the exchange and federal level. Moreover, prohibiting the netting of physical and cash positions during the spot month should benefit bona fide hedgers as well as price discovery of the underlying markets since market makers and speculators would not be able to maintain a relatively large position in the physical markets by netting it against its positions in the cash markets.[579] While this may increase compliance and transaction costs for speculators, it might benefit some bona fide hedgers and end users. It might also impose costs on exchanges, including increased surveillance and compliance costs and lost fees related to the trading that such market makers or speculators otherwise might engage in absent federal position limits or with the ability to their net physical and cash positions.

iii. Exclusions From the ''Referenced Contract'' Definition

First, while the proposed ''referenced contract'' definition would include linked contracts, it would explicitly exclude location basis contracts, which are contracts that reflect the difference between two delivery locations or quality grades of the same commodity.[580] The Commission preliminarily believes that excluding location basis contracts from the ''referenced contract'' definition would benefit market integrity by preventing a trader from obtaining an extraordinarily large speculative position in the commodity underlying the referenced contract. Otherwise, absent the proposed exclusion, a market participant could increase its exposure in the commodity underlying the referenced contract by using the location basis contract to net down against its position in a referenced contract, and then further increase its position in the referenced contract that would otherwise by restricted by position limits. Similarly, the Commission preliminarily believes that this would reduce hedging costs for hedgers and commercial end-users, as they would be able to more efficiently hedge the cost of commodities at their preferred location without the risk of possibly hitting a position limits ceiling or incur compliance costs related to applying for a bona fide hedge related to such position.

Excluding location basis contracts from the ''referenced contract'' definition also could impose costs for market participants that wish to trade location basis contracts since, as noted, such contracts would not be subject to federal limits and thus could be more easily subject to manipulation by a market participant that obtained an excessively large position. However, the Commission preliminarily believes such costs are mitigated because location basis contracts generally demonstrate less volatility and are less liquid than the core referenced futures contracts, meaning the Commission believes that it would be an inefficient method of manipulation (*i.e.,* too costly to implement and therefore, the Commission believes that the probability of manipulation is low). Further, excluding location basis contracts from the ''referenced contract'' definition is consistent with existing market practice since the market treats a contract on one grade or delivery location of a commodity as different from another grade or delivery location. Accordingly, to the extent that the proposal is consistent with current market practice, any benefits or costs already may have been realized.

Second, the Commission preliminarily has concluded that excluding commodity indices from the ''referenced contract'' definition would benefit market integrity by preventing speculators from using a commodity index contract to net down an outright position in a referenced contract that is a component of the commodity index contract, which would allow the speculator to take on large outright positions in the referenced contracts and therefore result in increased speculation, undermining the federal

[578] *See infra* Section IV.A.3.d.iv. (discussion of economically equivalent swaps).

[579] Otherwise, a participant could maintain large, offsetting positions in excess of limits in both the physically-settled and cash-settled contract, which might harm market integrity and price discovery and undermine the federal position limits framework. For example, absent such a restriction in the spot month, a trader could stand for over 100 percent of deliverable supply during the spot month by holding a large long position in the physical-delivery contract along with an offsetting short position in a cash-settled contract, which effectively would corner the market.

[580] The term ''location basis contract'' generally means a derivative that is cash-settled based on the difference in price, directly or indirectly, of (1) a core referenced futures contract; and (2) the same commodity underlying a particular core referenced futures contract at a different delivery location than that of the core referenced futures contract. For clarity, a core referenced futures contract may have specifications that include multiple delivery points or different grades (*i.e.,* the delivery price may be determined to be at par, a fixed discount to par, or a premium to par, depending on the grade or quality). The above discussion regarding location basis contracts is referring to delivery locations or quality grades other than those contemplated by the applicable core referenced futures contract.

position limits framework.[581] However, the Commission preliminarily believes that its proposed exclusion could impose costs on market participants that trade commodity indices since, as noted, such contracts would not be subject to federal limits and thus could be more easily subject to manipulation by a market participant that obtained an excessively large position. The Commission preliminarily believes such costs would be mitigated because the commodities comprising the index would themselves be subject to limits, and because commodity index contracts generally tend to exhibit low volatility since they are diversified across many different commodities. Further, the Commission believes that it is possible that excluding commodity indices from the definition of ''referenced contracts'' could result in some trading shifting to commodity indices contracts, which may reduce liquidity in exchange-listed core referenced futures contracts, harm pre-trade transparency and the price discovery process in the futures markets, and further depress open interest (as volumes shift to index positions, which would not count toward open interest calculations). However, the Commission believes that the probability of this occurring is low because the Commission preliminarily believes that using indices is an inefficient means of obtaining exposure to a certain commodity.

Under certain circumstances, a participant that has reached the applicable position limit could use a commodity index to purchase and weight a commodity index contract, which is otherwise excluded from the ''referenced contract'' definition and therefore from federal position limits, in a manner that would allow the participant to exceed limits of the applicable referenced contract (*i.e.,* the participant could be long outright in a referenced contract, purchase a commodity index contract that includes the applicable referenced contract as a component, and short the remaining components of the index. The Commission observes that these short positions would be subject to the proposed federal limits, so there would be a ceiling on this strategy and, in addition, it would be costly to potential manipulators because margin would have to be posted and exchanged to retain the positions. In this circumstance, excluding commodity indices from the ''referenced contract'' definition could impose costs on market integrity. However, the Commission preliminarily believes any related costs should be mitigated because proposed § 150.2 would include anti-evasion language that would deem such commodity index contract to be a referenced contract subject to federal limits. Also, analogous costs could apply to the discussion above regarding location basis contracts and such proposed anti-evasion provision would similarly cover location basis contracts.[582]

iv. Economically Equivalent Swaps

The existing federal position limits framework does not include limit levels on swaps. The Dodd-Frank Act added CEA section 4a(a)(5), which requires that when the Commission imposes position limits on futures and options on futures pursuant to CEA section 4a(a)(2), the Commission also establish limits simultaneously for ''economically equivalent'' swaps ''as appropriate.'' [583] As the statute does not define the term ''economically equivalent,'' the Commission will apply its expertise in construing such term consistent with the policy goals articulated by Congress, including in CEA sections 4a(a)(2)(C) and 4a(a)(3) as discussed below. Specifically, under the Commission's proposed definition of ''economically equivalent swap'' set forth in proposed § 150.1, a swap would generally qualify as economically equivalent with respect to a particular referenced contract so long as the swap shares ''identical material'' contract specifications, terms, and conditions with the referenced contract, disregarding any differences with respect to lot size or notional amount, delivery dates diverging by less than one calendar day (other than for natural gas referenced contracts),[584] or post-trade risk-management arrangements.[585] As discussed further below, the Commission explains that the definition of ''economically equivalent swaps'' is relatively narrow, especially compared to the definition of ''referenced contract'' as applied to cash-settled look-alike contracts.

The Commission preliminarily believes that the proposed definition of ''economically equivalent swaps'' would benefit (1) market integrity by protecting against excessive speculation and potential manipulation and (2) market liquidity by not favoring OTC or foreign markets over domestic markets. However, as discussed below, exchanges would be subject to delayed compliance with respect to the proposed § 150.5 requirements regarding exchange-set speculative position limits on swaps until such time that exchanges have access to sufficient data to monitor for limits on swaps across exchanges; as a result, exchange-set limits would not need to include, nor would exchanges be required to oversee, compliance with exchange-set position limits on swaps until such time.

(1) Benefits and Costs Related to Market Integrity

The Commission preliminarily believes that the proposed definition will benefit market integrity in two ways. First, the proposed definition would protect against excessive speculation and potential market manipulation by limiting the ability of speculators to obtain excessive positions through netting. For example, a more inclusive ''economically equivalent'' definition that would encompass additional swaps (*e.g.,* swaps that may differ in their ''material'' terms or physical swaps with delivery dates that

[581] Further, the Commission believes that prohibiting the netting of a commodity index position with a referenced contract is required by its interpretation of the Dodd-Frank Act's amendments to the CEA's definition of ''bona fide hedging transaction or position.'' The Commission interprets the amended CEA definition to eliminate the Commission's ability to recognize risk management positions as bona fide hedges or transactions. *See infra* Section IV.A.4.—Bona Fide Hedging and Spread and Other Exemptions from Federal Position Limits (proposed §§ 150.1 and 150.3) for further discussion. In this regard, the Commission has observed that it is common for swap dealers to enter into commodity index contracts with participants for which the contract would not qualify as a bona fide hedging position (*e.g.,* with a pension fund). Failing to exclude commodity index contracts from the ''referenced contract'' definition could enable a swap dealer to use positions in commodity index contracts as a risk management hedge by netting down its offsetting outright futures positions in the components of the index. Permitting this type of risk management hedge would subvert the statutory pass-through swap language in CEA section 4a(c)(2)(B), which the Commission interprets as prohibiting the recognition of positions entered into for risk management purposes as bona fide hedges unless the swap dealer is entering into positions opposite a counterparty for which the swap position is a bona fide hedge.

[582] Similarly, the proposed anti-evasion provision would also provide that a spread exemption would no longer apply.

[583] CEA section 4a(a)(5); 7 U.S.C. 6a(a)(5). In addition, CEA section 4a(a)(4) separately authorizes, but does not require, the Commission to impose federal limits on swaps that meet certain statutory criteria qualifying them as ''significant price discovery function'' swaps. 7 U.S.C. 6a(a)(4). The Commission reiterates, for the avoidance of doubt, that the definitions of ''economically equivalent'' in CEA section 4a(a)(5) and ''significant price discovery function'' in CEA section 4a(a)(4) are separate concepts and that contracts can be economically equivalent without serving a significant price discovery function.

[584] As discussed below, the proposed definition of ''economically equivalent swaps'' with respect to natural gas referenced contracts would contain the same terms, except that it would include delivery dates diverging by less than two calendar days.

[585] *See supra* Section II.A.4. (for further discussion regarding the Commission's proposed definition of ''economically equivalent swap'').

diverge by one day or more) could make it easier for market participants to inappropriately net down against their referenced contracts by allowing market participants to structure swaps that do not necessarily offer identical risk or economic exposure or sensitivity. In such a case, a market participant could enter into an OTC swap with a maturity that differs by days or even weeks in order to net down this position against its position in a referenced contract, enabling it to hold an even greater position in the referenced contract.

Similarly, requiring ''economically equivalent swaps'' to share all material terms with their corresponding referenced contracts benefits market integrity by preventing market participants from escaping the position limits framework merely by altering non-material terms, such as holiday conventions. On the other hand, the Commission recognizes that such a narrow definition could impose costs on the marketplace by possibly permitting excessive speculation since market participants would not be subject to federal position limits if they were to enter into swaps that may have different material terms (*e.g.,* penultimate swaps) [586] but may nonetheless be sufficiently correlated to their corresponding referenced contract. In this case, it is possible that there may be potential for excessive speculation, market manipulation such as squeezes and corners, insufficient market liquidity for bona fide hedgers, or disruption to the price discovery function. Nonetheless, to the extent that swaps currently are not subject to federal position limit levels, such potential costs would remain unchanged compared to the status quo.

Second, the relatively narrow proposed definition benefits market integrity, and reduces associated compliance and implementation costs, by permitting exchanges, market participants, and the Commission to focus resources on those swaps that pose the greatest threat for facilitating corners and squeezes—that is, those swaps with substantially identical delivery dates and material economic terms to futures and options on futures subject to federal position limits. While swaps that have different material terms than their corresponding referenced contracts, including different delivery dates, may potentially be used for engaging in market manipulation, the proposed definition would benefit market integrity by allowing exchanges and the Commission to focus on the most sensitive period of the spot month, including with respect to the Commission's and exchanges' various surveillance and enforcement functions. To the extent market participants would be able to use swaps that would not be covered by the proposed definition to effect market manipulation, such potential costs would not differ from the status quo since no swaps are currently covered by federal position limits. The Commission however acknowledges that its narrow definition may increase this cost, as fewer swaps will be covered under the limits.

Further, the proposal to delay compliance with respect to exchange-set limits on swaps will benefit exchanges by facilitating exchanges' ability to establish surveillance and compliance systems. As noted above, exchanges currently lack sufficient data regarding individual market participants' open swap positions, which means that requiring exchanges to establish oversight over participants' positions currently could impose substantial costs and also may be impractical to achieve. As a result, the Commission has preliminarily determined that allowing exchanges delayed compliance with respect to swaps would reduce unnecessary costs. Nonetheless, the Commission's preliminary determination to permit exchanges to delay implementing federal position limits on swaps could incentivize market participants to leave the futures markets and instead transact in economically-equivalent swaps, which could reduce liquidity in the futures and related options markets, although the Commission recognizes that this concern should be mitigated by the reality that the Commission would still oversee and enforce federal position limits on economically equivalent swaps.

Additionally, while futures and related options are subject to clearing and exchange oversight, economically equivalent swaps may be transacted bilaterally off-exchange (*i.e.,* OTC swaps). As a result, it is relatively easy to create customized OTC swaps that may be highly correlated to a referenced contract, which would allow the market participant to create an exposure in the underlying commodity similar to the referenced contract's exposure. Due to the relatively narrow proposed ''economically equivalent swap'' definition, the Commission preliminarily believes that it would not be difficult for market participants to avoid federal position limits by entering into such OTC swaps.[587] While such swaps may not be perfectly correlated to their corresponding referenced contracts, market participants may find this risk acceptable in order to avoid federal position limits. An increase in OTC swaps at the expense of futures and options contracts may impose costs on market integrity due to lack of exchange oversight. If liquidity were to move from futures exchanges to the OTC swaps markets, non-dealer commercial entities may face increased transaction costs and widening spreads, as swap dealers gain market power in the OTC market relative to centralized exchange trading. The Commission is unable to quantify the costs of these potential harms. However, while the Commission acknowledges these potential costs, such costs to those contracts that already have limits on them already may have been realized in the marketplace because swaps are not subject to federal position limits under the status quo.

Lastly, under this proposal, market participants would be able to determine whether a particular swap satisfies the definition of ''economically equivalent swap,'' as long as market participants make a reasonable, good faith effort in reaching their determination and are able to provide sufficient evidence, if requested, to support a reasonable, good faith effort. The Commission preliminarily anticipates that this flexibility will benefit market integrity by providing a greater level of certainty to market participants in contrast to the alternative in which market participants would be required to first submit swaps to the Commission staff and wait for feedback or approval. On the other hand, the Commission also recognizes that not having the Commission explicitly opine on whether a swap would qualify as economically equivalent could cause market participants to avoid entering into such swaps. In turn, this could lead to less efficient hedging strategies if the market participant is forced to turn to the futures markets (*e.g.,* a market participant may choose to transact in the OTC swaps markets for various reasons, including liquidity, margin requirements, or simply better familiarity with ISDA and swap processes over exchange-traded futures). However, as noted below, the Commission reserves the right to declare

[586] Or, in the case of natural gas referenced contracts, which would potentially include penultimate swaps as economically equivalent swaps, a swap with a maturity of less than one day away from the penultimate swap. *See infra* Section IV.A.3.d.iv.(3) (discussion of natural gas swaps).

[587] In contrast, since futures and options on futures contracts are created by exchanges and submitted to the Commission for either self-certification or approval under part 40 of the Commission's regulations, a market participant would not be able to customize an exchange-traded futures or options on futures contract.

whether a swap or class of swaps is or is not economically equivalent, and a market participant could petition, or request informally, that the Commission make such a determination, although the Commission acknowledges that there could be costs associated with this, including delayed timing and monetary costs.

Further, the Commission recognizes that requiring market participants to conduct reasonable due diligence and maintain related records also could impose new compliance costs. Additionally, the Commission recognizes that certain market participants could assert that an OTC swap is (or is not) ''economically equivalent'' depending upon whether such determination benefits the market participant. In such a case, market participants could theoretically subvert the intent of the federal position limits framework, although the Commission preliminarily believes that such potential costs would be mitigated due to its surveillance functions and the proposal to reserve the authority to declare that a particular swap or class of swaps either would or would not qualify as economically equivalent.

(2) The Proposed Definition Could Increase Benefits or Costs Related to Market Liquidity

First, the proposed definition could benefit market liquidity by being, in general, less disruptive to the swaps markets, which in turn may reduce the potential for disruption for the price discovery function compared to an alternative in which the Commission would proposed a broader definition. For example, if the Commission were to adopt an alternative to its proposed ''economically equivalent swap'' definition that encompassed a broader range of swaps by including, for example, delivery dates that diverge by one or more calendar days—perhaps by several days or weeks—a speculator with a large portfolio of swaps could more easily bump up against the applicable position limits and therefore would have a strong incentive either to reduce its swaps activity or move its swaps activity to foreign jurisdictions. If there were many similarly situated speculators, the market for such swaps could become less liquid, which in turn could harm liquidity for bona fide hedgers as large liquidity providers could move to other markets.

Second, the proposed definition could benefit market liquidity by being sufficiently narrow to reduce incentives for liquidity providers to move to foreign jurisdictions, such as the European Union (''EU'').[588] Additionally, the Commission preliminarily believes that proposing a definition similar to that used by the EU will benefit international comity.[589] Further, since market participants trading in both U.S. and EU markets would find the proposed definition to be familiar, it may help reduce compliance costs for those market participants that already have systems and personnel in place to identify and monitor such swaps.

(3) The Proposed Definition Could Create Benefits or Costs Related to Market Liquidity for the Natural Gas Market

As discussed in greater detail in the preamble, the Commission recognizes that the market dynamics in natural gas are unique in several respects, including the fact that unlike with respect to other core referenced futures contracts, for natural gas relatively liquid spot-month and penultimate cash-settled futures exist. As a result, the Commission believes that creating an exception to the proposed ''economically equivalent swap'' definition for natural gas would benefit market liquidity by not unnecessarily favoring existing penultimate contracts over spot contracts. The Commission is especially sensitive to potential market manipulation in the natural gas markets since market participants—to a significantly greater extent compared to the other core referenced futures contracts that are included in the proposal—regularly trade in both the physically-settled core referenced futures contract and the cash-settled look-alike referenced contracts. Accordingly, the Commission preliminarily has concluded that a slightly broader definition of ''economically equivalent swap'' would uniquely benefit the natural gas markets by helping to deter and prevent manipulation of a physically-settled contract to benefit a related cash-settled contract.

e. Pre-Existing Positions

Proposed § 150.2(g) would impose federal limits on ''pre-existing positions''—other than pre-enactment swaps and transition period swaps—during the spot month, while non-spot month pre-existing positions would not be subject to position limits as long as (i) the position was acquired in good faith consistent with the ''pre-existing position'' definition in proposed § 150.1;[590] and (ii) such position would be attributed to the person if the position increases after the limit's effective date.

The Commission believes that this approach would benefit market integrity since pre-existing positions (other than pre-enactment and transition period swaps) that exceed spot-month limits could result in market or price disruptions as positions are rolled into the spot month.[591] However, the Commission acknowledges that the proposed ''good-faith'' standard also could impose certain costs on market integrity since an inherently subjective ''good faith'' standard could result in disparate treatment of traders by a

[588] In this regard, the proposed definition is similar in certain ways to the EU definition for OTC contracts that are ''economically equivalent'' to commodity derivatives traded on an EU trading venue. The applicable European regulations define an OTC derivative to be ''economically equivalent'' when it has ''identical contractual specifications, terms and conditions, excluding different lot size specifications, delivery dates diverging by less than one calendar day and different post trade risk management arrangements.'' While the Commission's proposed definition is similar, the Commission's proposed definition requires ''identical *material*'' terms rather than simply ''identical'' terms. Further, the Commission's proposed definition excludes different ''lot size specifications or *notional amounts*'' rather than referencing only ''lot size'' since swaps terminology usually refers to ''notional amounts'' rather than to ''lot sizes.'' *See* EU Commission Delegated Regulation (EU) 2017/591, 2017 O.J. (L 87).

[589] Both the Commission's definition and the applicable EU regulation are intended to prevent harmful netting. *See* European Securities and Markets Authority, *Draft Regulatory Technical Standards on Methodology for Calculation and the Application of Position Limits for Commodity Derivatives Traded on Trading Venues and Economically Equivalent OTC Contracts,* ESMA/2016/668 at 10 (May 2, 2016), *available at https://www.esma.europa.eu/sites/default/files/library/2016-668_opinion_on_draft_rts_21.pdf* (''[D]rafting the [economically equivalent OTC swap] definition in too wide a fashion carries an even higher risk of enabling circumvention of position limits by creating an ability to net off positions taken in on-venue contracts against only roughly similar OTC positions.'')

The applicable EU regulator, the European Securities and Markets Authority (''ESMA''), recently released a ''consultation paper'' discussing the status of the existing EU position limits regime and specific comments received from market participants. According to ESMA, no commenter, with one exception, supported changing the definition of an economically equivalent swap (referred to as an ''economically equivalent OTC contract'' or ''EEOTC''). ESMA further noted that for some respondents, ''the mere fact that very few EEOTC contracts have been identified is no evidence that the regime is overly restrictive.'' *See* European Securities and Markets Authority, *Consultation Paper MiFID Review Report on Position Limits and Position Management Draft Technical Advice on Weekly Position Reports,* ESMA70–156–1484 at 46, Question 15 (Nov. 5, 2019), *available at https://www.esma.europa.eu/document/consultation-paper-position-limits.*

[590] Proposed § 150.1 would define ''pre-existing position'' to mean ''any position in a commodity derivative contract acquired in good faith prior to the effective date'' of any applicable position limit.

[591] The Commission is particularly concerned about protecting the spot month in physical-delivery futures from corners and squeezes.

particular exchange or across exchanges seeking a competitive advantage with one another and could impose trading costs on those traders given less advantageous treatment. For example, the Commission acknowledges that since it has given discretion to an exchange in interpreting this ''good faith'' standard, an exchange may be more liberal with concluding that a large trader or influential exchange member obtained a position in ''good faith.'' As a result, the proposal could potentially harm market integrity and/or increase transaction costs if an exchange were to benefit certain market participants compared to other market participants that receive relatively less advantageous treatment. However, the Commission believes the risk of any unscrupulous trader or exchange is mitigated since exchanges continue to be subject to Commission oversight and to DCM Core Principles 4 (''prevention of market disruption'') and 12 (''protection of markets and market participants''), among others, and since proposed § 150.2(g)(2) also would require that exchanges must attribute the position to the trader if its position increases after the position limit's effective date.

4. Bona Fide Hedging and Spread and Other Exemptions From Federal Position Limits (Proposed §§ 150.1 and 150.3)

a. Background

The proposal provides for several exemptions that, subject to certain conditions, would permit a trader to exceed the applicable federal position limit set forth under proposed § 150.2. Specifically, proposed § 150.3 would generally maintain, with certain modifications discussed below, the two existing federal exemptions for bona fide hedging positions and spread positions, and would include new federal exemptions for certain conditional spot month positions in natural gas, certain financial distress positions, and pre-enactment and transition period swaps. Proposed § 150.1 would set forth the proposed definitions for ''bona fide hedging transactions or positions'' and for ''spread transactions.'' [592]

b. Bona Fide Hedging Definition; Enumerated Bona Fide Hedges; and Guidance on Measuring Risk

The Commission is proposing several amendments related to bona fide hedges. First, the Commission is proposing to include a revised definition of ''bona fide hedging transactions or positions'' in § 150.1 to conform to the statutory bona fide hedge definition in CEA section 4a(c) as Congress amended it in the Dodd-Frank Act. As discussed in greater detail in the preamble, the Commission proposes to (1) revise the temporary substitute test, consistent with the Commission's understanding of the Dodd-Frank Act's amendments to section 4a of the CEA, to no longer recognize as bona fide hedges certain risk management positions; (2) revise the economically appropriate test to make explicit that the position must be economically appropriate to the reduction of ''price risk''; and (3) eliminate the incidental test and orderly trading requirement, which Dodd-Frank removed from section 4a of the CEA. The Commission preliminarily believes that these changes include non-discretionary changes that are required by Congress's amendments to section 4a of the CEA. The Commission also proposes to revise the bona fide hedge definition to conform to the CEA's statutory definition, which permits certain pass-through offsets.[593]

Second, the Commission would maintain the distinction between enumerated and non-enumerated bona fide hedges but would (1) move the currently-enumerated hedges in the existing definition of ''bona fide hedging transactions and positions'' currently found in Commission regulation § 1.3 to proposed Appendix A in part 150 that will serve as examples of positions that would comply with the proposed bona fide hedging definition; and (2) propose to make all existing enumerated bona fide hedges as well as additional enumerated hedges to be self-effectuating for federal position limit purposes, without the need for prior Commission approval. In contrast, the existing enumerated anticipatory bona fide hedges are not currently self-effectuating and require market participants to apply to the Commission for recognition.

Third, the Commission is proposing guidance with respect to whether an entity may measure risk on a net or gross basis for purposes of determining its bona fide hedge positions.

The Commission expects these proposed modifications will provide market participants with the ability to hedge, and exchanges with the ability to recognize hedges, in a manner that is consistent with common commercial hedging practices, reducing compliance costs and increase the benefits associated with sound risk management practices.

i. Bona Fide Hedging Definition

(1) Elimination of Risk Management Exemptions; Addition of the Proposed Pass-Through Swap Exemption

First, the Commission has preliminarily determined that eliminating the risk-management exemption in physical commodity derivatives subject to federal speculative position limits, unless the position satisfies the pass-through/swap offset requirements in section 4a(c)(2)(B) of the CEA discussed further below, is consistent with Congressional and statutory intent, as evidenced by the Dodd-Frank Act's amendments to the bona fide hedging definition in CEA section 4a(c)(2).[594] Accordingly, once the proposed federal limit levels go into effect, market participants with positions that do not otherwise satisfy

[592] This discussion sometimes refers to the ''bona fide hedging transactions or positions'' definition as ''bona fide hedges,'' ''bona fide hedging,'' or ''bona fide hedge positions.'' For the purpose of this discussion, the terms have the same meaning.

[593] As discussed in Section II.A.—§ 150.1—Definitions of the preamble, the existing definition of ''bona fide hedging transactions and positions'' currently appears in § 1.3 of the Commission's regulations; the proposal would move the revised definition to proposed § 150.1.

[594] *See supra* Section II.A.1.c.ii.(1). The existing bona fide hedging definition in § 1.3 requires that a position must ''normally'' represent a substitute for transactions or positions made at a later time in a physical marketing channel (*i.e.,* the ''temporary substitute test''). The Dodd-Frank Act amended the temporary substitute language that previously appeared in the statute by removing the word ''normally'' from the phrase normally represents a substitute for transactions made or to be made or positions taken or to be taken at a later time in a physical marketing channel.'' 7 U.S.C. 6a(c)(2)(A). The Commission preliminarily interprets this change as reflecting Congressional direction that a bona fide hedging position in physical commodities must *always* (and not just ''normally'') be in connection with the production, sale, or use of a physical cash-market commodity.

Previously, the Commission stated that, among other things, the inclusion of the word ''normally'' in connection with the pre-Dodd-Frank version of the temporary substitute language indicated that the bona fide hedging definition should not be construed to apply only to firms using futures to reduce their exposures to risks in the cash market, and that to qualify as a bona fide hedge, a transaction in the futures market did not need to be a temporary substitute for a later transaction in the cash market. *See* Clarification of Certain Aspects of the Hedging Definition, 52 FR at 27195, 27196 (Jul. 20, 1987). In other words, that 1987 interpretation took the view that a futures position could still qualify as a bona fide hedging position even if it was not in connection with the production, sale, or use of a physical commodity. Accordingly, based on the Commission's preliminary interpretation of the revised statutory definition of bona fide hedging in CEA section 4a(c)(2), risk-management hedges would not be recognized under the Commission's proposed bona fide hedging definition.

the proposed bona fide hedging definition or qualify for an exemption would no longer be able to rely on recognition of such risk-reducing techniques as bona fide hedges. Absent other factors, market participants who have, or have requested, a risk management exemption under the existing definition may resort to less effective hedging strategies resulting in, for example, increased costs for liquidity providers due to increased basis risk and/or decreased market efficiency due to higher transaction (*i.e.,* hedging) costs. Moreover, absent other factors, by excluding risk management positions from the bona fide hedge definition (other than those positions that would meet the pass-through/swap offset requirement in the proposed bona fide hedge definition, discussed further below), the proposed definition may affect the overall level of liquidity in the market since dealers who approach or exceed the federal position limit may decide to pull back on providing liquidity, including to bona fide hedgers.

On the other hand, the Commission believes that these potential costs could be mitigated for several reasons. First, the proposed bona fide hedging definition, consistent with the Dodd-Frank Act's changes to CEA section 4a(c)(2), would permit the recognition as bona fide hedges of futures and options on futures positions that offset pass-through swaps entered into by dealers and other liquidity providers (the ''pass-through swap counterparty'') [595] opposite bona fide hedging swap counterparties (the ''bona fide hedge counterparty''), as long as: (1) The pass-through swap counterparty can demonstrate, upon request from the Commission and/or from an exchange, that the pass-through swap qualifies as a bona fide hedge for the bona fide hedge counterparty; and (2) the pass-through swap counterparty enters into a futures or option on a futures position or a swap position, in each case in the same physical commodity as the pass-through swap to offset and reduce the price risk attendant to the pass-through swap.[596] Accordingly, a subset of risk management exemption holders could continue to benefit from an exemption, and potential counterparties could benefit from the liquidity they provide, as long as the position being offset qualifies as a bona fide hedge for the counterparty.

The Commission preliminarily has determined that any resulting costs or benefits related to the proposed pass-through swap exemption are a result of Congress's amendments to CEA section 4a(c) rather than the Commission's discretionary action. On the other hand, the Commission's discretionary action to require the pass-through swap counterparty to create and maintain records to demonstrate the bona fides of the pass-through swap would cause the swap counterparty to incur marginal recordkeeping costs.[597]

The proposed pass-through swap provision, consistent with the Dodd-Frank Act's changes to CEA section 4a(c)(2), also would address a situation where a participant who qualifies as a bona fide hedging swap counterparty (*i.e.,* a participant with a position in a previously-entered into swap that qualified, at the time the swap was entered into, as a bona fide hedging position under the proposed definition) seeks, at some later time, to offset that swap position.[598] Such step might be taken, for example, to respond to a change in the participant's risk exposure in the underlying commodity. As a result, a participant could use futures or options on futures in excess of federal position limits to offset the price risk of a previously-entered into swap, which would allow the participant to exceed federal limits using either new futures or options on futures or swap positions that reduce the risk of the original swap.

The Commission expects the pass-through swap provision to facilitate dynamic hedging by market participants. The Commission recognizes that a significant number of market participants use dynamic hedging to more effectively manage their portfolio risks. Therefore, this provision may increase operational efficiency. In addition, by permitting dynamic hedging, a greater number of dealers should be better able to provide liquidity to the market, as these dealers will be able to more effectively manage their risks by entering into pass-through swaps with bona fide hedgers as counterparties. Moreover, market participants are not precluded from using swaps that are not ''economically equivalent swap'' for such risk management purposes since swaps that are not deemed to be ''economically equivalent'' to a referenced contract would not be subject to the Commission's proposed position limits framework.

The Commission preliminarily observes that market participants may not need to rely on the proposed pass-through swap provision to the extent such parties employ swaps that qualify as ''economically equivalent swaps,'' since such market participants may be able to net such swaps against the corresponding futures or options on futures. As a result, the Commission preliminarily anticipates that the proposed pass-through swap provision would benefit those bona fide hedgers and pass-through swap counterparties that use swaps that would not qualify as economically equivalent under the Commission's proposal. To the extent market participants use swaps that would qualify as economically equivalent swaps, or could shift their trading strategies to use such swaps without incurring additional costs, the Commission preliminarily believes that the elimination of the risk management position would not necessarily result in market participants incurring costs or limiting their trading since they would be able to net the positions in economically equivalent swaps with their futures and options on futures positions, or with other economically equivalent swaps.

Second, for the nine legacy agricultural contracts, the proposal would generally set federal non-spot month limit levels higher than existing non-spot limits, which may enable additional dealer activity described above.[599] The remaining 16 core referenced futures contracts would be subject to existing exchange-set limits or accountability outside of the spot month, which does not represent a change from the status quo under existing or proposed § 150.5. The proposed higher levels with respect to the nine legacy agricultural contracts and the exchanges' flexible accountability regimes with respect to the proposes new 16 core referenced futures contract should mitigate at least some potential costs related to the

[595] Such pass-through swap counterparties are typically swap dealers providing liquidity to bona fide hedgers.

[596] *See* paragraph (2)(i) of the proposed bona fide hedging definition. Of course, if the pass-through swap qualifies as an ''economically appropriate swap,'' then the pass-through swap counterparty would not need to rely on the proposed pass-through swap provision since it may be able to offset its long (or short) position in the economically equivalent swap with the corresponding short (or long) position in the futures or option on futures position or on the opposite side of another economically equivalent swap.

[597] To the extent that the pass-through swap counterparty is a swap dealer or major swap participant, they already may be subject to similar recordkeeping requirements under § 1.31 and part 23 of the Commission's regulations. As a result, such costs may already have been realized.

[598] *See* paragraph (2)(ii) of the proposed bona fide hedging transactions or positions definition.

[599] Proposed § 150.2 generally would increase position limits for non-spot months for contracts that currently are subject to the federal position limits framework other than for CBOT Oats (O), CBOT KC HRW Wheat (KW), and MGEX HRS Wheat (MWE), for which the Commission would maintain existing levels.

prohibition on recognizing risk management positions as bona fide hedges.

Third, the proposal may improve market competitiveness and reduce transaction costs. As noted above, existing holders of the risk management exemption, and the levels permitted thereunder, are currently confidential, and the Commission is no longer granting new risk management exemptions to potential new liquidity providers. Accordingly, by eliminating the risk management exemption, the Commission's proposal would benefit the public and strengthen market integrity by improving market transparency since certain dealers would no longer be able to maintain the grandfathered risk management exemption while other dealer lack this ability under the status quo. While the Commission believes that the risk management exemption may allow dealers to more effectively provide market making activities, which benefits market liquidity and ultimately leads to lower prices for end-users, as noted above, the potential costs resulting from removing the risk management exemption may be mitigated by the revised position limit levels that reflect current EDS for spot month levels and current open interest and trading volume for non-spot month levels. Therefore, the Commission believes that existing risk management exemption holders should be able to continue providing liquidity to bona fide hedgers, but acknowledges that some may not to the same degree as under the exemption; however, the Commission believes that any potential harm to liquidity should be mitigated.

Further, the proposed spot month and non-spot month levels, which generally will be higher than the status quo, together with the elimination of the risk management exemptions that benefit only certain dealers, might enable new liquidity providers to enter the markets on a level playing field with the existing risk management exemption holders. With the possibility of additional liquidity providers, the proposed framework may strengthen market integrity by decreasing concentration risk potentially posed by too few market makers. However, the benefits to market liquidity the Commission describes above may be muted since this analysis is predicated, in part, on the understanding that dealers are the predominant large traders. Data in the Commission's Supplementary COT and its underlying data indicate that risk-management exemption holders are not the only large participants in these markets—large commercial firms also hold large positions in such commodities.

(2) Limiting ''Risk'' to ''Price'' Risk; Elimination of the Incidental Test and Orderly Trading Requirement

As discussed in the preamble, the proposed bona fide hedging definition's ''economically appropriate test'' would clarify that only hedges that offset *price* risks could be recognized as bona fide hedging transactions or positions. The Commission does not believe that this clarification would impose any new costs or benefits, as it is consistent with both the existing bona fide hedging definition [600] as well as the Commission's longstanding policy.[601] Nonetheless, the Commission realizes that hedging occurs for more types of risks than price (*e.g.,* volumetric hedging). Therefore, the Commission recognizes that by expressly limiting the bona fide hedge exemption to hedging only price risk, certain market participants may not be able to receive a bona fide hedging recognition, and for certain dealers, this may limit their ability to provide liquidity to the market because without being able to rely on bona fide hedging status, their trading activity would cause them to otherwise exceed federal limits.

The Commission further would implement Congress's Dodd-Frank Act amendments that eliminated the statutory bona fide hedge definition's incidental test and orderly trading requirement by proposing to make the same changes to the Commission's regulations. As discussed in the preamble, the Commission preliminarily believes that these proposed changes do not represent a change in policy or regulatory requirement. As a result, the Commission does not identify any costs or benefits related to these proposed changes.

ii. Proposed Enumerated Bona Fide Hedges

The Commission proposes enumerated bona fide hedges in Appendix A to part 150 of the Commission's regulations to provide a list bona fide hedges that would include: (i) The existing enumerated hedges; and (ii) additional enumerated bona fide hedges. The Commission reinforces that hedging practices not otherwise listed may still be deemed, on a case-by-case basis, to comply with the proposed bona fide hedging definition (*i.e.,* non-enumerated bona fide hedges). As discussed further below, the proposed enumerated bona fide hedges in Appendix A would be ''self-effectuating'' for purposes of federal position limits levels, which are expected to reduce delays and compliance costs associated with requesting an exemption.

Additionally, as part of the Commission's proposal, the exchanges would have discretion to determine, for purposes of their own exchange-granted bona fide hedges, whether any of the proposed enumerated bona fide hedges in proposed Appendix A to part 150 of the Commission's regulations would be permitted to be maintained during the lesser of the last five days of trading or the time period for the spot month in such contract (the ''five-day rule''), and the Commission's proposal otherwise would not require any of the enumerated bona fide hedges to be subject to the five-day rule for purposes of federal position limits. Instead, the Commission expects exchanges to make their own determinations with respect to exchange-set limits as to whether it is appropriate to apply the five-day rule for a particular bona fide hedge type and commodity contract. The Commission has preliminarily determined that exchanges are well-informed with respect to their respective markets and well-positioned to make a determination with respect to imposing the five-day rule in connection with recognizing bona fide hedges for their respective commodity contracts. In general, the Commission believes that, on the one hand, limiting a trader's ability to establish a position in this manner by requiring the five-day rule could result in increased costs related to operational inefficiencies, as a trader may believe that this is the most opportune time to hedge. On the other hand, the Commission believes that price convergence may be particularly sensitive to potential market manipulation or excessive speculation during this period. Accordingly, the Commission preliminarily believes that

[600] The existing bona fide hedging definition in § 1.3 provides that no transactions or positions shall be classified as bona fide hedging unless their purpose is to offset *price* risks incidental to commercial cash or spot operations. (emphasis added). Accordingly, the proposed definition would merely move this requirement to the proposed definition's revised ''economically appropriate test'' requirement.

[601] For example, in promulgating existing § 1.3, the Commission explained that a bona fide hedging position must, among other things, ''be economically appropriate to risk reduction, such risks must arise from operation of a commercial enterprise, and the price fluctuations of the futures contracts used in the transaction must be substantially related to fluctuations of the cash market value of the assets, liabilities or services being hedged.'' Bona Fide Hedging Transactions or Positions, 42 FR at 14832, 14833 (Mar. 16, 1977). Dodd-Frank added CEA section 4a(c)(2), which copied the ''economically appropriate test'' from the Commission's definition in § 1.3. *See also* 2013 Proposal, 78 FR at 75702, 75703.

the proposal to not impose the five-day rule with respect to any of the enumerated bona fide hedges for federal purposes but instead rely on exchange's determination with respect to exchange-granted exemptions would help to better optimize these considerations. The Commission notes a potential cost for market integrity if exchanges fail to implement a five-day rule in order to encourage additional trading in order to increase profit, which could harm price convergence. However, the Commission believes this concern is mitigated since exchanges also have an economic incentive to ensure that price convergence occurs with their respective contracts since commercial end-users would be less willing to use such contracts for hedging purposes if price convergence would fail to occur in such contracts as they may generally desire to hedge cash market prices with futures contracts.

iii. Guidance for Measuring Risk on a Gross or Net Basis

The Commission proposes guidance in paragraph (a) of Appendix B to part 150 on whether positions may be hedged on either a gross or net basis. Under the proposed guidance, among other things, a trader may measure risk on a gross basis if it would be consistent with the trader's historical practice and is not intended to evade applicable limits. The key cost associated with allowing gross hedging is that it may provide opportunity for hidden speculative trading.[602]

Such risk is mitigated to a certain extent by the guidance's provisos that the trader does not switch between net hedging and gross hedging in order to evade limits and that the DCM documents justifications for allowing gross hedging and maintains any relevant records in accordance with proposed § 150.9(d).[603] However, the Commission also recognizes that there are myriad of ways in which organizations are structured and engage in commercial hedging practices, including the use of multi-line business strategies in certain industries that would be subject to federal position limits for the first time under this proposal and for which net hedging could impose significant costs or be operationally unfeasible.

c. Spread Exemptions

Under existing § 150.3, certain spread exemptions are self-effectuating. Specifically, existing § 150.3 allows for ''spread or arbitrage positions'' that are ''between single months of a futures contract and/or, on a futures-equivalent basis, options thereon, outside of the spot month, in the same crop year; provided, however, that such spread or arbitrage positions, when combined with any other net positions in the single month, do not exceed the all-months limit set forth in § 150.2.'' [604] Proposed §§ 150.1 and 150.3 would amend the existing spread position exemption for federal limits by (i) listing specific spread transactions that may be granted; and (ii) other than for the listed spread positions, which would be self-effectuating, requiring a person to apply for spread exemptions directly with the Commission pursuant to proposed § 150.3.[605] In addition, the proposed rule would permit spread exemptions outside the same crop year and/or during the spot month.[606]

In connection with the spread exemption provisions, the Commission is relaxing the prohibition for contracts during the same crop year and/or the spot month so that exchanges are able to exempt spreads outside the same crop year and/or during the spot month. There may be benefits that result from permitting these types of spread exemptions. For example, the Commission believes that permitting spread exemptions not in the same crop year or during the spot month may potentially improve price discovery as well as provide market participants with the ability to use strategies involving spread positions, which may reduce hedging costs.

As in the intermarket wheat example discussed below, the proposed spread relief not limited to the same crop year month may better link prices between two markets (*e.g.,* the price of MGEX wheat futures and the price of CBOT wheat futures). Put another way, permitting spread exemptions outside the same crop year may enable pricing in two different but related markets for substitute goods to be more highly correlated, which, in this example, benefits market participants with a price exposure to the underlying protein content in wheat generally, rather than that of a particular commodity.

However, the Commission also recognizes certain potential costs to permitting spread exemptions during the spot month, particularly to extend into the last five days of trading. This feature could raise the risk of allowing participants in the market at a time in the contract where only those interested in making or taking delivery should be present. When a contract goes into expiration, open interest and trading volume naturally decrease as traders not interested in making or taking delivery roll their positions into deferred calendar months. The presence of large spread positions so close to the expiration of a futures contract, which positions are normally tied to large liquidity providers, may actually lead to disruptions in the price discovery function of the contract by disrupting the futures/cash price convergence. This could lead to increased transaction costs and harm the hedging utility for end-users of the futures contract, which could lead to higher costs passed on to consumers. However, the Commission preliminarily believes that these concerns would be mitigated as exchanges would continue to apply their expertise in overseeing and maintaining the integrity of their markets. For example, an exchange could refuse to grant a spread exemption if the exchange believed it would harm its markets, require a participant to reduce its positions, or implement a five-day-rule for spread exemptions, as discussed above.[607]

Generally, the Commission preliminarily finds that, by allowing speculators to execute intermarket and intramarket spreads as proposed, speculators would be able to hold a greater amount of open interest in

[602] For example, using gross hedging, a market participant could potentially point to a large long cash position as justification for a bona fide hedge, even though the participant, or an entity with which the participant is required to aggregate, has an equally large short cash position that would result in the participant having no net price risk to hedge as the participant had no price risk exposure to the commodity prior to establishing such derivative position. Instead, the participant created price risk exposure to the commodity by establishing the derivative position.

[603] Under proposed § 150.3(b)(2) and (e) and proposed § 150.9(e)(5), and (g), the Commission would have access to any information related to the applicable exemption request.

[604] 17 CFR 150.3. CEA section 4a(a)(1) provides the Commission with authority to exempt from position limits transactions ''normally known to the trade'' as ''spreads'' or ''straddles'' or ''arbitrage'' or to fix limits for such transactions or positions different from limits fixed for other transactions or positions.

[605] The proposed ''spread transactions'' definition would list the most common types of spread positions, including: Calendar spreads, intercommodity spreads, quality differential spreads, processing spreads (such as energy ''crack'' or soybean ''crush'' spreads), product or by-product differential spreads, and futures-options spreads. Proposed § 150.3(b) also would permit market participants to apply to the Commission for other spread transactions.

[606] As discussed under proposed § 150.3, spread exemptions identified in the proposed ''spread transaction'' definition in proposed § 150.1 would be self-effectuating similar to the status quo and would not represent a change to the status quo baseline. The related costs and benefits, particularly with respect to requesting exemptions with respect to spreads other than those identified in the proposed ''spread transaction'' definition, are discussed under the respective sections below.

[607] *See supra* Section IV.A.4.b.ii. (discussion of the five-day rule).

underlying contract(s), and therefore, bona fide hedgers may benefit from any increase in market liquidity. Spread exemptions may also lead to better price continuity and price discovery if market participants who seek to provide liquidity (for example, through entry of resting orders for spread trades between different contracts) receive a spread exemption, and thus would not otherwise be constrained by a position limit.

For clarity, the Commission has identified the following two examples of spread positions that could benefit from the proposed spread exemption:

- Reverse crush spread in soybeans on the CBOT subject to an intermarket spread exemption. In the case where soybeans are processed into two different products, soybean meal and soybean oil, the crush spread is the difference between the combined value of the products and the value of soybeans. There are two actors in this scenario: the speculator and the soybean processor. The spread's value approximates the profit margin from actually crushing (or mashing) soybeans into meal and oil. The soybean processor may want to lock in the spread value as part of its hedging strategy, establishing a long position in soybean futures and short positions in soybean oil futures and soybean meal futures, as substitutes for the processor's expected cash market transactions (the long position hedges the purchase of the anticipated inputs for processing and the short position hedges the sale of the anticipated soybean meal and oil products). On the other side of the processor's crush spread, a speculator takes a short position in soybean futures against long positions in soybean meal futures and soybean oil futures. The soybean processor may be able to lock in a higher crush spread because of liquidity provided by such a speculator who may need to rely upon a spread exemption. In this example, the speculator is accepting basis risk represented by the crush spread, and the speculator is providing liquidity to the soybean processor. The crush spread positions may result in greater correlation between the futures prices of soybeans on the one hand and those of soybean oil and soybean meal on the other hand, which means that prices for all three products may move up or down together in a more correlated manner.
- Wheat spread subject to intermarket spread exemptions. There are two actors in this scenario: the speculator and the wheat farmer. In this example, a farmer growing hard wheat would like to reduce the price risk of her crop by shorting a MGEX wheat futures. There, however, may be no hedger, such as a mill, that is immediately available to trade at a desirable price for the farmer. There may be a speculator willing to offer liquidity to the hedger; however, the speculator may wish to reduce the risk of an outright long position in MGEX wheat futures through establishing a short position in CBOT wheat futures (soft wheat). Such a speculator, who otherwise would have been constrained by a position limit at MGEX and/or CBOT, may seek exemptions from MGEX and CBOT for an intermarket spread, that is, for a long position in MGEX wheat futures and a short position in CBOT wheat futures of the same maturity. As a result of the exchanges granting an intermarket spread exemption to such a speculator, who otherwise may be constrained by limits, the farmer might be able to transact at a higher price for hard wheat than might have existed absent the intermarket spread exemptions. Under this example, the speculator is accepting basis risk between hard wheat and soft wheat, reducing the risk of a position on one exchange by establishing a position on another exchange, and potentially providing liquidity to a hedger. Further, spread transactions may aid in price discovery regarding the relative protein content for each of the hard and soft wheat contracts.

d. Conditional Spot Month Exemption Positions in Natural Gas

Proposed § 150.3(a)(4) would provide a new federal conditional spot month limit exemption position for cash-settled natural gas contracts that would permit traders to acquire positions up to 10,000 NYMEX Henry Hub Natural Gas (NG) equivalent-size contracts (the federal spot month limit in proposed § 150.2 for NYMEX Henry Hub Natural Gas (NG) referenced contracts is otherwise 2,000 contracts in the aggregate across all one's net positions) per exchange that lists the relevant natural gas cash-settled referenced contracts, along with an additional futures-adjusted 10,000 contracts of cash-settled economically equivalent swaps, as long as such person does not also hold positions in the physically-settled natural gas referenced contract.[608] NYMEX, ICE, Nasdaq Futures, and Nodal currently have rules in place establishing a conditional spot month limit exemption equivalent to up to 5,000 contracts in NYMEX-equivalent size. By proposing to include the conditional exemption for purposes of federal limits on natural gas contracts, the Commission reduces the incentive and ability for a market participant to manipulate a large physically-settled position to benefit a linked cash-settled position.

Further, the Commission has heeded natural gas traders' concerns about disrupting market practices and harming liquidity in the cash-settled contract, which could increase the cost of hedging and possibly prevent convergence between the physical delivery futures and cash markets.[609] While a trader with a position in the physical-delivery natural gas contract may incur costs associated with liquidating that position in order to meet the conditions of the federal exemption, such costs are incurred outside of the proposal, as the trader would have to do so as a condition of the exchange-level exemption under current exchange rules.[610]

e. Financial Distress Exemption

Proposed § 150.3(a)(3) would provide an exemption for certain financial distress circumstances, including the default of a customer, affiliate, or acquisition target of the requesting entity that may require the requesting entity to take on, in short order, the positions of another entity. In codifying the Commission's historical practice, the proposed rule accommodates transfers of positions from financially distressed firms to financially secure firms. The disorderly liquidation of a position threatens price impacts that may harm the efficiency and price discovery function of markets, and the proposal would make it less likely that positions will be prematurely or needlessly liquidated. The Commission has determined that costs related to filing and recordkeeping are likely to be minimal. The Commission cannot accurately estimate how often this exemption may be invoked because emergency or distressed market situations are unpredictable and dependent on a variety of firm and market-specific factors as well as general macroeconomic indicators.[611] The Commission, nevertheless, believes that emergency or distressed market situations that might trigger the need for this exemption will be infrequent, and that codifying this historical practice

[608] The NYMEX Henry Hub Natural Gas (NG) contract is the only natural gas contract included as a core referenced futures contract under this proposal.

[609] *See* 2016 Reproposal, 81 FR at 96862, 96863.

[610] *See* ICE Rule 6.20(c) and NYMEX Rule 559.F. *See, e.g.,* NASDAQ Futures Rule ch. v, section 13(a)(ii) and Nodal Exchange Rulebook Appendix C (equivalent rules of NASDAQ and Nodal exchanges).

[611] *See* 2016 Reproposal, 81 FR at 96862, 96863.

will add transparency to the Commission's oversight responsibilities.

f. Pre-Enactment and Transition Period Swaps Exemption

Proposed § 150.3(a)(5) would also provide an exemption from position limits for positions acquired in good faith in any ''pre-enactment swap,'' or in any ''transition period swap,'' in either case as defined in proposed § 150.1. A person relying on this exemption may net such positions with post-effective date commodity derivative contracts for the purpose of complying with any non-spot-month speculative positions limits, but may not net against spot month positions. This exemption would be self-effectuating, and the Commission preliminarily believes that proposed § 150.3(a)(5) would benefit both individual market participants by lessening the impact of the proposed federal limits, and market liquidity in general as liquidity providers initially would not be forced to reduce or exit their positions.

The proposal would benefit price discovery and convergence by prohibiting large traders seeking to roll their positions into the spot month from netting down positions in the spot-month against their pre-enactment swap or transition period swap. The Commission acknowledges that, on its face, including a ''good-faith'' requirement in the proposed § 150.3(a)(5) could hypothetically diminish market integrity since determining whether a trader has acted in ''good faith'' is inherently subjective and could result in disparate treatment among traders, where certain traders may assert a more aggressive position in order to seek a competitive advantage over others. The Commission believes the risk of any such unscrupulous trader or exchange is mitigated since exchanges would still be subject to Commission oversight and to DCM Core Principles 4 (''prevention of market disruption'') and 12 (''protection of markets and market participants''), among others. The Commission has determined that market participants who voluntarily employ this exemption also will incur negligible recordkeeping costs.

5. Process for the Commission or Exchanges To Grant Exemptions and Bona Fide Hedge Recognitions for Purposes of Federal Limits (Proposed §§ 150.3 and 150.9) and Related Changes to Part 19 of the Commission's Regulations

Existing §§ 1.47 and 1.48 set forth the process for market participants to apply to the Commission for recognition of certain bona fide hedges for purposes of federal limits, and existing § 150.3 sets forth a list of spread exemptions a person can rely on for purposes of federal limits. However, under existing Commission practices, spread exemptions and certain enumerated bona fide hedges are generally self-effectuating and do not require market participants to apply to the Commission for purposes of federal position limits, although market participants are required to file Form 204 monthly reports [612] to justify certain position limit overages. Further, for those bona fide hedges for which market participants are required to apply to the Commission, existing regulations and market practice require market participants to apply both to the Commission for purposes of federal limits and also to the relevant exchanges for purposes of exchange-set limits. The Commission has preliminarily determined that this dual application process creates inefficiencies for market participants.

Proposed §§ 150.3 and 150.9, taken together, would make several changes to the process of acquiring bona fide hedge recognitions and spread exemptions for federal position limits purposes. Proposed §§ 150.3 and 150.9 would maintain certain elements of the status quo while also adopting certain changes to facilitate the exemption process.[613]

First, with respect to the proposed enumerated bona fide hedges, proposed § 150.3 would maintain the status quo by providing that those enumerated bona fide hedges that currently are self-effectuating for the nine legacy agricultural contracts would remain self-effectuating for the nine legacy agricultural contracts for purposes of federal position limits.[614] Similarly, the enumerated bona fide hedges for the proposed additional 16 contracts that would be newly subject to federal position limits (*i.e.,* those contracts other than the nine legacy agricultural contracts) also would be self-effectuating for purposes of federal position limits.

Second, for recognition of any non-enumerated bona fide hedge in connection with any referenced contract, market participants would be required to apply either directly to the Commission under proposed § 150.3 or through an exchange that adheres to certain requirements under proposed § 150.9. The Commission notes that existing regulations require market participants to apply to the Commission for recognition of non-enumerated bona fide hedges, and so the Commission's proposal does not represent a change to the status quo in this respect for the nine legacy agricultural contracts.

Third, proposed § 150.3 would maintain the status quo by providing that the most common spread exemptions for the nine legacy agricultural contracts would remain self-effectuating. Similarly, these common spread exemptions also would be self-effectuating for the proposed additional 16 contracts that would be newly subject to federal position limits. These common spread exemptions would be listed in the proposed ''spread transaction'' definition under proposed § 150.1.[615]

Fourth, for any spread exemption not listed in the proposed ''spread transaction'' definition, market participants would be required to apply directly to the Commission under proposed § 150.3. There would be no exception for the nine legacy agricultural products nor would market participants be permitted to apply through an exchange under proposed § 150.9 for these types of spread exemptions.[616]

The Commission anticipates that most—if not all—market participants would utilize the exchange-centric process set forth in proposed § 150.9 with respect to applying for recognition of non-enumerated bona fide hedges rather than apply directly to the Commission under proposed § 150.3 because market participants are likely already familiar with the proposed processes set forth in § 150.9, which is intended to leverage the processes currently in place at the exchanges for addressing requests bona fide hedge recognitions from exchange-set limits. In the sections below, the Commission will discuss the costs and benefits related to both processes.

[612] In the case of cotton, market participants currently file the relevant portions of Form 304.

[613] In this section the Commission discusses the costs and benefits related to the *application* process for these exemptions and bona fide hedge recognitions. For a discussion of the costs and benefits related to the scope of the exemptions and bona fide hedge recognitions, *see supra* Section IV.A.5.a.iv.

[614] Under the status quo, market participants must apply to the Commission for recognition of certain enumerated anticipatory bona fide hedges. The Commission's proposal also would make these enumerated anticipatory bona fide hedges self-effectuating for the nine legacy agricultural contracts.

[615] The proposed ''spread transaction'' definition would include a calendar spread, intercommodity spread, quality differential spread, processing spread (such as energy ''crack'' or soybean ''crush'' spreads), product or by-product differential spread, or futures-option spread.

[616] As discussed below, the proposal would also eliminate the Form 204 and the equivalent portions of the Form 304.

a. Process for Requesting Exemptions and Bona Fide Hedge Recognitions Directly From the Commission (Proposed § 150.3)

Under existing §§ 1.47 and 1.48, and existing § 150.3, the processes for obtaining a recognition of a bona fide hedge or for relying on a spread exemption, are similar in some respects and different in other respects than the proposed approach. Existing §§ 1.47 and 1.48 require market participants seeking recognition of non-enumerated bona fide hedges and enumerated anticipatory bona fide hedges, respectively, for federal position limits to apply directly to the Commission for prior approval.

In contrast, existing non-anticipatory enumerated bona fide hedges and spread exemptions are self-effectuating, which means that market participants are not required to submit any information to the Commission for prior approval, although such market participants must subsequently file Form 204 or Form 304 each month in order to describe their cash market positions and justify their bona fide hedge position. There currently is no codified federal process related to financial distress exemptions or natural gas conditional spot month exemptions.

For those market participants that would choose to apply directly to the Commission for recognition of non-enumerated bona fide hedges or spread exemptions not included in the proposed ''spread transaction'' definition, which in each case would not be self-effectuating under the proposal, proposed § 150.3 would provide a process for the Commission to review and approve requests. Under proposed § 150.3, any person seeking Commission recognition of these types of bona fide hedges or a spread exemptions (as opposed to applying to using the exchange-centric process under proposed § 150.9 described below) would be required to submit a request directly to the Commission and to provide information similar to what is currently required under existing §§ 1.47 and 1.48.[617]

i. Existing Bona Fide Hedges That Currently Require Prior Submission to the Commission Under Existing §§ 1.47 and 1.48 for the Nine Legacy Agricultural Contracts

Under the proposal, the Commission would maintain the distinction between enumerated bona fide hedges and non-enumerated bona fide hedges under proposed § 150.3: (1) Enumerated bona fide hedges would continue to be self-effectuating; (2) enumerated anticipatory bona fide hedges would become self-effectuating so market participants would no longer need to apply to the Commission; and (3) non-enumerated bona fide hedges would still require market participants to apply for recognition. Market participants that choose to apply directly to the Commission for a bona fide hedge recognition (*i.e.,* for non-enumerated bona fide hedges) would be subject to an application process that generally is similar to what the Commission currently administers for the non-enumerated bona fide hedges and the enumerated anticipatory bona fide hedges.[618] With respect to enumerated anticipatory bona fide hedges for the nine legacy contracts, for which market participants currently are required to apply to the Commission for recognition for federal position limit purposes, the Commission preliminarily anticipates that the proposal would benefit market participants by making such hedges self-effectuating.[619] As a result, market participants will no longer be required to spend time and resources applying to the Commission. Further, for these enumerated anticipatory hedges, existing § 1.48 requires market participants to submit either an initial or supplemental application to the Commission 10 days prior to entering into the bona fide hedge that would cause the hedger to exceed federal position limits.[620] Under existing § 1.48, market participants could proceed with their proposed bona fide hedges if the Commission does not notify a market participants otherwise within the specific 10-day period. Because bona fide hedgers could implement enumerated anticipatory bona fide hedges without waiting the requisite 10 days, they may be able to implement their hedging strategy more efficiently with reduced cost and risk. The Commission acknowledges that making such bona fide hedges easier to obtain could increase the possibility of excess speculation since anticipatory exemptions are theoretically more difficult to substantiate compared to the other existing enumerated bona fide hedges. However, the Commission has gained significant experience over the years with bona fide hedging practices in general and with enumerated anticipatory bona fide hedging practices in particular, and the Commission preliminarily has determined that making such hedges self-effectuating should not increase the risk of excessive speculation or market manipulation compared to the status quo.

For non-enumerated bona fide hedges, existing § 1.47 requires market participants to submit (i) initial applications to the Commission 30 days prior to the date the market participant would exceed the applicable position limits and (ii) supplemental applications (*i.e.,* applications for a market participant that desire to exceed the bona fide hedge amount provided in the person's previous Commission filing) 10 days prior for Commission approval, and market participants can proceed with their proposed bona fide hedges if the Commission does not intervene within the specific time (*e.g.,* either 10 days or 30 days).

Proposed § 150.3 would similarly require market participants seeking recognition of a non-enumerated bona fide hedge for any of the proposed 25 core referenced futures contracts to apply to the Commission prior to exceeding federal position limits, but proposed § 150.3 would not prescribe a certain time period by which a bona fide hedger must apply or by which the

[617] For bona fide hedges and spread exemptions, this information would include: (i) A description of the position in the commodity derivative contract for which the application is submitted, including the name of the underlying commodity and the position size; (ii) information to demonstrate why the position meets the applicable requirements for a bona fide hedge or spread transaction; (iii) a statement concerning the maximum size of all gross positions in derivative contracts for which the application is submitted; (iv) for bona fide hedges, information regarding the applicant's activity in the cash markets and swaps markets for the commodity underlying the position for which the application is submitted; and (v) any other information that may help the Commission determine whether the position meets the applicable requirements for a bona fide hedge position or spread transaction.

[618] As noted above, under the existing framework market participants are not required to apply for any type of bona fide hedge recognition or spread exemption from the Commission for any of the proposed additional 16 contracts that would be newly subject to federal position limits (*i.e.,* those contracts other than the nine legacy agricultural contracts); rather, under the existing framework, such market participants must apply to the exchanges for bona fide hedge recognitions or exemptions for purposes of exchange-set position limits. Accordingly, to the extent that market participants would not need to apply to the Commission in connection with any of the proposed additional 16 contracts, the Commission's proposal would not impose additional costs or benefits compared to the status quo.

[619] As noted above, since market participants do not need to apply to the Commission for bona fide hedge recognition for any of the proposed additional 16 contracts that would be newly subject to federal position limits, the Commission's proposal would not result in any additional costs or benefits to the extent such bona fide hedge recognitions would be self-effectuating.

[620] Under the Commission's existing regulations, non-anticipatory enumerated bona fide hedges are self-effectuating, and market participants do not have to file any applications for recognition under existing Commission regulations. However, bona fide hedgers must file with the Commission monthly Form 204 (or Form 304 in connection with ICE Cotton No. 2 (CT)) reports discussing their underlying cash positions in order to substantiate their bona fide hedge positions.

Commission must respond. The Commission preliminarily anticipates that the proposal would benefit bona fide hedgers by enabling them in many cases to generally implement their hedging strategies sooner than the existing 30-day or 10-day waiting period, in which case the Commission believes hedging-related costs would decrease. However, the Commission believes that there could also be circumstances in which the overall process could take longer than the existing timelines under § 1.47, which could increase hedging related costs if a bona fide hedger is compelled to wait longer, compared to existing Commission practices, before executing its hedging strategy.

On the other hand, the Commission also recognizes that there could be potential costs to bona fide hedgers if under the proposal they are forced either to enter into less effective bona fide hedges or to wait to implement their hedging strategy, as a result of the potential uncertainty that could result from proposed § 150.3 not requiring the Commission to respond within a certain amount of time. The Commission believes this concern is mitigated to the extent market participants utilize the proposed § 150.3 process that would permit a market participant that demonstrates a ''sudden or unforeseen'' increase in its bona fide hedging needs to enter into a bona fide hedge without first obtaining the Commission's prior approval, as long as the market participant submits a retroactive application to the Commission within five business days of exceeding the applicable position limit. The Commission preliminarily believes this ''five-business day retroactive exemption'' would benefit bona fide hedgers compared to existing §§ 1.47 and 1.48, which requires Commission prior approval, since hedgers that would qualify to exercise the five-business day retroactive exemption are also likely facing more acute hedging needs—with potentially commensurate costs if required to wait. This provision would also leverage, for federal position limit purposes, existing exchange practices for granting retroactive exemptions from exchange-set limits.

On the other hand, the proposed five-business day retroactive exemption could harm market liquidity and bona fide hedgers if the applicable exchange or the Commission were to not approve of the retroactive request, and the Commission subsequently required liquidation of the position in question. As a result, such possibility could cause market participants to either enter into smaller bona fide hedge positions than they otherwise would or cause the bona fide hedger to delay entering into its hedge, in either case potentially causing bona fide hedgers to incur increased hedging costs.

However, the Commission preliminarily believes this concern is partially mitigated since proposed § 150.3 would require the purported bona fide hedger to exit its position in a ''commercially reasonable time,'' which the Commission believes should partially mitigate any costs incurred by the market participant compared to either an alternative that would require the bona fide hedger to exit its position immediately, or the status quo where the market participant either is unable to enter into a hedge at all without Commission prior approval.

ii. Spread Exemptions and Non-Enumerated Bona Fide Hedges

Proposed § 150.3 would impose a new requirement for market participants to (1) apply either directly to the Commission pursuant to proposed § 150.3 or to an exchange pursuant to proposed § 150.9 for any non-enumerated bona fide hedge; and (2) to apply directly to the Commission pursuant to proposed § 150.3 for any spread exemptions not identified in the proposed ''spread transaction'' definition for any of the proposed 25 core referenced futures contracts.[621] As noted above, common spread exemptions (*i.e.,* those identified in the proposed definition of ''spread transaction'' in proposed § 150.1) would remain self-effectuating for the nine legacy agricultural products and also would be self-effectuating for the 16 proposed core referenced futures contracts.[622] Unlike non-enumerated bona fide hedges, for which market participants could apply directly to the Commission under proposed § 150.3 or through an exchange under proposed § 150.9, for spread exemptions not identified in the proposed ''spread transaction'' definition, market participants would be required to apply directly to the Commission under proposed § 150.3.

As noted above, proposed § 150.3 also would maintain the status quo and continue to require any non-enumerated bona fide hedge in one of the nine legacy agricultural products to receive prior approval, and similarly would require prior approval for such non-enumerated bona fide hedges for the proposed additional 16 contracts that would be newly subject to federal position limits.[623] The Commission anticipates that there will be no change to the status quo baseline with respect to the most common spread exemptions since these exemptions would be self-effecting for purposes of federal position limits.

To the extent market participants would be required to obtain prior approval for a non-enumerated bona fide hedge or spread exemption for any of the additional 16 contracts that would be newly subject to federal position limits, the Commission recognizes that proposed § 150.3 would impose costs on market participants who will now be required to spend time and resources submitting applications to the Commission (for certain spread exemptions) or to either the Commission or an exchange (for non-enumerated bona fide hedges) for prior approval for federal position limit purposes.[624] Further, compared to the status quo in which the proposed new 16 contracts are not subject to federal position limits, the proposed process could increase uncertainty since market participants would be required to seek prior approval and wait up to 10 days. As a result, such uncertainty could cause market participants to either enter into smaller spread or bona fide hedging positions or do so at a later time. In either case, this could cause market participants to incur additional costs and/or implement less efficient hedging strategies. However, the Commission preliminarily believes that proposed § 150.3's framework would be familiar to market participants that currently apply to the Commission for bona fide exemptions for the nine legacy agricultural products, which should serve to reduce costs for some market participants associated with obtaining recognition of a bona fide hedge or spread exemption from the Commission for federal limits for those market

[621] As discussed below, for spread exemptions not identified in the proposed ''spread transaction'' definition in proposed § 150.3, market participants would be required to apply directly to the Commission under proposed § 150.3 and would not be able to apply under proposed § 150.9.

[622] Existing § 150.3(a)(2) does not specify a formal process for granting either spread exemptions or non-anticipatory enumerated bona fide hedges that are consistent with CEA section 4a(a)(1), so in practice spread exemptions and non-anticipatory enumerated bona fide hedges have been self-effectuating.

[623] The Commission discusses the costs and benefits related to the proposed process for non-enumerated bona fide hedge recognitions with respect to the nine legacy agricultural products in the above section.

[624] The Commission's Paperwork Reduction Act analysis identifies some of these information collection burdens in greater specificity. *See supra* Section IV.A.4.c. (discussing in greater detail the cost and benefits related to spread exemptions).

participants.[625] The Commission also preliminarily believes that this analysis also would apply to the nine legacy agricultural contracts for spread exemptions that are not listed in the proposed ''spread transaction'' definition and therefore also would require market participants to apply to the Commission for these types of spread exemptions for the first time for the nine legacy agricultural products. However, because the Commission preliminarily has determined that most spread transactions would be self-effectuating (especially for the nine legacy agricultural contracts based on the Commission's experience), the Commission believes that the proposal would impose only small costs with respect to spread exemptions for both the nine legacy agricultural contracts as well as the proposed additional 16 contracts that would be newly subject to federal position limits.

While the Commission has years of experience granting and monitoring spread exemptions and enumerated and non-enumerated bona fide hedges for the nine legacy agricultural contracts, as well as overseeing exchange processes for administering exemptions from exchange-set limits on such commodities, the Commission does not have the same level of experience or comfort administering bona fide hedge recognitions and spread exemptions for the additional 16 contracts that would be subject to the proposed federal position limits and the new proposed exemption processes for the first time. Accordingly, the Commission preliminarily recognizes that permitting enumerated bona fide hedges and spread recognitions identified in the proposed ''spread transaction'' definition for these additional 16 contracts might not provide the purported benefits, or could result in increased costs, compared to the Commission's experience with the nine legacy agricultural products.

The Commission also preliminarily believes that the proposal will benefit market participants by providing market participants the option to choose the process for applying for a non-enumerated bona fide hedge (*i.e.,* either directly with the Commission or, alternatively, through the exchange-centric process discussed under proposed § 150.9 below) for the additional 16 contracts that would be newly subject to federal position limits that would be more efficient given the market participants unique facts, circumstances, and experience.[626] If a market participant chooses to apply through an exchange for federal position limits pursuant to proposed § 150.9, the market participant would also receive the added benefit of not being required to also submit another application directly to the Commission. The Commission anticipates that most market participants would apply directly to exchanges for non-enumerated bona fide hedges, pursuant to the proposed streamlined process § 150.9, as explained below, in which case the Commission believes that most market participants would incur the costs and benefits discussed thereunder. The Commission also preliminarily believes that this analysis also would apply with respect to non-enumerated bona fide hedges for the nine legacy agricultural contracts.

iii. Exemption-Related Recordkeeping

Proposed § 150.3(d) would require persons who avail themselves of any of the foregoing exemptions to maintain complete books and records relating to the subject position, and to make such records available to the Commission upon request under proposed § 150.3(e). These requirements would benefit market integrity by providing the Commission with the necessary information to monitor the use of exemptions from speculative position limits and help to ensure that any person who claims any exemption permitted by proposed § 150.3 can demonstrate compliance with the applicable requirements. The Commission does not expect these requirements to impose significant new costs on market participants, as these requirements are in line with existing Commission and exchange-level recordkeeping obligations.

iv. Exemption Renewals

Consistent with existing §§ 1.47 and 1.48, with respect to any Commission-recognized bona fide hedge or Commission-granted spread exemption pursuant to proposed § 150.3, the Commission would not require a market participant to reapply annually for bona fide hedges.[627] The Commission preliminarily believes that this will reduce burdens on market participants but also recognizes that not requiring market participants to annually reapply ostensibly could harm market integrity since the Commission would not directly receive updated information with respect to particular bona fide hedgers or exemption holders prior to the trader excessing the applicable federal limits.

However, the Commission preliminarily believes that any potential harm would be mitigated since the Commission, unlike exchanges, has access to aggregate market data, including positions held by individual market participants. Further, proposed § 150.3 would require a market participant to submit a new application if any information changes, or upon the Commission's request. On the other hand, market participants would benefit by not being required to annually submit new applications, which the Commission preliminarily believes will reduce compliance costs.

v. Exemptions for Financial Distress and Conditional Natural Gas Positions

Proposed § 150.3 would codify the Commission's existing informal practice with respect to exemptions for financial distress and conditional spot month limit exemption positions in natural gas. The same costs and benefits described above with respect to applications for bona fide hedge recognitions and spread exemptions would also apply. However, to the extent the Commission currently allows exemptions related to financial distress, the Commission preliminarily has determined that the costs and benefits with respect to the related application process already may be recognized by market participants.

[625] The Commission preliminarily anticipates that the proposed application process in § 150.3(b) could slightly reduce compliance-related costs, compared to the status quo application process to the Commission under existing §§ 1.47 and 1.48, because proposed § 150.3 would provide a single, standardized process for all bona fide hedge and spread exemption requests that is slightly less complex—and more clearly laid out in the proposed regulations—than the Commission's existing application processes. Nonetheless, since the Commission anticipates that most market participants would apply directly to exchanges for bona fide hedges and spread exemptions when provided the option under proposed § 150.9, the Commission believes that most market participants would incur the costs and benefits discussed thereunder.

[626] As noted above, market participants seeking spread exemptions not listed in the proposed ''spread transaction'' definition in proposed § 150.1 would be required to apply directly with the Commission under proposed § 150.3 and would not be permitted to apply under proposed § 150.9. The Commission preliminarily recognizes that these types of spread exemptions are difficult to analyze compared to either the spread exemptions identified in proposed § 150.1 or bona fide hedges in general. Accordingly, the Commission preliminarily has determined to require market participants to apply directly to the Commission. Further, compared to the spread exemptions identified in proposed § 150.1, the Commission anticipates relatively few requests, and so does not believe the proposed application requirement will impose a large aggregate burden across market participants.

[627] As discussed below, with respect to exchange-set limits under proposed § 150.5 or the exchange process for federal limits under proposed § 150.9, market participants would be required to annually reapply to exchanges.

b. Process for Market Participants To Apply to an Exchange for Non-Enumerated Bona Fide Hedge Recognitions for Purposes of Federal Limits (Proposed § 150.9) and Related Changes to Part 19 of the Commission's Regulations

Proposed § 150.9 would provide a framework whereby a market participant could avoid the existing dual application process described above and, instead, file one application with an exchange to receive a non-enumerated bona fide hedging recognition, which as discussed previously would not be self-effectuating for purposes of federal position limits. Under this process, a person would be allowed to exceed the federal limit levels following an exchange's review and approval of an application for a bona fide hedge recognition or spread exemption, provided that the Commission during its review does not notify the exchange otherwise within a certain period of time thereafter. Market participants who do not elect to use the process in proposed § 150.9 for purposes of federal position limits would be required to request relief both directly from the Commission under proposed § 150.3, as discussed above, and also apply to the relevant exchange, consistent with existing practices.[628]

i. Proposed § 150.9—Establishment of General Exchange Process

Pursuant to proposed § 150.9, exchanges that elect to process these applications would be required to file new rules or rule amendments with the Commission under § 40.5 of the Commission's regulations and obtain from applicants all information to enable the exchange to determine, and the Commission to verify, that the facts and circumstances support a non-enumerated bona fide hedge recognition. The Commission initially believes that exchanges' existing practices generally are consistent with the requirements of proposed § 150.9, and therefore exchanges would only incur marginal costs, if any, to modify their existing practices to comply. Similarly, the Commission preliminarily anticipates that establishing uniform, standardized exemption processes across exchanges would benefit market participants by reducing compliance costs. On the other hand, the Commission recognizes that exchanges that wish to participate in the processing of applications with the Commission under proposed § 150.9 would be required to expend resources to establish a process consistent with the Commission's proposal. However, to the extent exchanges have similar procedures, such benefits and costs may already have been realized by market participants and exchanges.

The Commission preliminarily believes that there are significant benefits to the proposed § 150.9 process that would be largely realized by market participants. The Commission preliminarily has determined that the use of a single application to process both exchange and federal position limits will benefit market participants and exchanges by simplifying and streamlining the process. For applicants seeking recognition of a non-enumerated bona fide hedge, proposed § 150.9 should reduce duplicative efforts because applicants would be saved the expense of applying in parallel to both an exchange and the Commission for relief from exchange-set position limits and federal position limits, respectively. Because many exchanges already possess similar application processes with which market participants are likely accustomed, compliance costs should be decreased in the form of reduced application-production time by market participants and reduced response time by exchanges.

As discussed above, in connection with the recognition of bona fide hedges for federal position limit purposes, current practices set forth in existing §§ 1.47 and 1.48 require market participants to differentiate between (i) enumerated non-anticipatory bona fide hedges that are self-effectuating, and (ii) enumerated anticipatory bona fide hedges and non-enumerated bona fide hedges for which market participants must apply to the Commission for prior approval. Under the proposal, the Commission would no longer distinguish among different types of enumerated bona fide hedges (*e.g.,* anticipatory versus non-anticipatory enumerated bona fide hedges), and therefore, would not require exchanges to have separate processes for enumerated anticipatory positions under proposed § 150.9 for the nine legacy agricultural contracts. The Commission's proposal would also eliminate the requirement for bona fide hedgers to file Form 204 or Form 304, as applicable, with respect to any bona fide hedge, whether enumerated or non-enumerated.[629] The Commission preliminarily expects this to benefit market participants by providing a more efficient and less complex process that is consistent with existing practices at the exchange-level.

On the other hand, the Commission recognizes proposed § 150.9 would impose new costs related to non-enumerated bona fide hedges for the additional 16 contracts that would be newly subject to federal position limits. Under the proposal, market participants would now be required to submit applications to receive prior approval for federal position limits purposes. However, since the Commission preliminarily understands that exchanges already require market participants to submit applications and receive prior approval under exchange-set limits for all types of bona fide hedges, the Commission does not believe proposed § 150.9 would impose any additional incremental costs on market participants beyond those already incurred under exchanges' existing processes. Accordingly, the Commission preliminarily believes that any costs already may have been realized by market participants.

Further, the Commission preliminarily believes that employing a concurrent process with exchanges to oversee the non-enumerated bona fide hedges that would not be self-effectuating for federal position limits purposes would benefit market integrity by ensuring that market participants are appropriately relying on such bona fide hedges and not entering into such positions in order to attempt to manipulate the market or evade position limits. However, to the extent that exchange oversight, consistent with Commission standards and DCM core principles, already exists, such benefits may already be realized.

ii. Proposed § 150.9—Exchange Expertise, Market Integrity, and Commission Oversight

For non-enumerated bona fide hedge recognitions that would require the Commission's prior approval, the proposal would provide a framework that utilizes existing exchange resources and expertise so that fair access and liquidity are promoted at the same time market manipulations, squeezes, corners, and any other conduct that would disrupt markets are deterred and prevented. Proposed § 150.9 would build on existing exchange processes, which the Commission preliminarily

[628] As noted above, the Commission preliminarily anticipates that most, if not all, market participants will use proposed § 150.9, rather than proposed § 150.3, where permitted.

[629] *See infra* Section II.H.3. (discussion of proposed changes to part 19 eliminating Form 204 and portions of Form 304).

believes would strengthen the ability of the Commission and exchanges to monitor markets and trading strategies while reducing burdens on both the exchanges, which would administer the process, and market participants, who would utilize the process. For example, exchanges are familiar with their market participants' commercial needs, practices, and trading strategies, and already evaluate hedging strategies in connection with setting and enforcing exchange-set position limits; accordingly, exchanges should be able to readily identify bona fide hedges.[630]

For these reasons, the Commission has preliminarily determined that allowing market participants to apply through an exchange under proposed § 150.9, rather than directly to the Commission as required under existing § 1.47, is likely to be more efficient than if the Commission itself initially had to review and approve all applications. The Commission preliminarily considers the increased efficiency in processing applications under proposed § 150.9 as a benefit to bona fide hedgers and liquidity providers. By having the availability of the exchange's analysis and view of the markets, the Commission would be better informed in its review of the market participant and its application, which in turn may further benefit market participants in the form of administrative efficiency and regulatory consistency. However, the Commission recognizes additional costs for exchanges required to create and submit these real-time notices. To the extent exchanges already provide similar notice to the Commission or to market participants, or otherwise are required to notify the Commission under certain circumstances, such benefits and costs already may have been realized.

On the other hand, to the extent exchanges would become more involved with respect to review and oversight of market participants' bona fide hedges and spread exemptions, exchanges could incur additional costs. However, as noted, the Commission believes most of the costs have been realized by exchanges under current market practice.

At the same time, the Commission also preliminarily recognizes that this aspect of the proposal could potentially harm market integrity. Absent other provisions, since exchanges profit from increased activity, an exchange could hypothetically seek a competitive advantage by offering excessively permissive exemptions, which could allow certain market participants to utilize non-enumerated bona fide hedge recognitions to engage in excessive speculation or to manipulate market prices. If an exchange engaged in such activity, other market participants would likely face greater costs through increased transaction fees, including forgoing trading opportunities resulting from market prices moving against market participants and/or preventing the market participant from executing at its desired prices, which may also further lead to inefficient hedging. However, the Commission preliminarily believes that these hypothetical costs are unfounded since under proposed § 150.9 the Commission would review the applications submitted by market participants for bona fide hedge recognitions and spread exemptions; the Commission emphasizes that proposed § 150.9 is not providing exchanges with an ability to recognize a bona fide hedge or grant an exemption for federal position limit purposes in lieu of a Commission review. Rather, proposed § 150.9(e) and (f) would require an exchange to provide the Commission with notice of the disposition of any application for purposes of exchange limits concurrently with the notice the exchange would provide to the applicant, and the Commission would have 10 business days to make its determination for federal position limits purposes (although, in connection with ''sudden or unforeseen increases'' in bona fide hedging needs, as discussed in connection with proposed § 150.3, proposed § 150.9 would require the Commission to make its determination within two business days).

On the other hand, the Commission also recognizes that there could be potential costs to bona fide hedgers if under the proposal they are forced to wait up to 10 business days for the Commission to complete its review after the exchange's initial review—especially compared to the status quo for the 16 commodities that would be subject to federal limits for the first time under this release and currently are not required to receive the Commission's prior approval. As a result, the Commission preliminarily recognizes that a market participant could incur costs by waiting during the 10 business day period or be required to enter into a less efficient hedge, which would harm liquidity. However, the Commission believes this concern is mitigated since proposed § 150.9, similar to proposed § 150.3, would permit a market participant that demonstrates a ''sudden or unforeseen'' increase in its bona fide hedging needs to enter into a bona fide hedge without first obtaining the Commission's prior approval, as long as the market participant submits a retroactive application to the Commission within five business days of exceeding the applicable position limit. In turn, the Commission would only have two business days (as opposed to the default 10 business days) to complete its review for federal purposes. The Commission preliminarily believes this ''five-business day retroactive exemption'' would benefit bona fide hedgers compared to existing § 1.47, which requires Commission prior approval, since hedgers that would qualify to exercise the five-business day retroactive exemption are also likely facing more acute hedging needs—with potentially commensurate costs if required to wait. This provision would also leverage, for federal position limit purposes, existing exchange practices for granting retroactive exemptions from exchange-set limits.

On the other hand, the proposed five-business day retroactive exemption could harm market liquidity and bona fide hedgers since the Commission would be able to require a market participant to exit its position if the exchange or the Commission does not approve of the retroactive request, and such uncertainty could cause market participants to either enter into smaller bona fide hedge positions than it otherwise would or could cause the bona fide hedger to delay entering into its hedge, in either case potentially causing bona fide hedgers to incur increased hedging costs. However, the Commission preliminarily believes this concern is partially mitigated since proposed § 150.9 would require the purported bona fide hedger to exit its position in a ''commercially reasonable time,'' which the Commission believes should partially mitigate any costs incurred by the market participant compared to either an alternative that would require the bona fide hedger to exit its position immediately, or the status quo where the market participant either is unable to enter into a hedge at all without Commission approval.

While existing § 1.47 does not require market participants to annually reapply for certain bona fide hedges, proposed § 150.9 would require market participants to reapply at least annually with exchanges for purposes of federal position limits. The Commission recognizes that requiring market participants to reapply annually could impose additional costs on those that are not currently required to do so. However, the Commission believes that this is consistent with industry practice

[630] For a discussion on the history of exemptions, *see* 2013 Proposal, 78 FR at 75703–75706.

with respect to exchange-set limits and that market participants are familiar with exchanges' exemption processes, which should reduce related costs.[631] Further, the Commission preliminarily believes that market integrity would be strengthened by ensuring that exchanges receive updated trader information that may be relevant to the exchange's oversight.[632] However, to the extent any of these benefits and costs reflect current market practice, they already may have been realized by exchanges and market participants.

In addition, the proposed exchange-to-Commission monthly report in proposed § 150.5(a)(4) would further detail the exchange's disposition of a market participant's application for recognition of a bona fide hedge position or spread exemption as well as the related position(s) in the underlying cash markets and swaps markets. The Commission believes that such reports would provide greater transparency by facilitating the tracking of these positions by the Commission and would further assist the Commission in ensuring that a market participant's activities conform to the exchange's rules and to the CEA. The combination of the ''real-time'' exchange notification and exchanges' provision of monthly reports to the Commission under proposed §§ 150.9(e)(1) and 150.5(a)(4), respectively, would provide the Commission with enhanced surveillance tools on both a ''real-time'' and a monthly basis to ensure compliance with the requirements of this proposal. The Commission anticipates additional costs for exchanges required to create and submit monthly reports because the proposed rules would require exchanges to compile the necessary information in the form and manner required by the Commission. However, to the extent exchanges already provide similar notice to the Commission, or otherwise are required to notify the Commission under certain circumstances, such benefits and costs already may have been realized

iii. Proposed 150.9(d)—Recordkeeping

Proposed § 150.9(d) would require exchanges to maintain complete books and records of all activities relating to the processing and disposition of any applications, including applicants' submission materials, exchange notes, and determination documents.[633] The Commission preliminarily believes that this will benefit market integrity and Commission oversight by ensuring that pertinent records will be readily accessible, as needed by the Commission. However, the Commission acknowledges that such requirements would impose costs on exchanges. Nonetheless, to the extent that exchanges are already required to maintain similar records, such costs and benefits already may be realized.[634]

iv. Proposed § 150.9 (g)—Commission Revocation of Previously-Approved Applications

The Commission preliminarily acknowledges that there may be costs to market participants if the Commission revokes the hedge recognition for federal purposes under proposed § 150.9(f). Specifically, market participants could incur costs to unwind trades or reduce positions if the Commission required the market participant to do so under proposed § 150.9(f)(2).

However, the potential cost to market participants would be mitigated under proposed § 150.9(f) since the Commission would provide a commercially reasonable time for a person to come back into compliance with the federal position limits, which the Commission believes should mitigate transaction costs to exit the position and allow a market participant the opportunity to potentially execute other hedging strategies.

v. Proposed § 150.9—Commodity Indexes and Risk Management Exemptions

Proposed § 150.9(b) would prohibit exchanges from recognizing as a bona fide hedge with respect to commodity index contracts. The Commission recognizes that this proposed prohibition could alter trading strategies that currently use commodity index contracts as part of an entity's risk management program. Although there likely would be a cost to change risk management strategies for entities that currently rely on a bona fide hedge recognition for positions in commodity index contracts, as discussed above, the Commission believes that such financial products are not substitutes for positions in a physical market and therefore do not satisfy the statutory requirement for a bona fide hedge under section 4a(c)(2) of the Act.[635] In addition, the Commission further posits that this cost may be reduced or mitigated by the proposed increased in federal position limit levels set forth in proposed § 150.2 or by the implementation of the pass-through swap provision of the proposed bona fide hedge definition.[636]

c. Request for Comment

(48) The Commission requests comment on its considerations of the benefits and costs of proposed § 150.3 and § 150.9. Are there additional benefits or costs that the Commission should consider? Has the Commission misidentified any benefits or costs? Commenters are encouraged to include both quantitative and qualitative assessments of these benefits and costs, as well as data or other information to support such assessments.

(49) The Commission requests comment on whether a Commission-administered process, such as the process in proposed § 150.3, would promote more consistent and efficient decision-making. Commenters are encouraged to include both quantitative and qualitative assessments, as well as data or other information to support such assessments.

(50) The Commission recognizes there exist alternatives to proposed § 150.9. These include such alternatives as: (1) Not permitting exchanges to administer any process to recognize bona fide hedging transactions or positions or grant exempt spread positions for purposes of federal limits; or (2) maintaining the status quo. The Commission requests comment on whether an alternative to what is proposed would result in a superior cost-benefit profile, with support for any such position.

[631] *See infra* Section IV.A.6. (discussing proposed § 150.5).

[632] In contrast, the Commission, unlike exchanges, has access to aggregate market data, including positions held by individual market participants, and so the Commission has preliminarily determined that requiring market participants to apply annually under proposed § 150.3, absent any changes to their application, would not benefit market integrity to the same extent.

[633] Moreover, consistent with existing § 1.31, the Commission expects that these records would be readily accessible until the termination, maturity, or expiration date of the bona fide hedge recognition or exempt spread position and during the first two years of the subsequent, five-year retention period.

[634] The Commission believes that exchanges that process applications for recognition of bona fide hedging transactions or positions and/or spread exemptions currently maintain records of such applications as required pursuant to other existing Commission regulations, including existing § 1.31. The Commission, however, also believes that proposed § 150.9(d) may impose additional recordkeeping obligations on such exchanges. The Commission estimates that each exchange electing to administer the proposed process would likely incur a *de minimis* cost annually to retain records for each proposed process compared to the status quo. *See generally* Section IV.B. (discussing the Commission's PRA determinations).

[635] *See supra* Section III.F.6. (discussion of commodity indices); *see supra* Section IV.A.4.b.i.(1). (discussion of elimination of the risk management exemption).

[636] *See supra* Section IV.A.4.b.i.(1). (discussion of the pass-through swap exemption).

d. Related Changes to Part 19 of the Commission's Regulations Regarding the Provision of Information by Market Participants

Under existing regulations, the Commission relies on Form 204 [637] and Form 304,[638] known collectively as the ''series '04'' reports, to monitor for compliance with federal position limits. Under existing part 19, market participants that hold bona fide hedging positions in excess of federal limits for the nine legacy agricultural contracts currently subject to federal limits under existing § 150.2 must justify such overages by filing the applicable report (Form 304 for cotton and Form 204 for the other eight legacy commodities) each month.[639] The Commission uses these reports to determine whether a trader has sufficient cash positions that justify futures and options on futures positions above the speculative limits.

As discussed above, with respect to bona fide hedging positions, the Commission is proposing a streamlined approach under proposed § 150.9 to cash-market reporting that reduces duplication between the Commission and the exchanges. Generally, the Commission is proposing amendments to part 19 and related provisions in part 15 that would: (i) Eliminate Form 204; and (ii) amend the Form 304, in each case to remove any cash-market reporting requirements. Under this proposal, the Commission would instead rely on cash-market reporting submitted directly to the exchanges, pursuant to proposed §§ 150.5 and 150.9,[640] or request cash-market information through a special call.

The proposed cash-market and swap-market reporting elements of §§ 150.5 and 150.9 discussed above are largely consistent with current market practices with respect to exchange-set limits and thus should not result in any new costs. The proposed elimination of Form 204 and the cash-market reporting segments of the Form 304 would eliminate a reporting burden and the costs associated thereto for market participants. Instead, market participants would realize significant benefits by being able to submit cash market reporting to one entity—the exchanges—instead of having to comply with duplicative reporting requirements between the Commission and applicable exchange, or implement new Commission processes for reporting cash market data for market participants who will be newly subject to position limits.[641] Further, market participants are generally already familiar with exchange processes for reporting and recognizing bona fide hedging exemptions, which is an added benefit, especially for market participants that would be newly subject to federal position limits.

Further, the proposed changes would not impact the Commission's existing provisions for gathering information through special calls relating to positions exceeding limits and/or to reportable positions. Accordingly, as discussed above, the Commission proposes that all persons exceeding the proposed limits set forth in proposed § 150.2, as well as all persons holding or controlling reportable positions pursuant to existing § 15.00(p)(1), must file any pertinent information as instructed in a special call.[642] This proposed provision is similar to existing § 19.00(a)(3), but would require any such person to file the information as instructed in the special call, rather than to file a series '04 report.[643] The Commission preliminarily believes that relying on its special call authority is less burdensome for market participants than the existing Forms 204 and 304 reporting costs, as special calls are discretionary requests for information whereas the series '04 reporting requirements are a monthly, recurring reporting burden for market participants.

6. Exchange-Set Position Limits (Proposed § 150.5)

a. Introduction

Existing § 150.5 addresses exchange-set position limits on contracts not subject to federal limits under existing § 150.2, and sets forth different standards for DCMs to apply in setting limit levels depending on whether the DCM is establishing limit levels: (1) On an initial or subsequent basis; (2) for cash-settled or physically-settled contracts; and (3) during or outside the spot month.

In contrast, for physical commodity derivatives, proposed § 150.5(a) and (b) would (1) expand existing § 150.5's framework to also cover contracts subject to federal limits under § 150.2; (2) simplify the existing standards that DCMs apply when establishing exchange-set position limits; and (3) provide non-exclusive acceptable practices for compliance with those standards.[644] Additionally, proposed § 150.5(d) would require DCMs to adopt aggregation rules that conform to existing § 150.4.[645]

b. Physical Commodity Derivative Contracts Subject to Federal Position Limits Under § 150.5 (Proposed § 150.5(a))

i. Exchange-Set Position Limits and Related Exemption Process

For contracts subject to federal limits under § 150.2, proposed § 150.5(a)(1) would require DCMs to establish exchange-set limits no higher than the level set by the Commission. This is not a new requirement, and merely restates the applicable requirement in DCM Core Principle 5.[646]

Proposed § 150.5(a)(2) would authorize DCMs to grant exemptions from such limits and is generally consistent with current industry practice. The Commission has

[637] *CFTC Form 204: Statement of Cash Positions in Grains, Soybeans, Soybean Oil, and Soybean Meal,* U.S. Commodity Futures Trading Commission website, *available at https://www.cftc.gov/sites/default/files/idc/groups/public/@forms/documents/file/cftcform204.pdf* (existing Form 204).

[638] *CFTC Form 304: Statement of Cash Positions in Cotton,* U.S. Commodity Futures Trading Commission website, *available at http://www.cftc.gov/ucm/groups/public/@forms/documents/file/cftcform304.pdf* (existing Form 204). Parts I and II of Form 304 address fixed-price cash positions used to justify cotton positions in excess of federal limits. As described below, Part III of Form 304 addresses unfixed price cotton ''on-call'' information, which is not used to justify cotton positions in excess of limits, but rather to allow the Commission to prepare its weekly cotton on-call report.

[639] 17 CFR 19.01.

[640] *See supra* Section II.G.3. (discussion of proposed § 150.9). As discussed above, leveraging existing exchange application processes should avoid duplicative Commission and exchange procedures and increase the speed by which position limit exemption applications are addressed. While the Commission would recognize spread exemptions based on exchanges' application processes that satisfy the requirements in proposed § 150.9, for purposes of federal limits, the cash-market reporting regime discussed in this section of the release only pertains to bona fide hedges, not to spread exemptions, because the Commission has not traditionally relied on cash-market information when reviewing requests for spread exemptions.

[641] The Commission has noted that certain commodity markets will be subject to federal position limits for the first time. In addition, the existing Form 204 would be inadequate for reporting of cash-market positions relating to certain energy contracts that would be subject to federal limits for the first time under this proposal.

[642] *See* proposed § 19.00(b).

[643] 17 CFR 19.00(a)(3).

[644] *See* 17 CFR 150.2. Existing § 150.5 addresses only contracts *not* subject to federal limits under existing § 150.2 (aside from certain major foreign currency contracts). To avoid confusion created by the parallel federal and exchange-set position limit frameworks, the Commission clarifies that proposed § 150.5 deals solely with exchange-set position limits and exemptions therefrom, whereas proposed § 150.9 deals solely with the process for purposes of federal limits.

[645] *See* 17 CFR 150.4.

[646] *See* Commission regulation § 38.300 (restating DCMs' statutory obligations under the CEA § 5(d)(5), 7 U.S.C. 7(d)(5)). Accordingly, the Commission will not discuss any costs or benefits related to this proposed change since it merely reflects an existing regulatory and statutory obligation.

preliminarily determined that codifying such practice would establish important, minimum standards needed for DCMs to administer—and the Commission to oversee—an effective and efficient program for granting exemptions to exchange-set limits in a manner that does not undermine the federal limits framework.[647] In particular, proposed § 150.5(a)(2) would protect market integrity and prevent exchange-granted exemptions from undermining the federal limits framework by requiring DCMs to either conform their exemptions to the type the Commission would grant under proposed §§ 150.3 or 150.9, or to cap the exemption at the applicable federal limit level and to assess whether an exemption request would result in a position that is ''not in accord with sound commercial practices'' or would ''exceed an amount that may be established or liquidated in an orderly fashion in that market.''

Absent other factors, this element of the proposal could potentially increase compliance costs for traders since each DCM could establish different exemption-related rules and practices. However, to the extent that rules and procedures currently differ across exchanges, any compliance-related costs and benefits for traders may already be realized. Similarly, absent other provisions, a DCM could hypothetically seek a competitive advantage by offering excessively permissive exemptions, which could allow certain market participants to utilize exemptions in establishing sufficiently large positions to engage in excessive speculation and to manipulate market prices. However, proposed § 150.5(a)(2) would mitigate these risks by requiring that exemptions that do not conform to the types the Commission may grant under proposed § 150.3 could not exceed proposed § 150.2's applicable federal limit unless the Commission has first approved such exemption. Moreover, before a DCM could permit a new exemption category, proposed § 150.5(e) would require a DCM to submit rules to the Commission allowing for such exemptions, allowing the Commission to ensure that the proposed exemption type would be consistent with applicable requirements, including with the requirement that any resulting positions would be ''in accord with sound commercial practices'' and may be ''established and liquidated in an orderly fashion.''

Proposed § 150.5(a)(2) additionally would require traders to re-apply to the exchange at least annually for the exchange-level exemption. The Commission recognizes that requiring traders to re-apply annually could impose additional costs on traders that are not currently required to do so. However, the Commission believes this is industry practice among existing market participants, who are likely already familiar with DCMs' exemption processes.[648] This familiarity should reduce related costs, and the proposal should strengthen market integrity by ensuring that DCMs receive updated information related to a particular exemption.

Proposed § 150.5(a)(2) also would require a DCM to provide the Commission with certain monthly reports regarding the disposition of any exemption application, including the recognition of any position as a bona fide hedge, the exemption of any spread transaction or other position, the revocation or modification or previously granted recognitions or exemptions, or the rejection of any application, as well as certain related information similar to the information that applicants must provide the Commission under proposed § 150.3 or an exchange under proposed § 150.9, including underlying cash-market and swap-market information related to bona fide hedge positions. The Commission generally recognizes that this monthly reporting requirement could impose additional costs on exchanges, although the Commission also preliminarily has determined that it would assist with its oversight functions and therefore benefit market integrity. The Commission discusses this proposed requirement in greater detail in its discussion of proposed § 150.9.[649]

Further, while existing § 150.5(d) does not explicitly address whether traders should request an exemption prior to taking on its position, proposed § 150.5(a)(2), in contrast, would explicitly authorize (but not require) DCMs to permit traders to file a retroactive exemption request due to ''demonstrated sudden or unforeseen increases in its bona fide hedging needs,'' but only within five business days after the trade and as long as the trader provides a supporting explanation.[650] As noted above, these provisions are largely consistent with existing market practice, and to this extent, the benefits and costs already may have been realized by DCMs and market participants.

ii. Pre-Existing Positions

Proposed § 150.5(a)(3) would require DCMs to impose exchange-set position limits on ''pre-existing positions,'' other than pre-enactment swaps and transition period swaps, during the spot month, but not outside of the spot month, as long as any position outside of the spot month: (i) Was acquired in good faith consistent with the ''pre-existing position'' definition in proposed § 150.1;[651] and (ii) would be attributed to the person if the position increases after the limit's effective date. The Commission believes that this approach would benefit market integrity since pre-existing positions that exceed spot-month limits could result in market or price disruptions as positions are rolled into the spot month.[652] However, the Commission acknowledges that, on its face, including a ''good-faith'' requirement in the proposed ''pre-existing position'' definition could hypothetically diminish market integrity since determining whether a trader has acted in ''good faith'' is inherently subjective and could result in disparate treatment of traders by a particular exchange or across exchanges seeking a competitive advantage with one another. For example, with respect to a particular large or influential exchange member, an exchange could, in order to maintain the business relationship, be incentivized to be more liberal with its conclusion that the member obtained its position in ''good faith,'' or could be more liberal in

[647] This proposed standard is substantively consistent with current market practice. *See, e.g.,* CME Rule 559 (providing that CME will consider, among other things, the ''applicant's business needs and financial status, as well as whether the positions can be established and liquidated in an orderly manner . . .'') and ICE Rule 6.29 (requiring a statement that the applicant's ''positions will be initiated and liquidated in an orderly manner . . .''). This proposed standard is also substantively similar to existing § 150.5's standard and is not intended to be materially different. *See* existing § 150.5(d)(1) (an exemption may be limited if it would not be ''in accord with sound commercial practices or exceed an amount which may be established and liquidated in orderly fashion.'') 17 CFR 150.5(d)(1).

[648] As noted above, the Commission believes this requirement is consistent with current market practice. *See, e.g.,* CME Rule 559 and ICE Rule 6.29. While ICE Rule 6.29 merely requires a trader to ''submit to [ICE Exchange] a written request'' without specifying how often a trader must reapply, the Commission understands from informal discussions between Commission staff and ICE that traders must generally submit annual updates.

[649] *See supra* Section IV.A.5.b.ii. (discussion of monthly exchange-to-Commission report in proposed § 150.5(a)).

[650] Certain exchanges currently allow for the submission of exemption requests up to five business days after the trader established the position that exceeded a limit in certain circumstances. *See, e.g.,* CME Rule 559 and ICE's ''Guidance on Position Limits'' (Mar. 2018).

[651] Proposed § 150.1 would define ''pre-existing position'' to mean ''any position in a commodity derivative contract acquired in good faith prior to the effective date'' of any applicable position limit.

[652] The Commission is particularly concerned about protecting the spot month in physical-delivery futures from corners and squeezes.

general in order to gain a competitive advantage. The Commission believes the risk of any such unscrupulous trader or exchange is mitigated since exchanges would still be subject to Commission oversight and to DCM Core Principles 4 (''prevention of market disruption'') and 12 (''protection of markets and market participants''), among others, and since proposed § 150.5(a)(3) also would require that exchanges must attribute the position to the trader if its position increases after the position limit's effective date.

c. Physical Commodity Derivative Contracts Not Yet Subject to Federal Position Limits Under § 150.2 (Proposed § 150.5(b))

i. Spot Month Limits and Related Acceptable Practices

For cash-settled contracts during the spot month, existing § 150.5 sets forth the following qualitative standard: exchange-set limits should be ''no greater than necessary to minimize the potential for market manipulation or distortion of the contract's or underling commodity's price.'' However, for physically-settled contracts, existing § 150.5 provides a one-size-fits-all parameter that exchange limits must be no greater than 25 percent of EDS.

In contrast, the proposed standard for setting spot month limit levels for physical commodity derivative contracts not subject to federal position limits set forth in proposed § 150.5(b)(1) would not distinguish between cash-settled and physically-settled contracts, and instead would require DCMs to apply the existing § 150.5 qualitative standard to both.[653] The Commission also proposes a related, non-exclusive acceptable practice that would deem exchange-set position limits for both cash-settled and physically-settled contracts subject to proposed § 150.5(b) to be in compliance if the limits are no higher than 25 percent of the spot-month EDS.

Applying the existing § 150.5 qualitative standard and non-exclusive acceptable practice in proposed 150.5(b)(1), rather than a one-size-fits-all regulation, to both cash-settled and physically-settled contracts during the spot month is expected to enhance market integrity by permitting a DCM to establish a more tailored, product-specific approach by applying other parameters that may take into account the unique liquidity and other characteristics of the particular market and contract, which is not possible under the one-size-fits-all 25 percent EDS parameter set forth in existing § 150.5. While the Commission recognizes that the existing 25 percent EDS parameter has generally worked well, the Commission also recognizes that there may be circumstances where other parameters may be preferable and just as effective, if not more, including, for example, if the contract is cash-settled or does not have a reasonably accurate measurable deliverable supply, or if the DCM can demonstrate that a different parameter would better promote market integrity or efficiency for a particular contract or market.

On the other hand, the Commission recognizes that proposed § 150.5(b)(1) could adversely affect market integrity by theoretically allowing DCMs to establish excessively high position limits in order to gain a competitive advantage, which also could harm the integrity of other markets that offer similar products.[654] However, the Commission believes these potential risks would be mitigated since (i) proposed § 150.5(e) would require DCMs to submit proposed position limits to the Commission, which would review those rules for compliance with § 150.5(b), including to ensure that the proposed limits are ''in accord with sound commercial practices'' and that they may be ''established and liquidated in an orderly fashion''; and (ii) proposed § 150.5(b)(3) would require DCMs to adopt position limits for any new contract at a ''comparable'' level to existing contracts that are substantially similar (*i.e.,* ''look-alike contracts'') on other exchanges unless the Commission approves otherwise. Moreover, this latter requirement also may reduce the amount of time and effort needed for the DCM and Commission staff to assess proposed limits for any new contract that competes with another DCM's existing contract.

ii. Non-Spot Month Limits/Accountability Levels and Related Acceptable Practices

Existing § 150.5 provides one-size-fits-all levels for non-spot month contracts and allows for position accountability after a contract's initial listing only for those contracts that satisfy certain trading thresholds.[655] In contrast, for contracts outside the spot-month, proposed § 150.5(b)(2) would require DCMs to establish either position limits or position accountability levels that satisfy the same proposed qualitative standard discussed above for spot-month contracts.[656] For DCMs that establish position limits, the Commission proposes related acceptable practices that would provide non-exclusive parameters that are generally consistent with existing § 150.5's parameters for non-spot month contracts.[657] For DCMs that establish

[653] Proposed § 150.5(b)(1) would require DCMs to establish position limits for spot-month contracts at a level that is ''necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index.'' Existing § 150.5 also distinguishes between ''levels at designation'' and ''adjustments to levels,'' although each category similarly incorporates the qualitative standard for cash-settled contracts and the 25-percent metric for physically-settled contracts. Proposed § 150.5(b) would eliminate this distinction. The Commission intends the proposed § 150.5(b)(1) standard to be substantively the same as the existing § 150.5 standard for cash-settled contracts, except that under proposed § 150.5(b)(1), the standard would apply to physically-settled contracts.

[654] Since the existing § 150.5 framework already applies the proposed qualitative standard to cash-settled spot-month contracts, any new risks resulting from the proposed standard would occur only with respect to physically-settled contracts, which are currently subject to the one-size-fits-all 25-percent EDS parameter under the existing framework.

[655] As noted above, in establishing the specific metric, existing § 150.5 distinguishes between ''levels at designation'' and ''adjustments to [subsequent] levels.'' Proposed § 150.5(b)(2) would eliminate this distinction and apply the qualitative standard for all non-spot month position limit and accountability levels.

[656] DCM Core Principle 5 requires DCMs to establish either position limits or accountability for speculators. *See* Commission regulation § 38.300 (restating DCMs' statutory obligations under the CEA § 5(d)(5)). Accordingly, inasmuch as proposed § 150.5(b)(2) would require DCMs to establish position limits or accountability, the proposal does not represent a change to the status quo baseline requirements.

[657] Specifically, the acceptable practices proposed in Appendix F to part 150 would provide that DCMs would be deemed to comply with the proposed § 150.5(b)(2)(i) qualitative standard if they establish non-spot limit levels no greater than any one of the following: (1) Based on the average of historical positions sizes held by speculative traders in the contract as a percentage of open interest in that contract; (2) the spot month limit level for that contract; (3) 5,000 contracts (scaled up proportionally to the ratio of the notional quantity per contract to the typical cash market transaction if the notional quantity per contract is smaller than the typical cash market transaction, or scaled down proportionally if the notional quantity per contract is larger than the typical cash market transaction); or (4) 10 percent of open interest in that contract for the most recent calendar year up to 50,000 contracts, with a marginal increase of 2.5 percent of open interest thereafter.

These proposed parameters have largely appeared in existing § 150.5 for many years in connection with non-spot month limits, either for levels at designation, or for subsequent levels, with certain revisions. For example, while existing § 150.5(b)(3) has provided a limit of 5,000 contracts for energy products, existing § 150.5(b)(2) provides a limit of 1,000 contracts for physical commodities other than energy products. The proposed acceptable practice parameters would create a uniform standard of 5,000 contracts for all physical commodities. The Commission expects that the 5,000 contract acceptable practice, for example, would be a useful rule of thumb for exchanges because it would allow them to establish limits and demonstrate compliance with Commission regulations in a relatively efficient manner, particularly for new contracts that have yet to establish open interest. The spot month limit level under item (2) above

position accountability, § 150.1's proposed definition of ''position accountability'' would provide that a trader must reduce its position upon a DCM's request, which is generally consistent with existing § 150.5's framework, but would not distinguish between trading volume or contract type, like existing § 150.5. While DCMs would be provided the ability to decide whether to use limit levels or accountability levels for any such contract, under either approach, the DCM would have to set a level that is ''necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index.''

Proposed § 150.5(b)(2) would benefit market efficiency by authorizing DCMs to determine whether position limits or accountability would be best-suited outside of the spot month based on the DCM's knowledge of its markets. For example, position accountability could improve liquidity compared to position limits since liquidity providers may be more willing or able to participate in markets that do not have hard limits. As discussed above, DCMs are well-positioned to understand their respective markets, and best practices in one market may differ in another market, including due to different market participants or liquidity characteristics of the underlying commodities. For DCMs that choose to establish position limits, the Commission believes that applying the proposed § 150.5 qualitative standard to contracts outside the spot-month would benefit market integrity by permitting a DCM to establish a more tailored, product-specific approach by applying other tools that may take into account the unique liquidity and other characteristics of the particular market and contract, which is not possible under the existing § 150.5 specific parameters for non-spot month contracts. While the Commission recognizes that the existing parameters may have been well-suited to market dynamics when initially promulgated, the Commission also recognizes that open interest may have changed for certain contracts subject to proposed § 150.5(b), and open interest will likely continue to change in the future (*e.g.,* as new contracts may be introduced and as supply and/or demand may change for underlying commodities). In cases where open interest has not increased, the exchange may not need to change existing limit levels. But, for contracts where open interest have increased, the exchange would be able to raise its limits to facilitate liquidity consistent with an orderly market. However, the Commission reiterates that the specific parameters in the proposed acceptable practices are merely non-exclusive examples, and an exchange would be able to establish higher (or lower) limits, provided the exchange submits its proposed limits to the Commission under proposed § 150.5(e) and explains how its proposed limits satisfy the proposed qualitative standard and are otherwise consistent with all applicable requirements.

The Commission, however, recognizes that proposed § 150.5(b)(2) could adversely affect market integrity by potentially allowing DCMs to establish position accountability levels rather than position limits, regardless of whether the contract exceeds the volume-based thresholds provided in existing § 150.5. However, proposed § 150.5(e) would require DCMs to submit any proposed position accountability rules to the Commission for review, and the Commission would determine on a case-by-case basis whether such rules satisfy regulatory requirements, including the proposed qualitative standard. Similarly, in order to gain a competitive advantage, DCMs could theoretically set excessively high accountability (or position limit) levels, which also could potentially adversely affect markets with similar products. However, the Commission believes these risks would be mitigated since (i) proposed § 150.5(e) would require DCMs to submit proposed position accountability (or limits) to the Commission, which would review those rules for compliance with § 150.5(b), including to ensure that the exchange's proposed accountability levels (or limits) are ''necessary and appropriate to reduce the potential threat of market manipulation or price distortion'' of the contract or underlying commodity; and (ii) proposed § 150.5(b)(3) would require DCMs to adopt position limits for any new contract at a ''comparable'' level to existing contracts that are substantially similar on other exchanges unless the Commission approves otherwise.

iii. Exchange-Set Limits on Economically Equivalent Swaps

As discussed above, swaps that would qualify as ''economically equivalent swaps'' would become subject to the federal position limits framework. However, the Commission is proposing to allow exchanges to delay compliance—including enforcing position limits—with respect to exchange-set limits on economically equivalent swaps. The proposed delayed compliance would benefit the swaps markets by permitting SEFs and DCMs that list economically equivalent swaps more time to establish surveillance and compliance systems; as noted in the preamble, such exchanges currently lack sufficient data regarding individual market participants' open swap positions, which means that requiring exchanges to establish oversight over participants' positions currently would impose substantial costs and would be currently impracticable.

Nonetheless, the Commission's preliminary determination to permit exchanges to delay implementing federal position limits on swaps could incentivize market participants to leave the futures markets and instead transact in economically equivalent swaps, which could reduce liquidity in the futures and related options markets, which could also increase transaction and hedging costs. Delaying position limits on swaps therefore could harm market participants, especially end-users that do not transact in swaps, if many participants were to shift trading from the futures to the swaps markets. In turn, end-users could pass on some of these increased costs to the public at large.[658] However, the Commission believes that these concerns would be mitigated to the extent the Commission would still oversee and enforce federal position limits even if the exchanges would not be required to do so.

d. Position Aggregation

Proposed § 150.5(d) would require all DCMs that list physical commodity derivative contracts to apply aggregation rules that conform to existing § 150.4, regardless of whether the contract is subject to federal position limits under § 150.2.[659] The Commission believes

would be a new parameter for non-spot month contracts.

[658] On the other hand, the Commission has not seen any shifting of liquidity to the swaps markets—or general attempts at market manipulation or evasion of federal position limits—with respect to the nine legacy core referenced futures contracts, even though swaps currently are not subject to federal or exchange position limits.

[659] The Commission adopted final aggregation rules in 2016 under existing § 150.4, which applies to contracts subject to federal limits under § 150.2. *See* Final Aggregation Rulemaking, 81 FR at 91454. Under the Final Aggregation Rulemaking, unless an exemption applies, a person's positions must be aggregated with positions for which the person controls trading or for which the person holds a 10 percent or greater ownership interest. The Division of Market Oversight has issued time-limited no-action relief from some of the aggregation requirements contained in that rulemaking. *See* CFTC Letter No. 19–19 (July 31, 2019), *available at https://www.cftc.gov/csl/19-19/download.* Commission regulation § 150.4(b) sets forth several permissible exemptions from aggregation.

proposed § 150.5(d) would benefit market integrity in several ways. First, a harmonized approach to aggregation across exchanges that list physical commodity derivative contracts would prevent confusion that could result from divergent standards between federal limits under § 150.2 and exchange-set limits under § 150.5(b). As a result, proposed § 150.5(d) would provide uniformity, consistency, and reduced administrative burdens for traders who are active on multiple trading venues and/or trade similar physical contracts, regardless of whether the contracts are subject to § 150.2's federal position limits. Second, a harmonized aggregation policy eliminates the potential for DCMs to use excessively permissive aggregation policies as a competitive advantage, which would impair the effectiveness of the Commission's aggregation policy and limits framework. Third, since, for contracts subject to federal limits, proposed § 150.5(a) would require DCMs to set position limits at a level not higher than that set by the Commission under proposed § 150.2, differing aggregation standards could effectively lead to an exchange-set limit that is higher than that set by the Commission. Accordingly, harmonizing aggregation standards reinforces the efficacy and intended purpose of proposed §§ 150.2 and 150.5 and existing § 150.4 by eliminating DCMs' ability to circumvent the applicable federal aggregation and position limits rules.

To the extent a DCM currently is not applying the federal aggregation rules in existing § 150.4, or similar exchange-based rules, proposed § 150.5(d) could impose costs with respect to market participants trading referenced contracts for the proposed new 16 commodities that would become subject to federal position limits for the first time. Market participants would be required to update their trading and compliance systems to ensure they comply with the new aggregation rules.

e. Request for Comment

(51) The Commission requests comment on all aspects of the Commission's cost-benefit discussion of the proposal.

7. Section 15(a) Factors [660]

a. Protection of Market Participants and the Public

A chief purpose of speculative position limits is to preserve the integrity of derivatives markets for the benefit of commercial interests, producers, and other end- users that use these markets to hedge risk and of consumers that consume the underlying commodities. The Commission preliminarily believes that the proposed position limits regime would operate to deter excessive speculation and manipulation, such as squeezes and corners, which might impair the contract's price discovery function and liquidity for hedgers—and ultimately, would protect the integrity and utility of the commodity markets for the benefit of both producers and consumers.

At this time, the Commission is proposing to include the proposed 25 core referenced futures contracts within the proposed federal position limit framework. In selecting the proposed 25 core referenced contracts, the Commission, in accordance with its necessity analysis, considered the effects that these contracts have on the underlying commodity, especially with respect to price discovery; the fact that they require physical delivery of the underlying commodity; and, in some cases, the potentially acute economic burdens on interstate commerce that could arise from excessive speculation in these contracts causing sudden or unreasonable fluctuations or unwarranted changes in the price of the commodities underlying these contracts.[661]

Of particular importance are the proposed position limits during the spot month period because the Commission preliminarily believes that deterring and preventing manipulative behaviors, such as corners and squeezes, is more urgent during this period. The proposed spot month position limits are designed, among other things, to deter and prevent corners and squeezes as well as promote a more orderly liquidation process at expiration. By restricting derivatives positions to a proportion of the deliverable supply of the commodity, the spot month position limits reduce the possibility that a market participant can use derivatives, including referenced contracts, to affect the price of the cash commodity (and vice versa). Limiting a speculative position based on a percentage of deliverable supply also restricts a speculative trader's ability to establish a leveraged position in cash-settled derivative contracts, diminishing that trader's incentive to manipulate the cash settlement price. As the Commission has determined in the preamble, the Commission has concluded that excessive speculation or manipulation may cause sudden or unreasonable fluctuations or unwarranted changes in the price of the commodities underlying these contracts.[662] In this way, the Commission preliminarily believes that the proposed limits would benefit market participants that seek to hedge the spot price of a commodity at expiration, and benefit consumers who would be able to purchase underlying commodities for which prices are determined by fundamentals of supply and demand, rather than influenced by excessive speculation, manipulation, or other undue and unnecessary burdens on interstate commerce.

The Commission preliminarily believes that the proposed Commission and exchange-centric processes for granting exemptions from federal limits, including non-enumerated bona fide hedging recognitions, would help ensure the hedging utility of the futures market for commercial end-users. First, the proposal to allow exchanges to leverage existing processes and their knowledge of their own markets, including participant positions and activities, along with their knowledge of the underlying commodity cash market, should allow for more timely review of exemption applications than if the Commission were to conduct such initial application reviews. This benefits the public by allowing producers and end-users of a commodity to more efficiently and predictably hedge their price risks, thus controlling costs that might be passed on to the public. Second, exchanges may be better-suited than the Commission to leverage their knowledge of their own markets, including participant positions and activities, along with their knowledge of the underlying commodity cash market, in order to recognize whether an applicant qualifies for an exemption and what the level for that exemption should be. This benefits market participants and the public by helping assure that exemption levels are set in a manner that meets the risk management needs of the applicant without negatively impacting the futures and cash market for that commodity. Third, allowing for exchange-granted spread exemptions could improve liquidity in all months

[660] The discussion here covers the proposed amendments that the Commission has identified as being relevant to the areas set out in section 15(a) of the CEA: (i) Protection of market participants and the public; (ii) efficiency, competitiveness, and financial integrity of futures markets; (iii) price discovery; (iv) sound risk management practices; and (v) other public interest considerations. For proposed amendments that are not specifically addressed, the Commission has not identified any effects.

[661] *See supra* Section III.F.2. (discussion of the necessity findings as to the 25 core referenced futures contacts).

[662] *See supra* Section III.F. (discussion of the necessity finding).

for a listed contract or across commodities, benefitting hedgers by providing tighter bid-ask spreads for out-right trades. Furthermore, traders using spreads can arbitrage price discrepancies between calendar months within the same commodity contract or price discrepancies between commodities, helping ensure that futures prices more accurately reflect the underlying market fundamentals for a commodity. Lastly, the Commission would review each application for bona fide hedge recognitions or spread exemptions (other than those bona fide hedges and spread exemptions that would be self-effectuating under the Commission's proposal), but the proposal would allow the Commission to also leverage the exchange's knowledge and experience of its own markets and market participants discussed above.

The Commission also understands that there are costs to market participants and the public to setting the levels that are too high or too low. If the levels are set too high, there's greater risk of excessive speculation, which may harm market participants and the public. Further, to the extent that the proposed limits are set at such a level that even without these proposed exemptions, the probability of nearing or breaching such levels may be negligible for most market participants, benefits associated with such exemptions may be reduced.

Conversely, if the limits are set too low, transaction costs for market participants who are near or above the limit would rise as they transact in other instruments with higher transaction costs to obtain their desired level of speculative positions. Additionally, limits that are too low could incentivize speculators to leave the market and not be available to provide liquidity for hedgers, resulting in ''choppy'' prices. It is also possible for limits that are set too low to harm market efficiency because the views of some speculators might not be reflected fully in the price formation process.

In setting the proposed limit levels, the Commission considered these factors in order to implement to the maximum extent practicable, as it finds necessary in its discretion, to apply the position limits framework articulated in CEA section 4a(a) to set federal position limits to protect market integrity and price discovery, thereby benefiting market participants and the public.

b. Efficiency, Competitiveness, and Financial Integrity of Futures Markets

Position limits help to prevent market manipulation or excessive speculation that may unduly influence prices at the expense of the efficiency and integrity of markets. The proposed expansion of the federal position limits regime to 25 core referenced futures contracts (*e.g.,* the existing nine legacy agricultural contracts and the 16 proposed new contracts) enhances the buffer against excessive speculation historically afforded to the nine legacy agricultural contracts exclusively, improving the financial integrity of those markets. Moreover, the proposed limits in proposed § 150.2 may promote market competitiveness by preventing a trader from gaining too much market power in the respective markets.

Also, in the absence of position limits, market participants may be deterred from participating in a futures market if they perceive that there is a participant with an unusually large speculative position exerting what they believe is unreasonable market power. A lack of participation may harm liquidity, and consequently, may harm market efficiency.

On the other hand, traders who find position limits overly constraining may seek to trade in substitute instruments—such as futures contracts or swaps that are similar to or correlated with (but not otherwise deemed to be a referenced contract), forward contracts, or trade options—in order to meet their demand for speculative instruments. These traders may also decide to not trade beyond the federal speculative position limit. Trading in substitute instruments may be less effective than trading in referenced contracts and, thus, may raise the transaction costs for such traders. In these circumstances, futures prices might not fully reflect all the speculative demand to hold the futures contract, because substitute instruments may not fully influence prices the same way that trading directly in the futures contract does. Thus, market efficiency might be harmed.

The Commission preliminarily believes that focusing on the proposed 25 core referenced futures contracts, which generally have high levels of open interest and trading volume and/or have been subject to existing federal position limits for many years, should in general be less disruptive for the derivatives markets that it regulates, which in turn may reduce the potential for disruption for the price discovery function of the underlying commodity markets as compared to including less liquid contracts (of course, only to the extent that the Commission would be able to make the requisite necessity finding for such contracts).

Finally, the Commission preliminarily believes that the proposal to cease recognizing certain risk management positions as bona fide hedges, coupled with the proposed increased non-spot month limit levels for the nine legacy agricultural contracts, will foster competition among swap dealers by subjecting all market participants, including all swap dealers, to the same non-spot month limit rather than to an inconsistent patchwork of staff-granted exemptions. Accommodating risk management activity by additional entities with higher limit levels may also help lessen the concentration risk potentially posed by a few commodity index traders holding exemptions that are not available to competing market participants.

c. Price Discovery

Market manipulation or excessive speculation may result in artificial prices. Position limits may help to prevent the price discovery function of the underlying commodity markets from being disrupted. Also, in the absence of position limits, market participants might elect to trade less as a result of a perception that the market pricing is unfair as a consequence of what they perceive is the exercise of too much market power by a larger speculator. Reduced liquidity may have a negative impact on price discovery.

On the other hand, imposing position limits raises the concerns that liquidity and price discovery may be diminished, because certain market segments, *i.e.,* speculative traders, are restricted. For certain commodities, the Commission proposes to set the levels of position limits at increased levels, to avoid harming liquidity that may be provided by speculators that would establish large positions, while restricting speculators from establishing extraordinarily large positions. The Commission further preliminarily believes that the bona fide hedging recognition and exemption processes will foster liquidity and potentially improve price discovery by making it easier for market participants to have their bona fide hedging recognitions and spread exemptions granted.

In addition, position limits serve as a prophylactic measure that reduces market volatility due to a participant otherwise engaging in large trades that induce price impacts that interrupt price discovery. In particular, spot month position limits make it more difficult to mark the close of a futures contract to possibly benefit other contracts that settle on the closing futures price. Marking the close harms markets by spoiling convergence between futures prices and spot prices

at expiration and damaging price discovery.

d. Sound Risk Management Practices

Proposed exemptions for bona fide hedges help to ensure that market participants with positions that are hedging legitimate commercial needs are recognized as hedgers under the Commission's speculative position limits regime. This promotes sound risk management practices. In addition, the Commission has crafted the proposed rules to ensure sufficient market liquidity for bona fide hedgers to the maximum extent practicable, *e.g.,* through the proposals to: (1) Create a bona fide hedging definition that is broad enough to accommodate common commercial hedging practices, including anticipatory hedging, for a variety of commodity types; (2) maintain the status quo with respect to existing bona fide hedge recognitions and spread exemptions that would remain self-effectuating and make additional bona fide hedges self-effectuating (*i.e.,* certain anticipatory hedging); (3) provide additional ability for a streamlined process where market participants can make a single submission to an exchange in which the exchange and Commission would each review applications for non-enumerated bona fide hedge recognitions for purposes of federal and exchange-set limits that are in line with commercial hedging practices; and (4) to allow for a conditional spot month limit exemption in natural gas.

To the extent that monitoring for position limits requires market participants to create internal risk limits and evaluate position size in relation to the market, position limits may also provide an incentive for market participants to engage in sound risk management practices. Further, sound risk management practices would be promoted by the proposal to allow for market participants to measure risk in the manner most suitable for their business (*i.e.,* net versus gross hedging practices), rather than having to conform their hedging programs to a one-size-fits-all standard that may not be suitable for their risk management needs. Finally, the proposal to increase non-spot month limit levels for the nine legacy agricultural contracts to levels that reflect observed levels of trading activity, based on recent data reviewed by the Commission, should allow swap dealers, liquidity providers, market makers, and others who have risk management needs, but who are not hedging a physical commercial, to soundly manage their risks.

e. Other Public Interest

The Commission has not identified any additional public interest considerations related to the costs and benefits of this 2020 Proposal.

f. Request for Comment

(52) The Commission requests comment on all aspects of the Commission's discussion of the 15(a) factors for this proposal.

B. Paperwork Reduction Act

1. Overview

Certain provisions of the proposed rule on position limits for derivatives would amend or impose new ''collection of information'' requirements as that term is defined under the Paperwork Reduction Act (''PRA'').[663] An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number from the Office of Management and Budget (''OMB''). The proposed rule would modify the following existing collections of information previously approved by OMB and for which the Commodity Futures Trading Commission (''Commission'') has received control numbers: (i) OMB control number 3038–0009 (Large Trader Reports), which generally covers Commission regulations in parts 15 through 21; (ii) OMB control number 3038–0013 (Aggregation of Positions), which covers Commission regulations in part 150;[664] and (iii) OMB control number 3038–0093 (Provisions Common to Registered Entities), which covers Commission regulations in part 40.

Certain provisions of the proposed rule would impose new collection of information requirements under the PRA. As a result, the Commission is proposing to revise OMB control numbers 3038–0009, 3038–0013, and 3038–0093 and is submitting this proposal to OMB for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11.

2. Commission Reorganization of OMB Control Numbers 3038–0009 and 3038–0013

The Commission is proposing two non-substantive changes so that all collections of information related solely to the Commission's position limit requirements are consolidated under one OMB control number.[665] First, the Commission would transfer collections of information under part 19 (Reports by Persons Holding Bona Fide Hedge Positions and By Merchants and Dealers in Cotton) related to position limit requirements from OMB control number 3038–0009 to OMB control number 3038–0013. Second, the modified OMB control number 3038–0013 would be renamed as ''Position Limits.'' This renaming change is non-substantive and would allow for all collections of information related to the federal position limits requirements, including exemptions from speculative position limits and related large trader reporting, to be housed in one collection.

One collection would make it easier for market participants to know where to find the relevant position limits PRA burdens. If the proposed rule is finalized, the remaining collections of information under OMB control number 3038–0009 would cover reports by various entities under parts 15, 17, and 21[666] of the Commission's regulations, while OMB control number 3038–0013 would hold collections of information arising from parts 19 and 150.

As discussed in section 3 below, this non-substantive reorganization would result in: (i) A decreased burden estimate under control number 3038–0009 due to the transfer of the collection of information arising from obligations in part 19, and (ii) a corresponding increase of the amended part 19 burdens under control number 3038–0013. However, as discussed further below, the collection of information and burden hours arising from proposed part 19 that would be transferred to OMB control number 3038–0013 would be less than the existing burden estimate under OMB control number 3038–0009 since the Commission's proposal would amend existing part 19 by eliminating existing Form 204 and certain parts of Form 304 and the reporting burdens related thereto. As a result, market participants would see a net reduction of collections of information and burden hours under revised part 19.

[663] 44 U.S.C. 3501 *et seq.*

[664] Currently, OMB control number 3038–0013 is titled ''Aggregation of Positions.'' The Commission proposes to rename the OMB control number ''Position Limits'' to better reflect the nature of the information collections covered by that OMB control number.

[665] The Commission notes that certain collections of information under OMB control number 3038–0093 relate to several Commission regulations in addition to the Commission's proposed position limits framework. As a result, the collections of information discussed herein under this OMB control number 3038–0093 will not be consolidated under OMB control number 3038–0013.

[666] As noted above, OMB control number 3038–0009 generally covers Commission regulations in parts 15 through 21. However, it does not cover §§ 16.02, 17.01, 18.04, or 18.05, which are under OMB control number 3038–0103. Final Rule. 78 FR 69178 at 69200 (Nov. 18, 2013) (transferring §§ 16.02, 17.01, 18.04, and 18.05 to OMB Control Number 3038–0103).

3. Collections of Information

The proposed rule would amend existing regulations, and create new regulations, concerning speculative position limits. Among other amendments, the Commission's proposed rule would include: (1) New and amended federal spot month limits for the proposed 25 physical commodity derivatives; (2) amended federal non-spot limits for the nine legacy agricultural commodities contracts currently subject to federal position limits; (3) amended rules governing exchange-set limit levels and grants of exemptions therefrom; (4) an amended process for requesting certain spread exemptions and non-enumerated bona fide hedge recognitions for purposes of federal position limits directly from the Commission; (5) a new exchange-administered process for recognizing non-enumerated bona fide hedge positions from federal limit requirements; and (6) amendments to part 19 and related provisions that would eliminate certain reporting obligations that require traders to submit a Form 204 and Parts I and II of Form 304.

Specifically, this proposal would amend parts 15, 17, 19, 40, and 150 of the Commission's regulations to implement the proposed federal position limits framework. The proposal would also transfer an amended version of the ''bona fide hedging transactions or positions'' definition from existing § 1.3 to proposed § 150.1, and remove §§ 1.47, 1.48, and 140.97. The Commission's proposal would revise existing collections of information covered by OMB control number 3038–0009 by amending part 19, along with conforming changes to part 15, in order to narrow the scope of who is required to report under part 19.[667]

Furthermore, the proposed rule's amendments to part 150 would revise existing collections of information covered by OMB control number 3038–0013, including new reporting and recordkeeping requirements related to the application and request for relief from federal position limit requirements submitted to designated contract markets (''DCMs'') and swap execution facilities (''SEFs'') (collectively, ''exchanges''). Finally, the proposed rule would also amend part 40 to incorporate a new reporting obligation into the definition of ''terms and conditions'' in § 40.1(j) and result in a revised existing collection of information covered by OMB control number 3038–0093.

a. OMB Control Number 3038–0009—Large Trader Reports; Part 19—Reports by Persons Holding Bona Fide Hedge Positions and by Merchants and Dealers in Cotton

Under OMB control number 3038–0009, the Commission currently estimates that the collections of information related to existing part 19, including Form 204 and Form 304, collectively known as the ''Series '04'' reports, have a combined annual burden hours of 1,553 hours. Under existing part 19, market participants that hold *bona fide* hedging positions in excess of position limits for the nine legacy agricultural commodity contracts currently subject to federal limits must file a monthly report on Form 204 (or Parts I and II of Form 304 for cotton). These reports show a snapshot of traders' cash positions on one given day each month, and are used by the Commission to determine whether a trader has sufficient cash positions to justify futures and options on futures positions above the applicable federal position limits in existing § 150.2.

The Commission's proposal would amend part 19 to remove these reporting obligations associated with Form 204 and Parts I and II of Form 304. As discussed under proposed § 150.9 below, the Commission preliminarily has determined that it may eliminate these forms and still receive adequate information to carry out its market and financial surveillance programs since its proposed amendments to §§ 150.5 and 150.9 would also enable the Commission to obtain the necessary information from the exchanges. To effect these changes to traders' reporting obligations, the Commission would eliminate (i) existing § 19.00(a)(1), which requires the applicable persons to file a Form 204; and (ii) existing § 19.01, which among other things, sets forth the cash-market information required to be submitted on the Forms 204 and 304.[668] The Commission would maintain Part III of Form 304, which requests information on unfixed-price ''on call'' purchases and sales of cotton and which the Commission utilizes to prepare its weekly cotton on-call report.[669] The Commission would also maintain its existing special call authority under part 19.

The supporting statement for the current active information collection request for part 19 under OMB control number 3038–0009[670] states that in 2014: (i) 135 reportable traders filed the Series '04 reports (*i.e.,* Form 204 and Form 304 in the aggregate), (ii) totaling 3,105 Series '04 reports, for a total of (iii) 1,553 burden hours.[671] However, based on more current and recent 2019 submission data, the Commission is revising its existing estimates slightly higher for the Series '04 reports under part 19:

- *Form 204:* 50 monthly reports, for an annual total of 600 reports (50 monthly reports × 12 months = 600 total annual reports) and 300 annual burden hours (600 annual Form 204s submitted × 0.5 hours per report = 300 aggregate annual burden hours for all Form 204s).
- *Form 304:* 55 weekly reports, for an annual total of 2,860 reports (55 weekly reports × 52 weeks = 2,860 total annual reports) and 1,430 annual burden hours (2,860 annual Form 304s submitted × 0.5 hours per report = 1,430 aggregate annual burden hours for all Form 304s).

Accordingly, based on the above revised estimates the Commission would revise its estimate of the current collections of information under existing part 19 to reflect that approximately 105 reportable traders[672] file a total of 3,460 responses annually[673] resulting in an aggregate annual burden of 1,730 hours.[674] [675] The

[667] As noted above, the Commission would accomplish this by eliminating existing From 204 and Parts I and II of Form 304. Additionally, proposed changes to part 17, covered by OMB control number 3038–0009, would make conforming amendments to remove certain duplicative provisions and associated information collections related to aggregation of positions, which are in current § 150.4. These conforming changes would not impact the burden estimates of OMB control number 3038–0009.

[668] As noted above, the proposed amendments to part 19 affect certain provisions of part 15 and § 17.00. Based on the proposed elimination of Form 204 and Parts I and II of Form 304, the Commission proposes conforming technical changes to remove related reporting provisions from (i) the ''reportable position'' definition in § 15.00(p); (ii) the list of ''persons required to report'' in § 15.01; and (iii) the list of reporting forms in § 15.02. These proposed conforming amendments to part 15 would not impact the existing burden estimates.

[669] The Commission is proposing a technical change to Part III of Form 304 to require traders to identify themselves on the Form 304 using their Public Trader Identification Number, in lieu of the CFTC Code Number required on previous versions of the Form 304. However, the Commission preliminarily has determined that this would not result in any change to its existing PRA estimates with respect to the collections of information related to Part III of Form 304.

[670] *See* ICR Reference No: 201906–3038–008.

[671] 3,105 Series '04 submissions × 0.5 hours per submission = 1,553 aggregate burden hours for all submissions. The Commission notes that it has preliminarily estimated that it takes approximately 20 minutes to complete a Form 204 or 304. However, in order to err conservatively, the Commission now uses a figure of 30 minutes.

[672] 55 Form 304 reports + 50 Form 205 reports = 105 reportable traders.

[673] 2,860 Form 304s + 600 Form 204s = 3,460 total annual Series '04 reports.

[674] 3,460 Series '04 reports × 0.5 hours per report = 1,730 annual aggregate burden hours.

[675] These revised estimates result in an increased estimate under existing part 19 of 355 Series '04

Continued

Commission's proposal would reduce the current OMB control number 3038–0009 by these revised burden estimates under part 19 as they would be transferred to OMB control number 3038–0013.

With respect to the overall collections of information that would be transferred to OMB control number 3038–0013 based on the Commission's revised part 19 estimate, the Commission estimates that the Commission's proposal would reduce the collections of information in part 19 by 600 reports [676] and by 300 annual aggregate burden hours since the Commission's proposal would eliminate Form 204, as discussed above.[677] The Commission does not expect a change in the number of reportable traders that would be required to file Part III of Form 304.[678] Thus, the Commission continues to expect approximately 55 weekly Form 304 reports, for an annual total of 2,860 reports [679] for an aggregate total of 1,430 burden hours, which information collection burdens would be transferred to OMB control number 3038–0013.[680]

In addition, the Commission would maintain its authority to issue special calls for information to any person claiming an exemption from speculative federal position limits. While the position limits framework will expand to traders in the proposed twenty-five commodities (an increase from the existing nine legacy agricultural products), the position limit levels themselves will also be higher. The higher position limit levels would result in a smaller universe of traders who may exceed the position limits and thus be subject to a special call for information on their large position(s). Taking into account the higher limits and smaller universe of traders who would likely exceed the position limits, the Commission estimates that it is likely to issue a special call for information to 4 reportable traders. The Commission preliminarily estimates that it would take approximately 5 hours to respond to a special call. The Commission therefore estimates that industry would incur a total of 20 aggregate annual burden hours.[681]

b. OMB Control Number 3038–0013—Aggregation of Positions (To Be Renamed ''Position Limits'')

i. Introduction; Bona Fide Hedge Recognition and Exemption Process

The Commission is proposing to amend the existing process for market participants to apply to obtain an exemption or recognition of a bona fide hedge position. Currently, the ''bona fide hedging transaction or position'' definition appears in existing § 1.3. Under existing §§ 1.47 and 1.48, a market participant must apply directly to the Commission to obtain a bona fide hedge recognition in accordance with § 1.3 for federal position limit purposes.

Proposed §§ 150.3 and 150.9 would establish an amended process for obtaining a bona fide hedge exemption or recognition, which includes: (i) A new bona fide hedging definition in § 150.1, (ii) a new process administered by the exchanges in proposed § 150.9 for recognizing non-enumerated bona fide hedging positions for federal limit requirements, and (iii) an amended process to apply directly to the Commission for certain spread exemptions or for recognition of non-enumerated bona fide hedging positions. Proposed § 150.3 also would include new exemption types not explicitly listed in existing § 150.3.

The Commission has previously estimated the combined annual burden hours for submitting applications under both §§ 1.47 and 1.48 to be 42 hours.[682] The Commission's proposal would maintain the existing process where market participants may apply directly to the Commission, although the Commission expects market participants to predominantly rely on the exchange-administered process to obtain recognition of their non-enumerated bona fide hedging positions for purposes of federal position limit requirements. Enumerated bona fide hedge positions would remain self-effectuating, which means that market participants would not need to apply to the Commission for purposes of federal position limits, although market participants would still need to apply to an exchange for recognition of bona fide hedge positions for purposes of exchange-set position limits. The Commission forms this expectation on the fact that all the contracts that will now be subject to federal position limits are already subject to exchange-set limits. Thus, most market participants are likely to already be familiar with an exchange-administered process, as is being proposed under § 150.9. Familiarity with an exchange-administered process will result in operational efficiencies, such as completing one application for non-enumerated bona fide hedge requests for both federal and exchange-set limits and thus a reduced burden on market participants.

As previously discussed, the proposal would move the ''bona fide hedge transaction or position'' definition to proposed § 150.1, and amend the definition to, among other things, remove the distinction between different types of enumerated bona fide hedge positions so that anticipatory enumerated bona fide hedges would be self-effectuating like other non-anticipatory enumerated bona fide hedges. The proposal would maintain the distinction between enumerated and non-enumerated bona fide hedges, and market participants would be required to apply for recognition of non-enumerated bona fide hedge positions either directly from the Commission pursuant to proposed § 150.3 or indirectly through an exchange-centric process under § 150.9.[683] The Commission does not preliminarily believe that this amendment will have any PRA impacts since it is maintaining the status quo in which most enumerated bona fide hedges are self-effectuating while requiring traders to apply to the Commission for recognition

reports submitted by traders (3,460 estimated Series '04 reports − 3,105 submissions from the Commission's previous estimate = an increase of 355 response difference); an increase of 177 aggregate burden hours across all respondents (1,730 aggregate burden hours − 1,553 aggregate burden hours from the Commission's previous estimate = an increase of 177 aggregate burden hours); and a decrease of 30 respondent traders (105 respondents − 135 respondents from the Commission's previous estimate = a decrease of 30 respondents).

[676] 50 monthly Form 204 reports × 12 months = 600 total annual reports.

[677] 600 Form 204 reports × 0.5 burden hours per report = 300 aggregate annual burden hours.

[678] Since the Commission's proposal would eliminate Parts I and II of Form 304, proposed Form 304 would only refer to existing Part III of that form.

[679] 55 weekly Form 304 reports × 52 weeks = 2,860 total annual Form 304 reports.

[680] 2,860 Form 304 reports × 0.5 burden hours per report = 1,430 aggregate annual burden hours.

[681] 4 possible reportable traders × 5 hours each = 20 aggregate annual burden hours.

[682] The supporting statement for a previous information collection request, ICR Reference No: 201808–3038–003, for OMB control number 3038–0013, estimated that seven respondents would file the §§ 1.47 and 1.48 submissions, and that each respondent would file two submissions for a total of 14 annual submissions, requiring 3 hours per response, for a total of 42 burden hours for all respondents.

[683] Currently, in order to determine whether a futures, an option on a futures, or a swap position qualifies as a bona fide hedge, either (1) the position in question must qualify as an enumerated bona fide hedge, as defined in existing § 1.3, or (2) the trader must file a statement with the Commission, pursuant to existing § 1.47 (for non-enumerated bona fide hedges) and/or existing § 1.48 (for enumerated anticipatory bona fide hedges). The revised definition would be accompanied by an expanded list of enumerated bona fide hedges that would appear in acceptable practices, rather than in the definition. The Commission additionally proposes to include an additional enumerated bona fide hedge for anticipatory merchandizing, which would be self-effectuating like the other enumerated hedges. Under the existing framework, anticipatory merchandizing is considered to be a non-enumerated bona fide hedge. The Commission preliminarily does not expect this change to have any PRA impacts.

of non-enumerated bona fide hedge positions.

ii. § 150.2 Speculative Limits

Under proposed § 150.2(f), upon request from the Commission, DCMs listing a core referenced futures contract would be required to supply to the Commission deliverable supply estimates for each core referenced futures contract listed at that DCM. DCMs would only be required to submit estimates if requested to do so by the Commission on an as-needed basis. When submitting estimates, DCMs would be required to provide a description of the methodology used to derive the estimate, as well as any statistical data supporting the estimate. Appendix C to part 38 sets forth guidance regarding estimating deliverable supply.

Submitting deliverable supply estimates upon demand from the Commission for contracts subject to federal limits would be a new reporting obligation for DCMs. The Commission estimates that six DCMs would be required to submit initial deliverable supply estimates. The Commission estimates that it would request each DCM that lists a core referenced futures contract to file one initial report for each core reference futures contract it lists on its market. Such requests from the Commission would result in one initial submission for each of the proposed twenty-five core referenced futures contracts.[684] The Commission further estimates that it will take 20 hours to complete and file each report for a total annual burden of 500 hours for all respondents.[685] Accordingly, the proposed changes to § 150.2(f) would result in an initial, one-time increase to the current burden estimates of OMB control number 3038–0013 by an increase of 25 submissions across six respondent DCMs for the initial number of submissions for the twenty-five core referenced futures contracts and an initial, one-time burden of 500 hours.

iii. § 150.3 Exemptions From Federal Position Limit Requirements

Market participants may currently apply directly to the Commission for recognition of certain bona fide hedges under the process set forth in existing §§ 1.47 and 1.48. There is no existing process that is codified under the Commission's regulations for spread exemptions or other exemptions included under proposed § 150.3.

Proposed § 150.3 would specify the circumstances in which a trader could exceed federal position limits.[686] With respect to non-enumerated bona fide hedge recognitions and spread exemptions not identified in the proposed ''spread transaction'' definition in proposed § 150.1, proposed § 150.3(b) would provide a process for market participants to request such bona fide hedge recognitions or spread exemptions directly from the Commission (as previously noted, both enumerated bona fide hedges and spread exemptions identified in the proposed ''spread transaction'' definition would be self-effectuating and would not require a market participant to submit a request). Proposed § 150.3(b), (d), and (e) set forth exemption-related reporting and recordkeeping requirements that impact the current burden estimates in OMB control number 3038–0013.[687] The proposed collection of information is necessary for the Commission to determine whether to recognize a trader's position as a bona fide hedge exempted from position limit requirements.

Proposed § 150.3(b) establishes application filing requirements and recordkeeping and reporting requirements that are similar to existing requirements for bona fide hedge recognitions under existing §§ 1.47 and 1.48. Although these requirements in proposed § 150.3 would be new for market participants seeking spread exemptions (which are currently self-effectuating), the proposed filing, recordkeeping, and reporting requirements in § 150.3(b) are otherwise familiar to market participants that have requested certain bona fide hedging recognitions from the Commission under existing regulations.

The Commission estimates that very few or no traders would request recognition of a non-enumerated bona fide hedge, and those traders that do would likely prefer the exchange-administered process in proposed § 150.9 (discussed further below) rather than apply directly to the Commission under proposed § 150.3(b). Similarly, the Commission estimates that very few or no traders would submit a request for a spread exemption since the Commission preliminarily has determined that the most common spread exemptions are included in the proposed ''spread transaction'' definition and therefore would be self-effectuating and would not need approval for purposes of federal position limits. The Commission expects that traders are likely to rely on the § 150.3(b) process when dealing with a spread transaction or non-enumerated bona fide hedge position that poses a novel or complex question under the Commission's rules. Particularly when the exchanges have not recognized that type of practice as a non-enumerated bona fide hedge previously, the Commission expects market participants to seek more regulatory clarity under proposed § 150.3(b). In the event a trader submits such request under proposed § 150.3, the Commission estimates that traders would file one request per year for a total of one annual request for all respondents. The Commission further estimates that in such situation, it would take 20 hours to complete and file each report, for a total of 20 aggregate annual burden hours for all traders.

Proposed § 150.3(d) establishes recordkeeping requirements for persons who claim any exemptions or relief under proposed § 150.3. Proposed § 150.3(d) should help to ensure that if any person claims any exemption permitted under proposed § 150.3 such exemption holder can demonstrate compliance with the applicable requirements as follows:

First, under proposed § 150.3(d)(1), any person claiming an exemption would be required to keep and maintain complete books and records concerning certain details.[688] Proposed § 150.3(d)(1)

[684] In 2018, the DCMs submitted deliverable supply estimates for all the commodities that would be subject to federal position limits. Thus, the Commission expects that the exchanges would be able to leverage these recent estimates to minimize the burden of the initial submission under the Commission's proposal.

[685] 20 initial hours × 25 core referenced futures contracts = 500 one-time, aggregate burden hours. While there is an initial annual submission, the Commission does not expect to require the exchanges to resubmit the supply estimates on an annual basis.

[686] Proposed § 150.3(b) would include (1) recognitions of bona fide hedges under proposed § 150.3(b); (2) spread exemptions under proposed § 150.3(b); (3) financial distress positions a person could request from the Commission under § 140.99; and (4) exemptions for certain natural gas positions held during the spot month. Proposed § 150.3(b) would also exempt pre-enactment and transition period swaps. The enumerated bona fide hedge recognitions and spread exemptions identified in the proposed ''spread transaction'' definition in proposed § 150.1 would be self-effectuating.

[687] Proposed § 150.3(f) clarifies the implications on entities required to aggregate accounts under § 150.4, and § 150.3(g) provides for delegation of certain authorities to the Director of the Division of Market Oversight. The proposed changes to §§ 150.3(f) and 150.3(g) do not impact the current estimates for these OMB control numbers. Also, the proposal reminds persons of the relief provisions in § 140.99, covered by OMB control number 3038–0049, which does not impact the burden estimates.

[688] The requirement would include all details of related cash, forward, futures, options, and swap positions and transactions, including anticipated requirements, production and royalties, contracts for services, cash commodity products and by-

Continued

would establish recordkeeping requirements for any person relying on an exemption granted directly from the Commission. The Commission estimates that very few or no traders would claim an exemption directly from the Commission. In the event a trader requests an exemption, the Commission estimates that the trader would create one record per exemption per year for a total of one annual record for all respondents. The Commission further estimates that it will take one hour to comply with the recordkeeping requirement of § 150.3(d)(1) for a total of one aggregate annual burden hour for all traders.

Second, under proposed § 150.3(d)(2), a pass-through swap counterparty, as defined by proposed § 150.1, that relies on a representation received from a bona fide hedging swap counterparty that the swap qualifies in good faith as a ''bona fide hedging position or transaction,'' as defined under proposed § 150.1, would be required to: (i) Maintain any written representation for at least two years following the expiration of the swap; and (ii) furnish the representation to the Commission upon demand. Proposed § 150.3(d)(2) would create a new recordkeeping obligation for certain persons relying on the proposed pass-through swap representations, and the Commission estimates that 425 traders would be requested to maintain the required records. The Commission estimates that each trader would maintain one record per year for a total of 425 aggregate annual records for all respondents. The Commission further estimates that it will take one hour to comply with the recordkeeping requirement of § 150.3(d) for a total of one annual burden hour for each trader and 425 aggregate annual burden hours for all traders.

The Commission proposes to move existing § 150.3(b), which currently allows the Commission or certain Commission staff to make special calls to demand certain information regarding persons claiming exemptions, to proposed § 150.3(e), with some modifications to include swaps.[689] Together with the recordkeeping provision of proposed § 150.3(d), proposed § 150.3(e) should enable the Commission to monitor the use of exemptions from speculative position limits and help to ensure that any person who claims any exemption permitted by proposed § 150.3 can demonstrate compliance with the applicable requirements. The Commission's existing collection under existing § 150.3 estimated that the Commission issues two special calls per year for information related to exemptions, and that each response to a special call for information takes 3 burden hours to complete. This includes two burden hours to fulfill reporting requirements and 1 burden hour related to recordkeeping for an aggregate total for all respondents of six annual burden hours, broken down into four aggregate annual burden hours for reporting and two aggregate annual burden hours for recordkeeping.[690]

The Commission estimates that proposed § 150.3(e) would impose information collection burdens related to special calls by the Commission on approximately 18 additional respondents, for an estimated 20 special calls per year.[691] The Commission estimates that these 20 market participants would provide one submission per year to respond to the special call for a total of 20 annual submissions for all respondents. The Commission estimates it would take a market participant approximately 10 hours to complete a response to a special call. Therefore, the Commission estimates responses to special calls for information will take an aggregate total of 200 burden hours for all traders.[692] The Commission notes that it is also maintaining its special call authority for reporting requirements under proposed part 19 discussed above.

iv. § 150.5 Exchange Set Limits and Exemptions

Amendments to § 150.5 would refine the process, and establish non-exclusive methodologies, by which exchanges may set exchange-level limits and grant exemptions therefrom, including separate methodologies for setting limit levels for contracts subject to federal limits (§ 150.5(a)), physical commodity derivatives not subject to federal limits (§ 150.5(b)), and excluded commodity contracts (§ 150.5(c)).[693] In compliance with part 40 of the Commission's regulations, exchanges currently have policies and procedures in place to address exemptions from exchange set limits through their rulebooks. If the proposal is adopted, the Commission expects that the exchanges would accordingly update their rulebooks, both to conform to proposed new requirements and to incorporate the additional contracts that will be subject to federal position limits into their process for setting exchange-level limits and exemptions therefrom.

The collections of information related to amended rulebooks under part 40 are covered by OMB control number 3038–0093. Separately, the collections of information related to applications for exemptions from exchange-set limits are covered by OMB control number 3038–0013.

Under proposed § 150.5(a)(1), for any contract subject to a federal limit, DCMs and, ultimately, SEFs, would be required to establish exchange-set limits for such contracts. Under proposed § 150.5(a)(2), exchanges that wish to grant exemptions from exchange-set limits on commodity derivative contracts subject to federal limits would have to require traders to file an application to show a request for a bona fide hedge recognition or exemption conforms to a type that may be granted under proposed § 150.3(a)(1)–(4). Exchanges would have to require that such exchange-set limit exemption applications be filed in advance of the date such position would be in excess of the limits, but exchanges would be given the discretion to adopt rules allowing traders to file applications within five business days after a trader took on such position. Proposed § 150.5(a)(2) would also provide that exchanges must require that the trader reapply for the exemption at least annually. Proposed § 150.5(a)(4) would require each exchange to provide a monthly report showing the disposition of any exemption application, including the recognition of any position as a bona fide hedge, the exemption of any spread transaction, the renewal, revocation, or modification of a previously granted

products, cross-commodity hedges, and a record of bona fide hedging swap counterparties.

[689] Proposed § 150.3(e) would refer to commodity derivative contracts, whereas current § 150.3(b) refers to futures and options. The proposed change would result in the inclusion of swaps.

[690] The special call authority under part 19 and the proposed special call authority discussed under § 150.3 would be similar in nature; however, part 19 would apply to special calls regarding bona fide hedge recognitions and related underlying cash market positions while the special calls under proposed § 150.3 would apply to the other exemptions under proposed § 150.3.

[691] 2 respondents subject to special calls under existing § 150.3 + 18 additional respondents under proposed § 150.3 = 20 total respondents. The Commission estimates, at least during the initial implementation period, that it is likely to issue more special calls for information to monitor compliance with position limits, particularly in the commodity markets that will now be subject to federal position limits for the first time.

[692] 20 special calls × 10 burden hours per call = 200 total burden hours.

[693] Proposed § 150.5 addresses exchange-set position limits and exemptions therefrom, whereas proposed § 150.9 addresses federal limits and an exchange-administered process for purposes of federal limits where an applicant may apply through an exchange to the Commission for recognition of an non-enumerated bona fide hedge for purposes of federal position limits.

recognition or exemption, or the rejection of any application.[694]

These proposed collections of information related to exemptions from exchange-set limits are necessary to ensure that such exchange-set limits comply with Commission regulations, including that exchange limits are no higher than the applicable federal level; to establish minimum standards needed for exchanges to administer the exchange's position limits framework; and to enable the Commission to oversee an exchange's exemptions process to ensure it does not undermine the federal position limits framework. In addition, the Commission would use the information to confirm that exemptions are granted and renewed in accordance with the types of exemptions that may be granted under proposed § 150.3(a)(1)–(4).

The Commission estimates under proposed § 150.5(a) that 425 traders would submit applications to claim spread exemptions and bona fide hedge recognitions from exchange-set position limits on commodity derivatives contracts subject to federal limits set forth in § 150.2. The Commission estimates that each trader on average would submit one application to an exchange each year for a total of 425 applications for all respondents. The Commission further estimates that it will take 2 hours to complete and file each application for a total of 2 annual burden hours for each trader and 850 aggregate burden hours for all traders.[695]

The Commission estimates under proposed § 150.5(a)(4) that six exchanges would provide monthly reports for a total of 72 monthly reports for all exchanges.[696] The Commission further estimates that it will take 5 hours to complete and file each monthly report for a total of 60 annual burden hours for each exchange and 360 annual burden hours for all exchanges.[697]

Proposed § 150.5(b) would require exchanges, for physical commodity derivatives that are not subject to federal limits to set limits during the spot month and to set either limits or accountability outside of the spot month. Under proposed § 150.5(b)(3), where multiple exchanges list contracts that are substantially the same, including physically-settled contracts that have the same underlying commodity and delivery location, or cash-settled contracts that are directly or indirectly linked to a physically-settled contract, the exchange must either adopt ''comparable'' limits for such contracts, or demonstrate to the Commission how the non-comparable levels comply with the standards set forth in proposed § 150.5(b)(1) and (2). Such a determination also must address how the levels are necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index. Proposed § 150.5(b)(3) is intended to help ensure that position limits established on one exchange would not jeopardize market integrity or otherwise harm other markets. This provision may also improve the efficiency with which exchanges adopt limits on newly-listed contracts that compete with an existing contract listed on another exchange and help reduce the amount of time and effort needed for Commission staff to assess the new limit levels. Further, proposed § 150.5(b)(3) would be consistent with the Commission's proposal to generally apply equivalent federal limits to linked contracts, including linked contracts listed on multiple exchanges.

The Commission estimates that under proposed § 150.5(b)(3), six exchanges would make submissions to demonstrate to the Commission how the non-comparable levels comply with the standards set forth in proposed § 150.5(b)(1) and (2). The Commission estimates that each exchange on average would make 3 submissions each year for a total of 18 submissions for all exchanges. The Commission further estimates that it will take 10 hours to complete and file each submission for a total of 18 annual burden hours for each exchange and 180 burden hours for all exchanges.[698]

Proposed § 150.5(b)(4) would permit exchanges to grant exemptions from any exchange limit established for physical commodity contracts not subject to federal limits. To grant such exemptions, exchanges must require traders to file an application to show whether the requested exemption from exchange-set limits would be in accord with sound commercial practices in the relevant commodity derivative market and/or that may be established and liquidated in an orderly fashion in that market. This proposed collection of information is necessary to confirm that any exemptions granted from exchange limits on physical commodity contracts not subject to federal limits do not pose a threat of market manipulation or congestion, and maintains orderly execution of transactions. The Commission estimates that 200 traders would submit one application each year and that each application would take approximately two hours to complete, for an aggregate total of 400 burden hours per year for all traders.

Proposed § 150.5(e) reflects that, consistent with the definition of ''rule'' in existing § 40.1, any exchange action establishing or modifying position limits or exemptions therefrom, or position accountability, in any case pursuant to proposed § 150.5(a), (b), (c), or Appendix F to part 150, would qualify as a ''rule'' and must be submitted to the Commission pursuant to part 40 of the Commission's regulations. Proposed § 150.5(e) further provides that exchanges would be required to review regularly any position limit levels established under proposed § 150.5 to ensure the level continues to comply with the requirements of those sections. The Commission estimates under proposed § 150.5(e) that six exchanges would submit revised rulebooks to satisfy their compliance obligations under part 40.

[694] Additionally, each report should include the following details: (A) The date of disposition; (B) The effective date of the disposition; (C) The expiration date of any recognition or exemption; (D) Any unique identifier(s) the designated contract market or swap execution facility may assign to track the application, or the specific type of recognition or exemption; (E) If the application is for an enumerated bona fide hedging transaction or position, the name of the enumerated bona fide hedging transaction or position listed in Appendix A to this part; (F) If the application is for a spread transaction listed in the spread transaction definition in § 150.1, the name of the spread transaction as it is listed in § 150.1; (G) The identity of the applicant; (H) The listed commodity derivative contract or position(s) to which the application pertains; (I) The underlying cash commodity; (J) The maximum size of the commodity derivative position that is recognized by the designated contract market or swap execution facility as a bona fide hedging transaction or position, specified by contract month and by the type of limit as spot month, single month, or all-months-combined, as applicable; (K) Any size limitations or conditions established for a spread exemption or other exemption; and (L) For bona fide hedging transactions or positions, a concise summary of the applicant's activity in the cash markets and swaps markets for the commodity underlying the commodity derivative position for which the application was submitted.

[695] To increase efficiency and reduce duplicative efforts, the proposed rule would permit an exchange to have a single process in place that would allow market participants to request non-enumerated bona fide hedge recognitions from both federal and exchange-set position limits at the same time. The Commission believes that under a single process, the estimated burdens under proposed § 150.5(a) discussed in this section for exemptions from exchange-set limits will include the burdens under the federal limit exemption process for non-enumerated bona fide hedges under proposed § 150.9 discussed below.

[696] 6 exchanges × 12 months = 72 total monthly reports per year.

[697] 5 hours per monthly report × 12 months = 60 hours per year for each exchange. 60 annual hours × 6 exchanges = 360 aggregate annual hours for all exchanges.

[698] 18 estimated annual submissions × 10 burden hours per submission = 180 aggregate annual burden hours.

The Commission estimates that each exchange on average would make 1 initial revision of its rulebook to reflect the new position limit framework for a total of 6 applications for all exchanges. The Commission further estimates that it will take 30 hours to revise a rulebook for a total of 30 annual burden hours for each exchange and 180 burden hours for all exchanges.[699]

This proposed collection of information is necessary to ensure that the exchanges' rulebooks reflect the most up to date rules and requirements in compliance with the proposed position limits framework. The information would be used to confirm that exchanges are complying with their requirements to regularly review any position limit levels established under proposed § 150.5.

v. § 150.9 Exchange Process for Bona Fide Hedge Recognitions From Federal Limits

Proposed § 150.9 would establish a new streamlined process in which a trader could apply through an exchange to request a non-enumerated bona fide hedging recognition from federal position limits. As part of the process, proposed § 150.9 would create certain recordkeeping and reporting obligations on the market participant and the exchange, including: (i) An application to request non-enumerated bona fide hedge recognitions, which the trader would submit to the exchange and which the exchange would subsequently provide to the Commission if the exchange approves the application for purposes of exchange-set limits; (ii) a notification to the Commission and the applicant of the exchange's determination for purposes of exchange limits regarding the trader's request for recognition of a bona fide hedge or spread exemption; (iii) and a requirement to maintain full, complete and systematic records for Commission review of the exchange's decisions. The Commission believes that the exchanges that will elect to process applications for non-enumerated bona fide hedging exemptions under proposed § 150.9(a) already have similar processes for the review and disposition of such exemption applications in place through their rulebooks for purposes of exchange-set position limits.

Accordingly, the estimated burden on an exchange to comply with the proposed rule will be less burdensome because the exchanges may leverage their existing policies and procedures to comply with the proposed rule. The Commission estimates that six exchanges would elect to process applications for non-enumerated bona fide hedge recognitions that would satisfy the federal position limit requirements under proposed § 150.9, and would be required to file amended rulebooks pursuant to part 40 of the Commission's regulations. The Commission bases its estimate on the number of exchanges that have submitted similar rules to the Commission in the past.

Proposed § 150.9(c) would require a trader to submit an application with sufficient information to enable the exchange to determine whether it should recognize a position as a bona fide hedge for purposes of federal position limits. Each applicant would need to reapply for its non-enumerated bona fide hedge recognition at least on an annual basis by updating its original application. The Commission expects that traders would benefit from the exchange-administered framework established under proposed § 150.9 because traders may submit one application to obtain a non-enumerated bona fide hedge recognition for purposes of both exchange-set and federal limits, as opposed to submitting separate applications to the Commission for federal position limit purposes and separate applications to an exchange for exchange limit purposes.[700]

Accordingly, the estimated burden for traders requesting non-enumerated bona fide hedge recognitions from exchange-set limits under § 150.5(a) would subsume the burden estimates in connection with proposed § 150.9 for requesting non-enumerated bona fide hedge recognition's from federal limits since the Commission preliminarily believes exchanges would combine the two processes (*i.e.,* any trader who applies through an exchange under proposed § 150.9 for a non-enumerated bona fide hedge for federal position limits purposes also would be deemed to be applying at the same time under proposed § 150.5(a) for exchange position limits purposes and thus it would not be appropriate to distinguish between the two for PRA purposes). Accordingly, the Commission preliminarily anticipates that 6 exchanges each would receive only one application for a non-enumerated bona fide hedge recognition under proposed § 150.9 for a total of six aggregate annual applications for all exchanges; however, as noted above, this amount is included in the Commission's estimate in connection with proposed § 150.5(a).[701] Specifically, as discussed above in connection with proposed § 150.5(a), the Commission estimates under proposed §§ 150.5(a) and 150.9(a) that 425 traders would submit applications to claim exemptions and/or bona fide hedge recognitions for contracts subject to federal position limits as set forth in § 150.2.[702]

Proposed § 150.9(d) would require exchanges to keep full, complete, and systematic records, including all pertinent data and memoranda, of all activities relating to the processing of such applications and the disposition thereof. In addition, as provided for in proposed § 150.9(g), the Commission may, in its discretion, at any time, review the designated contract market's records retained pursuant to proposed § 150.9(d). The proposed recordkeeping requirement is necessary for the Commission to review the exchanges' processes, retention of records, and

[699] 6 initial applications × 30 burden hours = 180 initial aggregate burden hours.

[700] The Commission believes the collections of information set forth above are necessary for the exchange to process requests for recognition of non-enumerated bona fide hedges for purposes of both exchange-set position limits and federal position limits. The information would be used by the exchange to determine, and the Commission to review and verify, whether the facts and circumstances demonstrate it is appropriate to recognize a position as a non-enumerated bona fide hedging transaction or position.

[701] As discussed above, the process and estimated burdens under proposed § 150.9 would not apply to § 150.5(b) because proposed § 150.5(b) applies to those physical commodity contracts that are not subject to federal limits (as opposed to proposed § 150.5(a), which applies to those contracts subject to federal limits). As a result, a trader that would use the process established under § 150.5(b) for exchange-set limits would not need to apply under proposed § 150.9 since the traders would not need a bona fide hedge recognition or an exemption from federal position limits.

[702] As discussed in connection with proposed § 150.5(a) above, the Commission estimates that each trader on average would make one application each year for a total of 425 applications across all exchanges. The Commission further estimates that, for proposed §§ 150.5(a) and 150.9(a), taken together, it will take two hours to complete and file each application for a total of two annual burden hours for each trader and 850 aggregate annual burden hours for all traders. (425 annual applications × 2 burden hours per application = 850 aggregate annual burden hours). The Commission preliminarily anticipates that compared to proposed § 150.5(a), fewer traders will apply under proposed § 150.9 since proposed § 150.9 applies only to non-enumerated bona fide hedge recognitions for federal purposes. In comparison, while proposed § 150.5 would encompass these same applications for non-enumerated bona fide hedge recognitions (but for the purpose of exchange-set limits), proposed § 150.5(a) also would include enumerated bona fide hedge applications along with spread exemption requests. The Commission's estimate of 850 aggregate annual burden hours encompasses all such requests from all traders. However, for the sake of clarity, the Commission preliminarily anticipates that 6 exchanges each would receive one application per year for a non-enumerated bona fide hedge under proposed § 150.9 (for a total of six applications across all exchanges); as noted, this burden is included in the Commission's estimate of 425 annual applications in connection with its estimate under proposed § 150.5(a).

compliance with requirements established and implemented under this section.

Proposed § 150.9(d) would create a new recordkeeping obligation consistent with the standards in existing § 1.31.[703] The Commission estimates that six exchanges would each create one record in connection with proposed § 150.9 each year for a total of six annual records for all respondents. The Commission further estimates that it will take five hours to comply with the proposed recordkeeping requirement of § 150.9(d) for a total of five annual burden hours for each exchange and 30 aggregate annual burden hours across all exchanges.

Proposed § 150.9(f) would allow the Commission to inspect such books and records.[704] In the event the Commission exercises its authority to inspect such books and records, it estimates that the Commission would make an inspection to two exchanges per year and each exchange would incur four hours to make its books and records available to the Commission for review for a total of 8 aggregate annual burden hours for the two estimated respondent exchanges.[705]

Under proposed § 150.9(e), an exchange would need to provide an applicant and the Commission with notice of any approved application of an exchange's determination to recognize bona fide hedges and grant spread exemptions with respect to its own position limits for purposes of exceeding the federal position limits. The proposed notification requirement is necessary to inform the Commission of the details of the type of bona fide hedge recognitions or spread exemptions being granted. The information would be used to keep the Commission informed as to the manner in which an exchange administers its application procedures, and the exchange's rationale for permitting large positions.

The Commission estimates that under proposed § 150.9(e), 6 exchanges would submit notifications of approved application of an exchange's determination to recognize non-enumerated bona fide hedges for purposes of exceeding the federal position limits. The Commission estimates that each exchange on average would make 2 notifications: one notification each to the applicant trader and to the Commission each year for a total of 12 notices for all exchanges. The Commission further estimates that it will take 0.5 hours to complete and file each notification for a total of one annual burden hour for each exchange and six burden hours for all exchanges.[706]

c. OMB Control Number 3038–0093—Provisions Common to Registered Entities

1. § 150.9(a)

Under proposed § 150.9(a), exchanges that would like for their market participants to be able to exceed federal position limits based on a non-enumerated bona fide hedge recognition granted by the exchange with respect to its own limits must have rules, adopted pursuant to the rule approval process in § 40.5 of the Commission's regulations, establishing processes consistent with the provisions of proposed § 150.9. The proposed collection of information is necessary to capture the new non-enumerated bona fide hedge process in the exchanges' rulebook, which is subject to Commission approval. The information would be used to assess the process put in place by each exchange submitting amended rulebooks.

The Commission has previously estimated the combined annual burden hours for both §§ 40.5 and 40.6 to be 7,000 hours.[707] If the proposed rule is adopted, the Commission estimates that six exchanges would make one initial § 40.5 rule filings per year for a total of six one-time initial submissions for all exchanges. The Commission further estimates that the exchanges would employ a combination of in-house and outside legal and compliance counsel to update existing rulebooks and it will take 25 hours to complete and file each rule for a total 25 one-time burden hours for each exchange and 150 one-time burden hours for all exchanges.

2. Request for Comments on Collection

The Commission invites the public and other Federal agencies to comment on any aspect of the proposed information collection requirements discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to (i) evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collections of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information proposed to be collected; and (iv) minimize the burden of the proposed collections of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology.

Those desiring to submit comments on the proposed information collection requirements should submit them directly to the Office of Information and Regulatory Affairs, OMB, by fax at (202) 395–6566, or by email at *OIRAsubmissions@omb.eop.gov*. Please provide the Commission with a copy of submitted comments so that all comments can be summarized and addressed in the final rule preamble. Refer to the **ADDRESSES** section of this notice of proposed rulemaking for comment submission instructions to the Commission. A copy of the supporting statements for the collection of information discussed above may be obtained by visiting *http://www.RegInfo.gov*. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') requires that agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the

[703] Consistent with existing § 1.31, the Commission expects that these records would be readily available during the first two years of the required five year recordkeeping period for paper records, and readily accessible for the entire five-year recordkeeping period for electronic records. In addition, the Commission expects that records required to be maintained by an exchange pursuant to this section would be readily accessible during the pendency of any application, and for two years following any disposition that did not recognize a derivative position as a bona fide hedge.

[704] Proposed § 150.9(g)(1) provides the Commission's authority to, at its discretion, and at any time, review the exchange's processes, retention of records, and compliance with requirements established and implemented under this section. Under proposed § 150.9(g)(2), if the Commission determines additional information is required to conduct its review, pursuant to proposed § 150.9(g)(1), then it would notify the exchange and the relevant market participant of any issues identified and provide them with ten business days to provide supplemental information.

[705] 2 exchanges per year subject to a Commission inspection × 4 hours per inspection request = 8 aggregate annual burden hours for all exchanges.

[706] 12 notices for all exchanges × 0.5 hours per notice = six (6) total burden hours across all exchanges.

[707] The supporting statement for the current active information collection request, ICR Reference No: 201503–3038–002, for OMB control number 3038–0013, estimated that seven respondents would file the §§ 1.47 and 1.48 reports, and that each respondent would file two reports for a total of 14 annual responses, requiring three hour per response, for a total of 42 burden hours for all respondents.

impact.[708] A regulatory flexibility analysis or certification typically is required for ''any rule for which the agency publishes a general notice of proposed rulemaking pursuant to'' the notice-and-comment provisions of the Administrative Procedure Act, 5 U.S.C. 553(b).[709] The requirements related to the proposed amendments fall mainly on registered entities, exchanges, FCMs, swap dealers, clearing members, foreign brokers, and large traders. The Commission has previously determined that registered DCMs, FCMs, swap dealers, major swap participants, eligible contract participants, SEFs, clearing members, foreign brokers and large traders are not small entities for purposes of the RFA.[710]

Further, while the requirements under this rulemaking may impact nonfinancial end users, the Commission notes that position limits levels apply only to large traders. Accordingly, the Chairman, on behalf of the Commission, hereby certifies, on behalf of the Commission, pursuant to 5 U.S.C. 605(b), that the actions proposed to be taken herein would not have a significant economic impact on a substantial number of small entities. The Chairman made the same certification in the 2013 Proposal,[711] the 2016 Supplemental Proposal,[712] and the 2016 Reproposal.[713]

D. Antitrust Considerations

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of the Act, and the policies and purposes of the Act, in issuing any order or adopting any Commission rule or regulation (including any exemption under section 4(c) or 4c(b)), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 17 of the Act.[714]

The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. The Commission requests comment on whether the proposed rule implicates any other specific public interest to be protected by the antitrust laws.

The Commission has considered the proposed rules to determine whether they are anticompetitive and has preliminarily determined that the proposed rules could, in some circumstances, be anticompetitive because position limits at low levels are, to some degree, inherently anticompetitive. A more established DCM that already lists, or is first to list, a core referenced futures contract (an ''incumbent DCM'') has a competitive advantage over smaller DCMs seeking to expand or future entrant DCMs (collectively ''entrant DCMs''), even in the absence of position limits, because ''liquidity attracts liquidity.'' That is, a market participant seeking to execute a single transaction or, for that matter, establish a large position would, other things being equal, gravitate toward a more established facility that successfully lists a contract with relatively consistent volume and transparent pricing—where there is likely to be someone willing to take the other side of a trade. This is especially true if the market participant is already clearing other products with the incumbent DCM. This would tend to protect the incumbent DCM's contract and reinforce the advantage of an incumbent DCM, which has to do less to keep and attract customers and should be able to keep more of the profits from trading volume. That is, the status of incumbency by itself may to some extent create a barrier to entry for an entrant DCM where the presence of a counterparty at the desired price is less assured. Position limits at low levels, especially in the non-spot month, may exacerbate the situation. If a market participant establishes a futures position on an incumbent DCM and then reaches the federal limit level on the incumbent DCM, it becomes even less likely that the market participant will migrate to an entrant DCM, because the federal limit would still apply and prevents the market participant from increasing its aggregate futures position where ever located. Higher volume may permit an incumbent DCM to charge lower transaction fees than an entrant DCM; the price concession that a market participant might have to absorb to establish a large position may be lower on an incumbent DCM than an entrant DCM. Both of these factors would inform a DCM's decision regarding where to set the levels for its own exchange-set limits. Moreover, the incumbent DCM can use other tools to defend its advantage such as the implementation of new technologies, the use of various fees/charges and the application of exemptions to federal limits. The Commission preliminarily believes that the relatively high limit levels that the Commission proposes today do not at this time establish a barrier to entry or competitive restraint likely to facilitate anticompetitive effects in any relevant antitrust market for contract trading. This is because the limit levels that the Commission proposes today are based on recent data regarding deliverable supply and open interest. However, if the size of the relevant markets continues on an upward trend and the Commission does not adjust federal limit levels commensurately, limit levels that become stale over time could facilitate anticompetitive effects. The Commission requests comment on whether and in what circumstances adopting the proposed rules could be anticompetitive.

The Commission has also preliminarily determined that the proposed rules serve the regulatory purpose of the Act ''to deter and prevent price manipulation or any other disruptions to market integrity.'' [715] The Commission proposes to implement the rules pursuant to section 4a(a) of the CEA, which articulates additional policies and purposes.[716]

The Commission has identified the following less anticompetitive means: Requiring derivatives clearing organizations (''DCOs'') to impose initial margin surcharges for position limits. This would be less anticompetitive because initial margin surcharges would still allow a large speculator to accumulate a futures position on another DCM if the speculator so desired while protecting against the price impact from a large price change against the speculator who would otherwise be forced to offload a position due to position limits. The Commission requests comment on whether there are other less anticompetitive means of achieving the relevant purposes of the Act. The Commission is not required to

[708] 44 U.S.C. 601 *et seq.*

[709] 5 U.S.C. 601(2), 603–05.

[710] *See* Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act, 47 FR 18618–19, Apr. 30, 1982 (DCMs, FCMs, and large traders) (''RFA Small Entities Definitions''); Opting Out of Segregation, 66 FR 20740–43, Apr. 25, 2001 (eligible contract participants); Position Limits for Futures and Swaps; Final Rule and Interim Final Rule, 76 FR 71626, 71680, Nov. 18, 2011 (clearing members); Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33476, 33548, Jun. 4, 2013 (SEFs); A New Regulatory Framework for Clearing Organizations, 66 FR 45604, 45609, Aug. 29, 2001 (DCOs); Registration of Swap Dealers and Major Swap Participants, 77 FR 2613, Jan. 19, 2012, (swap dealers and major swap participants); and Special Calls, 72 FR 50209, Aug. 31, 2007 (foreign brokers).

[711] *See* 2013 Proposal, 78 FR at 75784.

[712] *See* 2016 Supplemental Proposal, 81 FR at 38499.

[713] *See* 2016 Reproposal, 81 FR at 96894.

[714] 7 U.S.C. 19(b).

[715] Section 3(b) of the CEA, 7 U.S.C. 5(b).

[716] 7 U.S.C. 7a(a) (burdens on interstate commerce; trading or position limits).

follow the least anticompetitive course of action.

The Commission has examined whether requiring DCOs to impose initial margin surcharges for position limits in lieu of imposing position limits is feasible and has preliminarily determined that is not because it could be inconsistent with a relevant provision of the CEA and would require the Commission to revise its current regulations in part 39 to be more prescriptive and less principles-based. Thus, the Commission has preliminarily determined not to adopt this less anticompetitive means. Under section 5b(c)(2)(A)(ii) of the CEA [717] and the corresponding provision of the Commission's current regulations, a registered DCO has ''reasonable discretion in establishing the manner by which it complies with each core principle.'' [718] Moreover, the Commission's regulations already require DCOs to ''establish initial margin requirements that are commensurate with the risks of each product and portfolio, including any unusual characteristics of, or risks associated with, particular products or portfolios . . .,'' [719] which would include large positions. DCOs are also already required to use models that take into account concentration, minimum liquidation time, and other risk factors inherent in large positions, and the Commission reviews these models.[720] Finally, Congress has required that the Commission establish position limits ''as the Commission finds are necessary.'' [721] The Commission requests comment on its feasibility analysis.

List of Subjects

17 CFR Part 1

Agricultural commodity, Agriculture, Brokers, Committees, Commodity futures, Conflicts of interest, Consumer protection, Definitions, Designated contract markets, Directors, Major swap participants, Minimum financial requirements for intermediaries, Reporting and recordkeeping requirements, Swap dealers, Swaps.

17 CFR Part 15

Brokers, Commodity futures, Reporting and recordkeeping requirements, Swaps.

17 CFR Part 17

Brokers, Commodity futures, Reporting and recordkeeping requirements, Swaps.

17 CFR Part 19

Commodity futures, Cottons, Grains, Reporting and recordkeeping requirements, Swaps.

17 CFR Part 40

Commodity futures, Reporting and recordkeeping requirements, Procedural rules.

17 CFR Part 140

Authority delegations (Government agencies), Conflict of interests, Organizations and functions (Government agencies).

17 CFR Part 150

Bona fide hedging, Commodity futures, Cotton, Grains, Position limits, Referenced Contracts, Swaps.

17 CFR Part 151

Bona fide hedging, Commodity futures, Cotton, Grains, Position limits, Referenced Contracts, Swaps.

For the reasons stated in the preamble, the Commodity Futures Trading Commission proposes to amend 17 CFR chapter I as follows:

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

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

Authority: 7 U.S.C. 1a, 2, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6l, 6m, 6n, 6o, 6p, 6r, 6s, 7, 7a–1, 7a–2, 7b, 7b–3, 8, 9, 10a, 12, 12a, 12c, 13a, 13a–1, 16, 16a, 19, 21, 23, and 24 (2012).

§ 1.3 [Amended]

■ 2. In § 1.3, remove the definition of the term ''bona fide hedging transactions and positions for excluded commodities.''

§ 1.47 [Removed and Reserved]

■ 3. Remove and reserve § 1.47.

§ 1.48 [Removed and Reserved]

■ 4. Remove and reserve § 1.48.

PART 15—REPORTS—GENERAL PROVISIONS

■ 5. The authority citation for part 15 continues to read as follows:

Authority: 7 U.S.C. 2, 5, 6a, 6c, 6f, 6g, 6i, 6k, 6m, 6n, 7, 7a, 9, 12a, 19, and 21, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

■ 6. In § 15.00, revise paragraph (p)(1) to read as follows:

§ 15.00 Definitions of terms used in parts 15 to 19, and 21 of this chapter.

* * * * *

(p) * * *

(1) For reports specified in parts 17 and 18 and in § 19.00(a) and (b) of this chapter, any open contract position that at the close of the market on any business day equals or exceeds the quantity specified in § 15.03 in either:

(i) Any one futures of any commodity on any one reporting market, excluding futures contracts against which notices of delivery have been stopped by a trader or issued by the clearing organization of the reporting market; or

(ii) Long or short put or call options that exercise into the same future of any commodity, or other long or short put or call commodity options that have identical expirations and exercise into the same commodity, on any one reporting market.

* * * * *

■ 7. In § 15.01, revise paragraph (d) to read as follows:

§ 15.01 Persons required to report.

* * * * *

(d) Persons, as specified in part 19 of this chapter, who:

(1) Are merchants or dealers of cotton holding or controlling positions for future delivery in cotton that equal or exceed the amount set forth in § 15.03; or

(2) Are persons who have received a special call from the Commission or its designee under § 19.00(b) of this chapter.

* * * * *

■ 8. Revise § 15.02 to read as follows:

§ 15.02 Reporting forms.

Forms on which to report may be obtained from any office of the Commission or via *https://www.cftc.gov.* Listed below are the forms to be used for the filing of reports. To determine who shall file these forms, refer to the Commission rule listed in the column opposite the form number.

Form No.	Title	Rule
40	Statement of Reporting Trader	18.04

[717] 7 U.S.C. 7a–1(c)(2)(A)(ii).

[718] 17 CFR 39.10(b).

[719] 17 CFR 39.13(g)(2)(i).

[720] *See generally* 17 CFR 39.13.

[721] *See supra* Section III.F. (discussion of the necessity finding).

Form No.	Title	Rule
71	Identification of Omnibus Accounts and Sub-accounts	17.01
101	Positions of Special Accounts	17.00
102	Identification of Special Accounts, Volume Threshold Accounts, and Consolidated Accounts	17.01
304	Statement of Cash Positions for Unfixed-Price Cotton ''On Call''	19.00

(Approved by the Office of Management and Budget under control numbers 3038–0007, 3038–0009, 3038–0013, and 3038–0103.)

PART 17—REPORTS BY REPORTING MARKETS, FUTURES COMMISSION MERCHANTS, CLEARING MEMBERS, AND FOREIGN BROKERS

■ 9. The authority citation for part 17 continues to read as follows:

Authority: 7 U.S.C. 2, 6a, 6c, 6d, 6f, 6g, 6i, 6t, 7, 7a, and 12a.

■ 10. In § 17.00, revise paragraph (b) introductory text to read as follows:

§ 17.00 Information to be furnished by futures commission merchants, clearing members and foreign brokers.

* * * * *

(b) *Interest in or control of several accounts.* Except as otherwise instructed by the Commission or its designee and as specifically provided in § 150.4 of this chapter, if any person holds or has a financial interest in or controls more than one account, all such accounts shall be considered by the futures commission merchant, clearing member, or foreign broker as a single account for the purpose of determining special account status and for reporting purposes.

* * * * *

■ 11. In § 17.03, add paragraph (i) to read as follows:

§ 17.03 Delegation of authority to the Director of the Office of Data and Technology or the Director of the Division of Market Oversight.

* * * * *

(i) Pursuant to § 17.00(b), and as specifically provided in § 150.4 of this chapter, the authority shall be designated to the Director of the Office of Data and Technology to instruct a futures commission merchant, clearing member, or foreign broker to consider otherwise than as a single account for the purpose of determining special account status and for reporting purposes all accounts one person holds or controls, or in which the person has a financial interest.

■ 12. Revise part 19 to read as follows:

PART 19—REPORTS BY PERSONS HOLDING REPORTABLE POSITIONS IN EXCESS OF POSITION LIMITS, AND BY MERCHANTS AND DEALERS IN COTTON

Sec.

Authority: 7 U.S.C. 6g, 6c(b), 6i, and 12a(5).

§ 19.00 Who shall furnish information.

(a) *Persons filing cotton on call reports.* Merchants and dealers of cotton holding or controlling positions for future delivery in cotton that are reportable pursuant to § 15.00(p)(1)(i) of this chapter shall file CFTC Form 304.

(b) *Persons responding to a special call.* All persons:

(1) Exceeding speculative position limits under § 150.2 of this chapter; or

(2) Holding or controlling positions for future delivery that are reportable pursuant to § 15.00(p)(1) of this chapter and who have received a special call from the Commission or its designee shall file any pertinent information as instructed in the special call. Filings in response to a special call shall be made within one business day of receipt of the special call unless otherwise specified in the call. Such filing shall be transmitted using the format, coding structure, and electronic data submission procedures approved in writing by the Commission.

§ 19.01 [Reserved]

§ 19.02 Reports pertaining to cotton on call purchases and sales.

(a) *Information required.* Persons required to file CFTC Form 304 reports under § 19.00(a) shall file CFTC Form 304 reports showing the quantity of call cotton bought or sold on which the price has not been fixed, together with the respective futures on which the purchase or sale is based. As used herein, call cotton refers to spot cotton bought or sold, or contracted for purchase or sale at a price to be fixed later based upon a specified future.

(b) *Time and place of filing reports.* Each CFTC Form 304 report shall be made weekly, dated as of the close of business on Friday, and filed not later than 9 a.m. Eastern Time on the third business day following that Friday using the format, coding structure, and electronic data transmission procedures approved in writing by the Commission.

§ 19.03 Delegation of authority to the Director of the Division of Enforcement.

(a) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Enforcement, or such other employee or employees as the Director may designate from time to time, the authority in § 19.00(b) to issue special calls.

(b) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Enforcement, or such other employee or employees as the Director may designate from time to time, the authority in § 19.00(b) to provide instructions or to determine the format, coding structure, and electronic data transmission procedures for submitting data records and any other information required under this part.

(c) The Director of the Division of Enforcement may submit to the Commission for its consideration any matter which has been delegated in this section.

(d) Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

§§ 19.04–19.10 [Reserved]

Appendix A to Part 19—Form 304

BILLING CODE 6351–01–P

CFTC FORM 304
Statement of Cash Positions for Unfixed-Price Cotton "On Call"

NOTICE: Failure to file a report required by the Commodity Exchange Act ("CEA" or the "Act")[1] and the regulations thereunder,[2] or the filing of a report with the Commodity Futures Trading Commission ("CFTC" or "Commission") that includes a false, misleading, or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of section 6(c)(2) of the Act (7 U.S.C. 9), section 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or section 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both.

PRIVACY ACT NOTICE

The Commission's authority for soliciting this information is granted in sections 4i and 8 of the CEA and related regulations (*see, e.g.*, 17 CFR 19.02). The information solicited from entities and individuals engaged in activities covered by the CEA is required to be provided to the CFTC, and failure to comply may result in the imposition of criminal or administrative sanctions (*see, e.g.*, 7 U.S.C. 9 and 13a-1, and/or 18 U.S.C. 1001). The information requested is used by the Commission to prepare its cotton on-call report. The requested information may be used by the Commission in the conduct of investigations and litigation and, in limited circumstances, may be made public in accordance with provisions of the CEA and other applicable laws. It may also be disclosed to other government agencies and to contract markets to meet responsibilities assigned to them by law. The information will be maintained in, and any additional disclosures will be made in accordance with, the CFTC System of Records Notices, available on *www.cftc.gov*.

[1] 7 U.S.C. 1, *et seq.*

[2] Unless otherwise noted, the rules and regulations referenced in this notice are found in chapter I of title 17 of the Code of Federal Regulations; 17 CFR chapter I.

BACKGROUND & INSTRUCTIONS

Applicable Regulations:

- 17 CFR 19.00(a) specifies who shall file Form 304.
- 17 CFR 19.02(a) specifies the information required on Form 304.
- 17 CFR 19.02(b) specifies the frequency (weekly), the report date (close of business on Friday), and the time (9 a.m. Eastern Time on the third business day following that Friday) and manner, for filing the Form 304.

Please follow the instructions below to generate and submit the required filing. Relevant regulations are cited in parentheses () for reference. Unless the context requires otherwise, the terms used herein shall have the same meaning as ascribed in parts 15 to 21 of the Commission's regulations.

Complete Form 304 as follows:

The trader identification fields should be completed by all filers. This Form 304 requires traders to identify themselves using their Public Trader Identification Number, in lieu of the CFTC Code Number required on previous versions of the Form 304. This number is provided to traders who have previously filed Forms 40 or 102 with the Commission. Traders may contact the Commission to obtain this number if it is unknown. If a trader has a National Futures Association Identification Number ("NFA ID") and/or a Legal Entity Identifier ("LEI"), the trader should also identify itself using those numbers. Form 304 requires traders to identify the name of the reporting trader or firm and the contact information (including full name, address, phone number, and email address) for a natural person the Commission may contact regarding the submitted Form 304.

Merchants and dealers of cotton shall report on Form 304. Report in hundreds of 500-lb. bales unfixed-price cotton "on-call" pursuant to § 19.02(a) of the Commission's regulations. Include under "Call Purchases" stocks on hand for which price has not yet been fixed. For each listed stock, report the delivery month, delivery year, quantity of call purchases, and quantity of call sales.

The signature/authorization page shall be completed by all filers. This page shall include the name and position of the natural person filing Form 304 as well as the name of the reporting trader represented by that person. The trader certifying this Form 304 on the signature/authorization page should note that filing a report that includes a false, misleading, or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of section 6(c)(2) of the Act (7 U.S.C. 9), section 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or section 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both.

Submitting Form 304: Once completed, please submit this form to the Commission pursuant to the instructions on *www.cftc.gov* or as otherwise directed by Commission staff. If submission attempts fail, the reporting trader shall contact the Commission at *techsupport@cftc.gov* for further technical support.

Please be advised that pursuant to 5 CFR 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number.

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Public Trader ID No. [provided by CFTC]			OMB No. 3038-0013
COMMODITY FUTURES TRADING COMMISSION **FORM 304** **STATEMENT OF CASH POSITIONS FOR UNFIXED-PRICE COTTON "ON-CALL"**	Identifying Information		
	Identification Codes:		
	NFA ID	Legal Entity Identifier (LEI)	
	Name of Reporting Trader or Firm:		
	Name of Person to Contact Regarding This Form:		
	First Name	Middle Name	Last Name / Suffix
	Contact Information:		
	Address	Phone Number	Email Address

NOTICE: Failure to file a report required by the Commodity Exchange Act ("CEA" or the "Act") and the regulations thereunder, or the filing of a report with the Commodity Futures Trading Commission ("CFTC" or "Commission") that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of section 6(c)(2) of the Act (7 U.S.C. 9), section 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or section 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both. Please be advised that pursuant to 5 CFR 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number.

Unfixed-price Cotton "on-call" pursuant to § 19.02(a); include under "Call Purchases" stocks on hand for which price has not yet been fixed. Report in hundreds of bales (500-lb. bales).

Delivery Month	Delivery Year	Call Purchases ('00 bales)	Call Sales ('00 bales)

CFTC Form 304 (XX-XX)
Previous Editions Obsolete

Please sign/authenticate the Form 304 prior to submitting.

Signature/ Electronic Authentication:

☐ By checking this box and submitting this form (or by clicking "submit," "send," or any other analogous transmission command if transmitting electronically), I certify that I am duly authorized by the reporting trader identified below to provide the information and representations submitted on this Form 304, and that to the best of my knowledge the information and representations made herein are true and correct.

Reporting Trader Authorized Representative (Name and Position):

_____ (Name)

_____ (Position)

Submitted on behalf of:

_____ (Reporting Trader Name)

Date of Submission: _____

CFTC Form 304 (XX-XX)
Previous Editions Obsolete

Form 304, Example – July 2017 Call purchases of 200 bales and sales of 1,800 bales; October Call purchases of 6,600 bales and sales of 8,000 bales.

Unfixed-price Cotton "on-call" pursuant to § 19.02(a); include under "Call Purchases" stocks on hand for which price has not yet been fixed. Report in hundreds of bales (500-lb. bales).			
Delivery Month	Delivery Year	Call Purchases ('00 bales)	Call Sales ('00 bales)
July	2017	2	18
October	2017	66	80

BILLING CODE 6351–01–C

PART 40—PROVISIONS COMMON TO REGISTERED ENTITIES

■ 13. The authority citation for part 40 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 5, 6, 7, 7a, 8 and 12, as amended by Titles VII and VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Pub. L. 111–203, 124 Stat. 1376 (2010).

■ 14. In § 40.1, revise paragraphs (j)(1)(vii) and (j)(2)(vii) to read as follows:

§ 40.1 Definitions.

* * * * *

(j) * * *

(1) * * *

(vii) Speculative position limits, position accountability standards, and position reporting requirements, including an indication as to whether the contract meets the definition of a referenced contract as defined in § 150.1 of this chapter, and, if so, the name of the core referenced futures contract on which the referenced contract is based.

* * * * *

(2) * * *

(vii) Speculative position limits, position accountability standards, and position reporting requirements, including an indication as to whether the contract meets the definition of economically equivalent swap as defined in § 150.1 of this chapter, and, if so, the name of the referenced contract to which the swap is economically equivalent.

* * * * *

PART 140—ORGANIZATION, FUNCTIONS, AND PROCEDURES OF THE COMMISSION

■ 15. The authority citation for part 140 continues to read as follows:

Authority: 7 U.S.C. 2(a)(12), 12a, 13(c), 13(d), 13(e), and 16(b).

§ 140.97 [Removed and Reserved]

■ 16. Remove and reserve § 140.97.

PART 150—LIMITS ON POSITIONS

■ 17. The authority citation for part 150 is revised to read as follows:

Authority: 7 U.S.C. 1a, 2, 5, 6, 6a, 6c, 6f, 6g, 6t, 12a, and 19, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

■ 18. Revise § 150.1 to read as follows:

§ 150.1 Definitions.

As used in this part—

Bona fide hedging transactions or positions means a position in commodity derivative contracts in a physical commodity, where:

(1) Such position:

(i) Represents a substitute for transactions made or to be made, or positions taken or to be taken, at a later time in a physical marketing channel;

(ii) Is economically appropriate to the reduction of price risks in the conduct and management of a commercial enterprise; and

(iii) Arises from the potential change in the value of—

(A) Assets which a person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising;

(B) Liabilities which a person owes or anticipates incurring; or

(C) Services that a person provides or purchases, or anticipates providing or purchasing; or

(2) Such position qualifies as:

(i) *Pass-through swap and pass-through swap offset pair.* Paired positions of a pass-through swap and a pass-through swap offset, where:

(A) The pass-through swap is a swap position entered into by one person for which the swap would qualify as a bona fide hedging transaction or position pursuant to paragraph (1) of this definition (the bona fide hedging swap counterparty) that is opposite another person (the pass-through swap counterparty); and

(B) The pass-through swap offset is a futures, option on a futures, or swap position entered into by the pass-through swap counterparty in the same physical commodity as the pass-through swap, and which reduces the pass-through swap counterparty's price risks attendant to that pass-through swap; and provided that the pass-through swap counterparty is able to demonstrate upon request that the pass-through swap qualifies as a bona fide hedging transaction or position pursuant to paragraph (1) of this definition; or

(ii) *Offsets of a bona fide hedger's qualifying swap position.* A futures, option on a futures, or swap position entered into by a bona fide hedging swap counterparty that reduces price risks attendant to a previously-entered-into swap position that qualified as a bona fide hedging transaction or position at the time it was entered into for that counterparty pursuant to paragraph (1) of this definition.

Commodity derivative contract means any futures, option on a futures, or swap contract in a commodity (other than a security futures product as defined in section 1a(45) of the Act).

Core referenced futures contract means a futures contract that is listed in § 150.2(d).

Economically equivalent swap means, with respect to a particular referenced contract, any swap that has identical material contractual specifications, terms, and conditions to such referenced contract.

(1) Other than as provided in paragraph (2) of this definition, for the purpose of determining whether a swap is an economically equivalent swap with respect to a particular referenced contract, the swap shall not be deemed to lack identical material contractual specifications, terms, and conditions due to different lot size specifications or notional amounts, delivery dates diverging by less than one calendar day, or different post-trade risk management arrangements.

(2) With respect to any natural gas referenced contract, for the purpose of determining whether a swap is an economically equivalent swap to such referenced contract, the swap shall not be deemed to lack identical material contractual specifications, terms, and conditions due to different lot size specifications or notional amounts, delivery dates diverging by less than two calendar days, or different post-trade risk management arrangements.

(3) With respect to any referenced contract or class of referenced contracts, the Commission may make a determination that any swap or class of swaps satisfies, or does not satisfy, this economically equivalent swap definition.

Eligible affiliate means an entity with respect to which another person:

(1) Directly or indirectly holds either:

(i) A majority of the equity securities of such entity, or

(ii) The right to receive upon dissolution of, or the contribution of, a majority of the capital of such entity;

(2) Reports its financial statements on a consolidated basis under Generally Accepted Accounting Principles or International Financial Reporting Standards, and such consolidated financial statements include the financial results of such entity; and

(3) Is required to aggregate the positions of such entity under § 150.4 and does not claim an exemption from aggregation for such entity.

Eligible entity[1] means a commodity pool operator; the operator of a trading

[1] The definition of the term eligible entity was amended by the Commission in a final rule published on December 16, 2016 (81 FR at 91454, 91489). Aside from proposing to remove the lettering from each of the defined terms and to display them in alphabetical order, the definition of

Continued

vehicle which is excluded, or which itself has qualified for exclusion from the definition of the term ''pool'' or ''commodity pool operator,'' respectively, under § 4.5 of this chapter; the limited partner, limited member or shareholder in a commodity pool the operator of which is exempt from registration under § 4.13 of this chapter; a commodity trading advisor; a bank or trust company; a savings association; an insurance company; or the separately organized affiliates of any of the above entities:

(1) Which authorizes an independent account controller independently to control all trading decisions with respect to the eligible entity's client positions and accounts that the independent account controller holds directly or indirectly, or on the eligible entity's behalf, but without the eligible entity's day-to-day direction; and

(2) Which maintains:

(i) Only such minimum control over the independent account controller as is consistent with its fiduciary responsibilities to the managed positions and accounts, and necessary to fulfill its duty to supervise diligently the trading done on its behalf; or

(ii) If a limited partner, limited member or shareholder of a commodity pool the operator of which is exempt from registration under § 4.13 of this chapter, only such limited control as is consistent with its status.

Entity means a ''person'' as defined in section 1a of the Act.

Excluded commodity means an ''excluded commodity'' as defined in section 1a of the Act.

Futures-equivalent means:

(1) An option contract, whether an option on a future or an option that is a swap, which has been adjusted by an economically reasonable and analytically supported risk factor, or delta coefficient, for that option computed as of the previous day's close or the current day's close or contemporaneously during the trading day, and converted to an economically equivalent amount of an open position in a core referenced futures contract, *provided however,* if a participant's position exceeds speculative position limits as a result of an option assignment, that participant is allowed one business day to liquidate the excess position without being considered in violation of the limits;

(2) A futures contract which has been converted to an economically equivalent amount of an open position in a core referenced futures contract; and

(3) A swap which has been converted to an economically equivalent amount of an open position in a core referenced futures contract.

Independent account controller[2] means a person:

(1) Who specifically is authorized by an eligible entity, as defined in this section, independently to control trading decisions on behalf of, but without the day-to-day direction of, the eligible entity;

(2) Over whose trading the eligible entity maintains only such minimum control as is consistent with its fiduciary responsibilities for managed positions and accounts to fulfill its duty to supervise diligently the trading done on its behalf or as is consistent with such other legal rights or obligations which may be incumbent upon the eligible entity to fulfill;

(3) Who trades independently of the eligible entity and of any other independent account controller trading for the eligible entity;

(4) Who has no knowledge of trading decisions by any other independent account controller; and

(5) Who is:

(i) Registered as a futures commission merchant, an introducing broker, a commodity trading advisor, or an associated person of any such registrant, or

(ii) A general partner, managing member or manager of a commodity pool the operator of which is excluded from registration under § 4.5(a)(4) of this chapter or § 4.13 of this chapter, *provided that* such general partner, managing member or manager complies with the requirements of § 150.4(c).

Long position means, on a futures-equivalent basis, a long call option, a short put option, a long underlying futures contract, or a swap position that is equivalent to a long futures contract.

Physical commodity means any agricultural commodity as that term is defined in § 1.3 of this chapter or any exempt commodity as that term is defined in section 1a of the Act.

Position accountability means any bylaw, rule, regulation, or resolution that is submitted to the Commission pursuant to part 40 of this chapter in lieu of, or along with, a speculative position limit, and that requires a trader whose position exceeds the accountability level to consent to: (1) Provide information about its position to the designated contract market or swap execution facility; and (2) halt increasing further its position or reduce its position in an orderly manner, in each case as requested by the designated contract market or swap execution facility.

Pre-enactment swap means any swap entered into prior to enactment of the Dodd-Frank Act of 2010 (July 21, 2010), the terms of which have not expired as of the date of enactment of that Act.

Pre-existing position means any position in a commodity derivative contract acquired in good faith prior to the effective date of any bylaw, rule, regulation, or resolution that specifies a speculative position limit level or a subsequent change to that level.

Referenced contract means:

(1) A core referenced futures contract listed in § 150.2(d) or, on a futures-equivalent basis with respect to a particular core referenced futures contract, a futures contract or options on a futures contract, including a spread, that is either:

(i) Directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of that particular core referenced futures contract; or

(ii) Directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of the same commodity underlying that particular core referenced futures contract for delivery at the same location or locations as specified in that particular core referenced futures contract; or

(2) On a futures-equivalent basis, an economically equivalent swap.

(3) The definition of referenced contract does not include a location basis contract, a commodity index contract, any guarantee of a swap, or a trade option that meets the requirements of § 32.3 of this chapter.

Short position means, on a futures-equivalent basis, a short call option, a long put option, a short underlying futures contract, or a swap position that is equivalent to a short futures contract.

Speculative position limit means the maximum position, either net long or net short, in a commodity derivative contract that may be held or controlled by one person, absent an exemption, whether such limits are adopted for combined positions in all commodity derivative contracts in a particular commodity, including the spot month future and all single month futures (the spot month and all single month futures, cumulatively, ''all-months-combined''), positions in a single month of commodity derivative contracts in a particular commodity other than the spot month future (''single month''), or

the term eligible entity would not be further amended by this proposal and is included solely to maintain the continuity of this definitions section.

[2] The definition of the term independent account controller was amended by the Commission in a final rule published on December 16, 2016 (81 FR at 91454, 91489). This term would not be further amended by this proposal and is included solely to maintain the continuity of this definitions section.

positions in the spot month of commodity derivative contacts in a particular commodity. Such a limit may be established under federal regulations or rules of a designated contract market or swap execution facility. For referenced contracts other than core referenced futures contracts, single month means the same period as that of the relevant core referenced futures contract.

Spot month means:

(1) For physical-delivery core referenced futures contracts, the period of time beginning at the earlier of the close of business on the trading day preceding the first day on which delivery notices can be issued by the clearing organization of a contract market, or the close of business on the trading day preceding the third-to-last trading day, until the contract expires, except as follows:

(i) For *ICE Futures U.S. Sugar No. 11* (SB) core referenced futures contract, the spot month means the period of time beginning at the opening of trading on the second business day following the expiration of the regular option contract traded on the expiring futures contract until the contract expires;

(ii) For *ICE Futures U.S. Sugar No. 16* (SF) core referenced futures contract, the spot month means the period of time beginning on the third-to-last trading day of the contract month until the contract expires;

(iii) For *Chicago Mercantile Exchange Live Cattle* (LC) core referenced futures contract, the spot month means the period of time beginning at the close of trading on the fifth business day of the contract month until the contract expires;

(2) For referenced contracts other than core referenced futures contracts, the spot month means the same period as that of the relevant core referenced futures contract.

Spread transaction means either a calendar spread, intercommodity spread, quality differential spread, processing spread, product or by-product differential spread, or futures-option spread.

Swap means ''swap'' as that term is defined in section 1a of the Act and as further defined in § 1.3 of this chapter.

Swap dealer means ''swap dealer'' as that term is defined in section 1a of the Act and as further defined in § 1.3 of this chapter.

Transition period swap means a swap entered into during the period commencing after the enactment of the Dodd-Frank Act of 2010 (July 21, 2010), and ending 60 days after the publication in the **Federal Register** of final amendments to this part implementing section 737 of the Dodd-Frank Act of 2010.

■ 19. Revise § 150.2 to read as follows:

§ 150.2 Federal speculative position limits.

(a) *Spot month speculative position limits.* For physical-delivery referenced contracts and, separately, for cash-settled referenced contracts, no person may hold or control positions in the spot month, net long or net short, in excess of the levels specified by the Commission.

(b) *Single month and all-months-combined speculative position limits.* For any referenced contract, no person may hold or control positions in a single month or in all-months-combined (including the spot month), net long or net short, in excess of the levels specified by the Commission.

(c) *Relevant contract month.* For purposes of this part, for referenced contracts other than core referenced futures contracts, the spot month and any single month shall be the same as those of the relevant core referenced futures contract.

(d) *Core referenced futures contracts.* Federal speculative position limits apply to referenced contracts based on the following core referenced futures contracts:

TABLE 1 TO PARAGRAPH (d)—CORE REFERENCED FUTURES CONTRACTS

Commodity type	*Designated contract market*	*Core referenced futures contract*[1]
Legacy Agricultural		
	Chicago Board of Trade	
		Corn (C).
		Oats (O).
		Soybeans (S).
		Soybean Meal (SM).
		Soybean Oil (SO).
		Wheat (W).
		Hard Winter Wheat (KW).
	ICE Futures U.S.	
		Cotton No. 2 (CT).
	Minneapolis Grain Exchange	
		Hard Red Spring Wheat (MWE).
Other Agricultural		
	Chicago Board of Trade	
		Rough Rice (RR).
	Chicago Mercantile Exchange	
		Live Cattle (LC).
	ICE Futures U.S.	
		Cocoa (CC).
		Coffee C (KC).
		FCOJ–A (OJ).
		U.S. Sugar No. 11 (SB).
		U.S. Sugar No. 16 (SF).
Energy		
	New York Mercantile Exchange	
		Light Sweet Crude Oil (CL).
		NY Harbor ULSD (HO).
		RBOB Gasoline (RB).
		Henry Hub Natural Gas (NG).
Metals		
	Commodity Exchange, Inc.	
		Gold (GC).

TABLE 1 TO PARAGRAPH (d)—CORE REFERENCED FUTURES CONTRACTS—Continued

Commodity type	*Designated contract market*	*Core referenced futures contract*[1]
	New York Mercantile Exchange	Silver (SI). Copper (HG). Palladium (PA). Platinum (PL).

[1] The core referenced futures contract includes any successor contracts.

(e) *Establishment of speculative position limit levels.* The levels of federal speculative position limits are fixed by the Commission at the levels listed in appendix E to this part; *provided however,* compliance with such speculative limits shall not be required until 365 days after publication in the **Federal Register**.

(f) *Designated contract market estimates of deliverable supply.* Each designated contract market listing a core referenced futures contract shall supply to the Commission an estimated spot month deliverable supply upon request by the Commission, and may supply such estimates to the Commission at any other time. Each estimate shall be accompanied by a description of the methodology used to derive the estimate and any statistical data supporting the estimate, and shall be submitted using the format and procedures approved in writing by the Commission. A designated contract market should use the guidance regarding deliverable supply in appendix C to part 38 of this chapter.

(g) *Pre-existing positions*—(1) *Pre-existing positions in a spot month.* A spot month speculative position limit established under this section shall apply to pre-existing positions other than pre-enactment swaps and transition period swaps.

(2) *Pre-existing positions in a non-spot month.* A single month or all-months-combined speculative position limit established under this section shall not apply to pre-existing positions, *provided however,* that if such position is not a pre-enactment swap or transition period swap then that position shall be attributed to the person if the person's position is increased after the effective date of such limit.

(h) *Positions on foreign boards of trade.* The speculative position limits established under this section shall apply to a person's combined positions in referenced contracts, including positions executed on, or pursuant to the rules of a foreign board of trade, pursuant to section 4a(a)(6) of the Act, *provided that:*

(1) Such referenced contracts settle against any price (including the daily or final settlement price) of one or more contracts listed for trading on a designated contract market or swap execution facility that is a trading facility; and

(2) The foreign board of trade makes available such referenced contracts to its members or other participants located in the United States through direct access to its electronic trading and order matching system.

(i) *Anti-evasion provision.* For the purposes of applying the speculative position limits in this section, if used to willfully circumvent or evade speculative position limits:

(1) A commodity index contract and/or a location basis contract shall be considered to be a referenced contract;

(2) A bona fide hedging transaction or position recognition or spread exemption shall no longer apply; and

(3) A swap shall be considered to be an economically equivalent swap.

(j) *Delegation of authority to the Director of the Division of Market Oversight.* (1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority in paragraph (f) of this section to request estimated deliverable supply from a designated contract market and to provide the format and procedures for submitting such estimates.

(2) The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(3) Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

(k) *Eligible affiliates and aggregation.* For purposes of this part, if an eligible affiliate meets the conditions for any exemption from aggregation under § 150.4, the eligible affiliate may choose to utilize that exemption, or it may opt to be aggregated with its affiliated entities.

■ 20. Revise § 150.3 to read as follows:

§ 150.3 Exemptions.

(a) *Positions which may exceed limits.* The speculative position limits set forth in § 150.2 may be exceeded to the extent that all applicable requirements in this part are met, *provided that* such positions are one of the following:

(1) *Bona fide hedging transactions or positions.* Positions that comply with the bona fide hedging transaction or position definition in § 150.1, and are:

(i) Enumerated in appendix A to this part; or

(ii) Bona fide hedging transactions or positions, other than those enumerated in appendix A to this part, that are approved as non-enumerated bona fide hedging transactions or positions in accordance with paragraph (b)(4) of this section or § 150.9;

(2) *Spread transactions.* Transactions that:

(i) Meet the spread transaction definition in § 150.1; or

(ii) Do not meet the spread transaction definition in § 150.1, but have been approved by the Commission pursuant to paragraph (b)(4) of this section.

(3) *Financial distress positions.* Positions of a person, or related persons, under financial distress circumstances, when exempted by the Commission from any of the requirements of this part in response to a specific request made to the Commission pursuant to § 140.99 of this chapter, where financial distress circumstances include, but are not limited to, situations involving the potential default or bankruptcy of a customer of the requesting person or persons, an affiliate of the requesting person or persons, or a potential acquisition target of the requesting person or persons;

(4) *Conditional spot month limit exemption positions in natural gas.* Spot month positions in natural gas cash-settled referenced contracts that exceed the spot month speculative position limit set forth in § 150.2, *provided that such positions:*

(i) Do not exceed the equivalent of 10,000 contracts of the NYMEX Henry Hub Natural Gas core referenced futures contract per designated contract market that lists a natural gas cash-settled referenced contract;

(ii) Do not exceed 10,000 futures equivalent contracts in economically equivalent swaps in natural gas; and

(iii) That the person holding or controlling such positions does not hold or control positions in spot-month physical-delivery referenced contracts in natural gas; or

(5) *Pre-enactment and transition period swaps exemption.* The speculative position limits set forth in § 150.2 shall not apply to positions acquired in good faith in any pre-enactment swap, or in any transition period swap, in either case as defined by § 150.1; *provided however,* that a person may net such positions with post-effective date commodity derivative contracts for the purpose of complying with any non-spot month speculative position limit.

(b) *Application for relief.* Any person with a position in a referenced contract seeking recognition of such position as a bona fide hedging transaction or position, in accordance with paragraph (a)(1)(ii) of this section, or seeking an exemption for a spread position in accordance with paragraphs (a)(2)(ii) of this section, in each case for purposes of federal speculative position limits set forth in § 150.2, may submit an application to the Commission in accordance with this section.

(1) *Required information.* The application shall include the following information:

(i) With respect to an application for a recognition of a bona fide hedging transaction or position:

(A) A description of the position in the commodity derivative contract for which the application is submitted, including, but not limited to, the name of the underlying commodity and the derivative position size;

(B) Information to demonstrate why the position satisfies the requirements of section 4a(c)(2) of the Act and the definition of bona fide hedging transaction or position in § 150.1, including factual and legal analysis;

(C) A statement concerning the maximum size of all gross positions in commodity derivative contracts for which the application is submitted;

(D) A description of the applicant's activity in the cash markets and swaps markets for the commodity underlying the position for which the application is submitted, including, but not limited to, information regarding the offsetting cash positions; and

(E) Any other information that may help the Commission determine whether the position satisfies the requirements of section 4a(c)(2) of the Act and the definition of bona fide hedging transaction or position in § 150.1.

(ii) With respect to an application for a spread exemption:

(A) A description of the spread position for which the application is submitted;

(B) A statement concerning the maximum size of all gross positions in commodity derivative contracts for which the application is submitted; and

(C) Any other information that may help the Commission determine whether the position is consistent with section 4a(a)(3)(B) of the Act.

(2) *Additional information.* If the Commission determines that it requires additional information in order to determine whether to recognize a position as a bona fide hedging transaction or position, or grant a spread exemption, the Commission shall:

(i) Notify the applicant of any supplemental information required; and

(ii) Provide the applicant with ten business days in which to provide the Commission with any supplemental information.

(3) *Timing of application.* (i) Except as provided in paragraph (b)(3)(ii) of this section, a person seeking relief in accordance with this section must submit an application to the Commission and receive a notice of approval of such application prior to the date that the position for which the application was submitted would be in excess of the applicable federal speculative position limit set forth in § 150.2;

(ii) A person may, however, due to demonstrated sudden or unforeseen increases in their bona fide hedging needs, submit an application for a recognition of a bona fide hedging transaction or position within five business days after the person established the position that exceeded the applicable federal speculative position limit.

(A) Any application filed pursuant to paragraph (b)(3)(ii) of this section must include an explanation of the circumstances warranting the sudden or unforeseen increases in bona fide hedging needs.

(B) If an application filed pursuant to paragraph (b)(3)(ii) of this section is denied, the person must bring its position within the federal speculative position limits within a commercially reasonable time, as determined by the Commission in consultation with the applicant and the applicable designated contract market or swap execution facility.

(C) The Commission will not determine that the person holding the position has committed a position limits violation during the period of the Commission's review nor once the Commission has issued its determination.

(4) *Commission determination.* After review of the application and any supplemental information provided by the requestor, the Commission will determine, with respect to the transaction or position for which the request is submitted, whether to recognize all or a specified portion of such transaction or position as a bona fide hedging transaction or position or whether to exempt all or a specified portion of such spread transaction, as applicable. The Commission shall notify the applicant of its determination, and an applicant may exceed federal speculative position limits set forth in § 150.2 upon receiving a notice of approval.

(5) *Renewal of application.* With respect to any application approved by the Commission pursuant to this section, a person shall renew such application if the information provided pursuant to paragraph (b)(1) of this section changes or upon request by the Commission.

(6) *Commission revocation or modification.* If the Commission determines, at any time, that a recognized bona fide hedging transaction or position is no longer consistent with section 4a(c)(2) of the Act or the definition of bona fide hedging transaction or position in § 150.1, or that a spread exemption is no longer consistent with section 4a(a)(3)(B) of the Act, the Commission shall notify the person holding such position and, in its discretion, revoke or modify the bona fide hedge recognition or spread exemption for purposes of federal speculative position limits and require the person to reduce the derivatives position within a commercially reasonable time or otherwise come into compliance. This notification shall briefly specify the nature of the issues raised and the specific provisions of the Act or the Commission's regulations with which the position or application is, or appears to be, inconsistent.

(c) *Previously-granted risk management exemptions.* Exemptions previously granted by the Commission under § 1.47 of this chapter, or by a designated contract market or swap execution facility, in either case to the extent that such exemptions are for the risk management of positions in financial instruments, including but not limited to index funds, shall not apply after the effective date of speculative position limit levels adopted, pursuant to § 150.2(e). Nothing in this paragraph

shall preclude the Commission, a designated contract market, or swap execution facility from recognizing a bona fide hedging transaction or position for the former holder of such a risk management exemption if the position complies with the definition of bona fide hedging transaction or position under this part, including appendices hereto.

(d) *Recordkeeping.* (1) Persons who avail themselves of exemptions or relief under this section shall keep and maintain complete books and records concerning all details of their related cash, forward, futures, options on futures, and swap positions and transactions, including anticipated requirements, production and royalties, contracts for services, cash commodity products and by-products, cross-commodity hedges, and records of bona fide hedging swap counterparties, and shall make such books and records available to the Commission upon request under paragraph (e) of this section.

(2) Any person that relies on a representation received from another person that a swap qualifies as a pass-through swap under paragraph (2) of the definition of bona fide hedging transaction or position in § 150.1 shall keep and make available to the Commission upon request all relevant books and records supporting such a representation, including any record the person intends to use to demonstrate that the pass-through swap is a bona fide hedging transaction or position, for a period of at least two years following the expiration of the swap.

(3) All books and records required to be kept pursuant to this section shall be kept in accordance with the requirements of § 1.31 of this chapter.

(e) *Call for information.* Upon call by the Commission, the Director of the Division of Enforcement or the Director's delegate, any person claiming an exemption from speculative position limits under this section shall provide to the Commission such information as specified in the call relating to the positions owned or controlled by that person; trading done pursuant to the claimed exemption; the commodity derivative contracts or cash market positions which support the claimed exemption; and the relevant business relationships supporting a claimed exemption.

(f) *Aggregation of accounts.* Entities required to aggregate accounts or positions under § 150.4 shall be considered the same person for the purpose of determining whether they are eligible for an exemption under paragraphs (a)(1) through (4) of this section with respect to such aggregated account or position.

(g) *Delegation of authority to the Director of the Division of Market Oversight.* (1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight, or such other employee or employees as the Director may designate from time to time:

(i) The authority in paragraph (a)(3) of this section to provide exemptions in circumstances of financial distress;

(ii) The authority in paragraph (b)(2) of this section to request additional information with respect to a request for a bona fide hedging transaction or position recognition or spread exemption;

(iii) The authority in paragraph (b)(3)(ii)(B) of this section to, if applicable, determine a commercially reasonable amount of time required for a person to bring its position within the federal speculative position limits:

(iv) The authority in paragraph (b)(4) of this section to make a determination whether to recognize a position as a bona fide hedging transaction or position or to grant a spread exemption; and

(v) The authority in paragraph (b)(2) or (b)(5) of this section to request that a person submit updated materials or renew their request with the Commission.

(2) The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(3) Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

■ 21. Revise § 150.5 to read as follows:

§ 150.5 Exchange-set speculative position limits and exemptions therefrom.

(a) *Requirements for exchange-set limits on commodity derivative contracts subject to federal limits set forth in § 150.2*—(1) *Exchange-set limits.* For any commodity derivative contract that is subject to a federal speculative position limit under § 150.2, a designated contract market or swap execution facility that is a trading facility shall set a speculative position limit no higher than the level specified in § 150.2.

(2) *Exemptions to exchange-set limits.* A designated contract market or swap execution facility that is a trading facility may grant exemptions from any speculative position limits it sets under paragraph (a)(1) of this section in accordance with the following:

(i) *Exemption levels.* Exemptions of the type that conform to the exemptions the Commission identified in:

(A) Sections 150.3(a)(1)(i), (a)(2)(i), and (a)(4) through (5) may be granted at a level that exceeds the level of the applicable federal limit in § 150.2;

(B) Sections 150.3(a)(1)(ii) and (a)(2)(ii) may be granted at a level that exceeds the level of the applicable federal limit in § 150.2, *provided that,* the exemption is first approved in accordance with § 150.3(b) or 150.9, as applicable;

(C) Section 150.3(a)(3) may be granted at a level that exceeds the level of the applicable federal limit in § 150.2, *provided that,* the Commission has first approved such exemption pursuant to a request submitted under § 140.99 of this chapter; and

(D) Exemptions of the type that do not conform to the exemptions identified in § 150.3(a) shall be granted at a level that is capped at the level of the applicable federal limit in § 150.2 and that complies with paragraph (a)(2)(ii)(C) of this section, unless the Commission has first approved such exemption pursuant to § 150.3(b) or pursuant to a request submitted under § 140.99.

(ii) *Application for exemption from exchange-set limits.* A designated contract market or swap execution facility that is a trading facility that elects to grant exemptions under paragraph (a)(2)(i) of this section:

(A) *(1)* Except as provided in paragraph (a)(2)(ii)(A)*(2)* of this section, shall require traders to file an application requesting such exemption in advance of the date that such position would be in excess of the limits then in effect. Such application shall include any information needed to enable the designated contract market or swap execution facility to determine, and the Commission to verify, whether the facts and circumstances demonstrate that the designated contract market or swap execution facility may grant an exemption. Any application for a bona fide hedging transaction or position shall include a description of the applicant's activity in the cash markets and swaps markets for the commodity underlying the position for which the application is submitted, including, but not limited to, information regarding the offsetting cash positions.

(2) The designated contract market or swap execution facility may, however, adopt rules that allow a person, due to demonstrated sudden or unforeseen increases in its bona fide hedging needs, to file an application to request a recognition of a bona fide hedging transaction or position within five business days after the person

established the position that exceeded the applicable exchange-set speculative position limit.

(3) The designated contract market or swap execution facility must require that any application filed pursuant to paragraph (a)(2)(ii)(A)*(2)* of this section include an explanation of the circumstances warranting the sudden or unforeseen increases in bona fide hedging needs.

(4) If an application filed pursuant to paragraph (a)(2)(ii)(A)*(2)* of this section is denied, the applicant must bring its position within the designated contract market or swap execution facility's speculative position limits within a commercially reasonable time as determined by the designated contract market or swap execution facility.

(5) The designated contract market, swap execution facility, or Commission will not determine that the person holding the position has committed a position limits violation during the period of the designated contract market or swap execution facility's review nor once the designated contract market or swap execution facility has issued its determination;

(B) Shall require, for any such exemption granted, that the trader re-apply for the exemption at least on an annual basis;

(C) May, in accordance with the designated contract market or swap execution facility's rules, deny any such application, or limit, condition, or revoke any such exemption, at any time after providing notice to the applicant, and shall take into account whether the requested exemption would result in positions that would not be in accord with sound commercial practices in the relevant commodity derivative market and/or that would exceed an amount that may be established and liquidated in an orderly fashion in that market; and

(D) Notwithstanding paragraph (a)(2)(ii)(C) of this section, may require persons with positions that comply either with the bona fide hedging transactions or positions definition or the spread transactions definition in § 150.1, as applicable, to exit any such positions in excess of limits during the lesser of the last five days of trading or the time period for the spot month in such physical-delivery contract, or to otherwise limit the size of such position. Designated contract markets and swap execution facilities may refer to paragraph (b) of appendix B to part 150 for guidance regarding the foregoing.

(3) *Exchange-set limits on pre-existing positions*—(i) *Pre-existing positions in a spot month.* A designated contract market or swap execution facility that is a trading facility shall require compliance with spot month exchange-set speculative position limits for pre-existing positions in commodity derivative contracts other than pre-enactment swaps and transition period swaps.

(ii) *Pre-existing positions in a non-spot month.* A single month or all-months-combined speculative position limit established under paragraph (a)(1) of this section shall not apply to any pre-existing positions in commodity derivative contracts, *provided however,* that if such position is not a pre-enactment swap or transition period swap, then such position shall be attributed to the person if the person's position is increased after the effective date of such limit.

(4) *Monthly reports detailing the disposition of each application.* (i) For commodity derivative contracts subject to federal speculative position limits, the designated contract market or swap execution facility shall submit to the Commission a report each month showing the disposition of any exemption application, including the recognition of any position as a bona fide hedging transaction or position, the exemption of any spread transaction or other position, the renewal, revocation, or modification of a previously granted recognition or exemption, or the rejection of any application, as well as the following details:

(A) The date of disposition;

(B) The effective date of the disposition;

(C) The expiration date of any recognition or exemption;

(D) Any unique identifier(s) the designated contract market or swap execution facility may assign to track the application, or the specific type of recognition or exemption;

(E) If the application is for an enumerated bona fide hedging transaction or position, the name of the enumerated bona fide hedging transaction or position listed in appendix A to this part;

(F) If the application is for a spread transaction listed in the spread transaction definition in § 150.1, the name of the spread transaction as it is listed in § 150.1;

(G) The identity of the applicant;

(H) The listed commodity derivative contract or position(s) to which the application pertains;

(I) The underlying cash commodity;

(J) The maximum size of the commodity derivative position that is recognized by the designated contract market or swap execution facility as a bona fide hedging transaction or position, specified by contract month and by the type of limit as spot month, single month, or all-months-combined, as applicable;

(K) Any size limitations or conditions established for a spread exemption or other exemption; and

(L) For bona fide hedging transactions or positions, a concise summary of the applicant's activity in the cash markets and swaps markets for the commodity underlying the commodity derivative position for which the application was submitted.

(ii) The designated contract market or swap execution facility shall submit to the Commission the information required by paragraph (a)(4)(i) of this section:

(A) As specified by the Commission on the Forms and Submissions page at *www.cftc.gov*; and

(B) Using the format, coding structure, and electronic data transmission procedures approved in writing by the Commission.

(b) *Requirements for exchange-set limits on commodity derivative contracts in a physical commodity that are not subject to the limits set forth in § 150.2*—(1) *Exchange-set spot month limits*—(i) *Spot month speculative position limit levels.* For any commodity derivative contract subject to paragraph (b) of this section, a designated contract market or swap execution facility that is a trading facility shall establish speculative position limits for the spot month no greater than 25 percent of the estimated spot month deliverable supply, calculated separately for each month to be listed.

(ii) *Additional sources for compliance.* Alternatively, a designated contract market or swap execution facility that is a trading facility may submit rules to the Commission establishing spot month speculative position limits other than as provided in paragraph (b)(1)(i) of this section, provided that the limits are set at a level that is necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index.

(2) *Exchange-set limits or accountability outside of the spot month*—(i) *Non-spot month speculative position limit or accountability levels.* For any commodity derivative contract subject to paragraph (b) of this section, a designated contract market or swap execution facility that is a trading facility shall adopt either speculative position limits or position accountability outside of the spot month at a level that is necessary and appropriate to reduce the potential threat of market manipulation or price

distortion of the contract's or the underlying commodity's price or index.

(ii) *Additional sources for compliance.* A designated contract market or swap execution facility that is a trading facility may refer to the non-exclusive acceptable practices in paragraph (b) of appendix F of this part to demonstrate to the Commission compliance with the requirements of paragraph (b)(2)(i) of this section.

(3) *Look-alike contracts.* For any newly listed commodity derivative contract subject to paragraph (b) of this section that is substantially the same as an existing contract listed on a designated contract market or swap execution facility that is a trading facility, a designated contract market or swap execution facility that is a trading facility listing such newly listed contract shall adopt spot month, individual month, and all-months-combined speculative position limits comparable to those of the existing contract. Alternatively, if such designated contract market or swap execution facility seeks to adopt speculative position limits that are not comparable to those of the existing contract, such designated contract market or swap execution facility shall demonstrate to the Commission how the levels comply with paragraphs (b)(1) and/or (b)(2) of this section.

(4) *Exemptions to exchange-set limits.* A designated contract market or swap execution facility that is a trading facility may grant exemptions from any speculative position limits it sets under paragraphs (b)(1) or (b)(2) of this section in accordance with the following:

(i) Traders shall be required to apply to the designated contract market or swap execution facility for any such exemption from its speculative position limit rules; and

(ii) A designated contract market or swap execution facility that is a trading facility may deny any such application, or limit, condition, or revoke any such exemption, at any time after providing notice to the applicant, and shall take into account whether the requested exemption would result in positions that would not be in accord with sound commercial practices in the relevant commodity derivative market and/or would exceed an amount that may be established and liquidated in an orderly fashion in that market.

(c) *Requirements for security futures products.* For security futures products, speculative position limits and position accountability requirements are specified in § 41.25 of this chapter.

(d) *Rules on aggregation.* For commodity derivative contracts in a physical commodity, a designated contract market or swap execution facility that is a trading facility shall have aggregation rules that conform to § 150.4.

(e) *Requirements for submissions to the Commission.* A designated contract market or swap execution facility that is a trading facility that adopts speculative position limits and/or position accountability levels pursuant to paragraphs (a) or (b) of this section, and/or that elects to offer exemptions from any such levels pursuant to such paragraphs, shall submit to the Commission pursuant to part 40 of this chapter rules establishing such levels and/or exemptions. To the extent any such designated contract market or swap execution facility adopts speculative position limit levels, such part 40 submission shall also include the methodology by which such levels are calculated, and the designated contract market or swap execution facility shall review such speculative position limit levels regularly for compliance with this section and update such speculative position limit levels as needed.

(f) *Delegation of authority to the Director of the Division of Market Oversight*—(1) *Commission delegations.* The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight, or such other employee or employees as the Director may designate from time to time, the authority in paragraph (a)(4)(ii) of this section to provide instructions regarding the submission to the Commission of information required to be reported, pursuant to paragraph (a)(4)(i) of this section, by a designated contract market or swap execution facility, to specify the manner for submitting such information on the Forms and Submissions page at *www.cftc.gov* and to determine the format, coding structure, and electronic data transmission procedures for submitting such information.

(2) *Commission consideration of delegated matter.* The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(3) *Commission authority.* Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

■ 22. Revise § 150.6 to read as follows:

§ 150.6 Scope.

This part shall only be construed as having an effect on speculative position limits set by the Commission or by a designated contract market or swap execution facility, including any associated recordkeeping and reporting regulations in this chapter. Nothing in this part shall be construed to relieve any contract market, swap execution facility, or its governing board from responsibility under section 5(d)(4) of the Act to prevent manipulation and corners. Further, nothing in this part shall be construed to affect any other provisions of the Act or Commission regulations, including, but not limited to, those relating to actual or attempted manipulation, corners, squeezes, fraudulent or deceptive conduct, or to prohibited transactions.

§ 150.7 [Reserved].

■ 23. Add and reserve § 150.7.

■ 24. Add § 150.8 to read as follows:

§ 150.8 Severability.

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

■ 25. Add § 150.9 to read as follows:

§ 150.9 Process for recognizing non-enumerated bona fide hedging transactions or positions with respect to federal speculative position limits.

For purposes of federal speculative position limits, a person with a position in a referenced contract seeking recognition of such position as a non-enumerated bona fide hedging transaction or position, in accordance with § 150.3(a)(1)(ii), shall submit an application to the Commission, pursuant to § 150.3(b), or submit an application to a designated contract market or swap execution facility in accordance with this section. If such person submits an application to a designated contract market or swap execution facility in accordance with this section, and the designated contract market or swap execution facility, with respect to its own speculative position limits established pursuant to § 150.5(a), recognizes the person's position as a non-enumerated bona fide hedging transaction or position, then the person may also exceed the applicable federal speculative position limit for such position, in accordance with paragraph (e) of this section. The designated contract market or swap execution facility may approve such applications only if the designated contract market or swap execution facility complies with the conditions set forth in paragraphs (a) through (e) of this section.

(a) *Approval of rules.* The designated contract market or swap execution

facility maintains rules, consistent with the requirements of this section and approved by the Commission pursuant to § 40.5 of this chapter, that establish application processes and conditions for recognizing bona fide hedging transactions or positions.

(b) *Prerequisites for a designated contract market or swap execution facility to recognize bona fide hedging transactions or positions in accordance with this section.* (1) The designated contract market or swap execution facility lists the applicable referenced contract for trading;

(2) The position meets the definition of bona fide hedging transactions or positions in section 4a(c)(2) of the Act and the definition of bona fide hedging transactions or positions in § 150.1; and

(3) The designated contract market or swap execution facility does not recognize as a bona fide hedging transaction or position any position involving a commodity index contract and one or more referenced contracts, including exemptions known as risk management exemptions.

(c) *Application process.* The designated contract market or swap execution facility's application process meets the following conditions:

(1) *Required application information.* The designated contract market or swap execution facility requires the applicant to provide, and can obtain from the applicant, all information to enable the designated contract market or swap execution facility to determine, and the Commission to verify, whether the facts and circumstances demonstrate that the designated contract market or swap execution facility may recognize a position as a bona fide hedging transaction or position, including the following:

(i) A description of the position in the commodity derivative contract for which the application is submitted, including but not limited to, the name of the underlying commodity and the derivative position size;

(ii) Information to demonstrate why the position satisfies the requirements of section 4a(c)(2) of the Act and the definition of bona fide hedging transaction or position in § 150.1, including factual and legal analysis;

(iii) A statement concerning the maximum size of all gross positions in commodity derivative contracts for which the application is submitted;

(iv) A description of the applicant's activity in the cash markets and the swaps markets for the commodity underlying the position for which the application is submitted, including, but not limited to, information regarding the offsetting cash positions; and

(v) Any other information the designated contract market or swap execution facility requires, in its discretion, to verify that the position complies with paragraph (b)(2) of this section, as applicable.

(2) *Timing of application.* (i) Except as provided in paragraph (c)(2)(ii) of this section, the designated contract market or swap execution facility requires the applicant to submit an application and receive a notice of approval of such application prior to the date that the position for which such application was submitted would be in excess of the applicable federal speculative position limits.

(ii) A designated contract market or swap execution facility may, however, adopt rules that allow a person to, due to demonstrated sudden or unforeseen increases in its bona fide hedging needs, file an application with the designated contract market or swap execution facility to request a recognition of a bona fide hedging transaction or position within five business days after the person established the position that exceeded the applicable federal speculative position limit.

(A) The designated contract market or swap execution facility must require that any application filed pursuant to paragraph (c)(2)(ii) of this section include an explanation of the circumstances warranting the sudden or unforeseen increases in bona fide hedging needs.

(B) If an application filed pursuant to paragraph (c)(2)(ii) of this section is denied by the designated contract market, swap execution facility, or Commission, the applicant must bring its position within the applicable federal speculative position limits within a commercially reasonable time as determined by the Commission in consultation with the applicant and the applicable designated contract market or swap execution facility.

(C) The designated contract market, swap execution facility, or Commission will not determine that the person holding the position has committed a position limits violation during the period of the designated contract market, swap execution facility, or Commission's review nor once a determination has been issued.

(3) *Renewal of applications.* The designated contract market or swap execution facility requires each applicant to reapply for such recognition or exemption at least on an annual basis by updating the original application, and to receive a notice of approval of the renewal from the designated contract market or swap execution facility prior to the date that such position would be in excess of the applicable federal speculative position limits.

(4) *Exchange revocation authority.* The designated contract market or swap execution facility retains its authority to limit, condition, or revoke, at any time after providing notice to the applicant, any bona fide hedging transaction or position recognition for purposes of the designated contract market or swap execution facility's speculative position limits established under § 150.5(a), for any reason as determined in the discretion of the designated contract market or swap execution facility, including if the designated contract market or swap execution facility determines that the position no longer meets the conditions set forth in paragraph (b) of this section, as applicable.

(d) *Recordkeeping.* (1) The designated contract market or swap execution facility keeps full, complete, and systematic records, which include all pertinent data and memoranda, of all activities relating to the processing of such applications and the disposition thereof. Such records include:

(i) Records of the designated contract market or swap execution facility's recognition of any derivative position as a bona fide hedging transaction or position, revocation or modification of any such recognition, or the rejection of an application;

(ii) All information and documents submitted by an applicant in connection with its application, including documentation and information that is submitted after the disposition of the application, and any withdrawal, supplementation, or update of any application;

(iii) Records of oral and written communications between the designated contract market or swap execution facility and the applicant in connection with such application; and

(iv) All information and documents in connection with the designated contract market or swap execution facility's analysis of, and action(s) taken with respect to, such application.

(2) All books and records required to be kept pursuant to this section shall be kept in accordance with the requirements of § 1.31 of this chapter.

(e) *Process for a person to exceed federal speculative position limits on a referenced contract*—(1) *Notification to the Commission.* The designated contract market or swap execution facility must submit to the Commission a notification of each initial determination to recognize a bona fide hedging transaction or position in accordance with this section,

concurrently with the notice of such determination the designated contract market or swap execution facility provides to the applicant.

(2) *Notification requirements.* The notification in paragraph (e)(1) of this section shall include, at a minimum, the following information:

(i) Name of the applicant;

(ii) Brief description of the bona fide hedging transaction or position being recognized;

(iii) Name of the contract(s) relevant to the recognition;

(iv) The maximum size of the position that may exceed federal speculative position limits;

(v) The effective date and expiration date of the recognition;

(vi) An indication regarding whether the position may be maintained during the last five days of trading during the spot month, or the time period for the spot month; and

(vii) A copy of the application and any supporting materials.

(3) *Exceeding federal speculative position limits on referenced contracts.* A person may exceed federal speculative position limits on a referenced contract ten business days after the designated contract market or swap execution facility issues the notification required pursuant to paragraph (e)(1) of this section, unless the Commission notifies the designated contract market or swap execution facility and the applicant otherwise, pursuant to paragraph (e)(5) of this section, before the ten business day period expires.

(4) *Exceeding federal speculative position limits on referenced contracts due to sudden or unforeseen circumstances.* If a person files an application for a recognition of a bona fide hedging transaction or position in accordance with paragraph (c)(2)(ii) of this section, then such person may rely on the designated contract market or swap execution facility's determination to grant such recognition for purposes of federal speculative position limits two business days after the designated contract market or swap execution facility issues the notification required pursuant to paragraph (e)(1) of this section, unless the Commission notifies the designated contract market or swap execution facility and the applicant otherwise, pursuant to paragraph (e)(5) of this section, before the two business day period expires.

(5) *Commission stay of pending applications and requests for additional information.* If the Commission determines to stay an application that requires additional time to analyze, or request additional information to determine whether the position for which the application is submitted meets the conditions set forth in paragraph (b) of this section, the Commission shall notify the applicable designated contract market or swap execution facility and applicant of the Commission's determination or request for any supplemental information required, and provide an opportunity for the applicant to respond with any supplemental information.

(6) *Commission determination.* If the Commission determines that a position for which the application is submitted does not meet the conditions set forth in paragraph (b) of this section, the Commission shall:

(i) Notify the designated contract market or swap execution facility and applicant, and, after providing an opportunity for the applicant to respond, the Commission may, in its discretion, reject the exchange's determination for purposes of federal speculative position limits and, as applicable, require the person to reduce the derivatives position within a commercially reasonable time, as determined by the Commission in consultation with the applicant and the applicable designated contract market or swap execution facility, or otherwise come into compliance; and

(ii) The Commission will not determine that the person holding the position has committed a position limits violation during the period of the Commission's review nor once the Commission has issued its determination.

(f) *Commission revocation of approved applications.* (1) If a designated contract market or swap execution facility limits, conditions, or revokes any recognition of a bona fide hedging transaction or position for purposes of the designated contract market or swap execution facility's speculative position limits established under § 150.5(a), then such recognition will also be deemed limited, conditioned, or revoked for purposes of federal speculative position limits.

(2) If the Commission determines, at any time, that a position that has been recognized as a bona fide hedging transaction or position has been granted for a position that, for purposes of federal speculative position limits, is no longer consistent with section 4a(c)(2) of the Act or the definition of bona fide hedging transaction or position in § 150.1, the following applies:

(i) The Commission shall notify the person holding the position and, after providing an opportunity to respond, the Commission may, in its discretion, revoke the exchange's determination for purposes of federal speculative position limits and require the person to reduce the derivatives position within a commercially reasonable time as determined by the Commission in consultation with the applicant and the applicable designated contract market or swap execution facility, or otherwise come into compliance;

(ii) The Commission shall include in its notification a brief explanation of the nature of the issues raised and the specific provisions of the Act or the Commission's regulations with which the position or application is, or appears to be, inconsistent; and

(iii) The Commission shall not determine that the person holding the position has committed a position limits violation during the period of the Commission's review nor once the Commission has issued its determination, provided the person reduced the derivatives position within a commercially reasonable time, as determined by the Commission in consultation with the applicant and the applicable designated contract market or swap execution facility, or otherwise came into compliance.

(g) *Delegation of authority to the Director of the Division of Market Oversight*—(1) *Commission delegations.* The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight, or such other employee or employees as the Director may designate from time to time, the authority in paragraph (e)(5) of this section, to request additional information from the applicable designated contract market or swap execution facility and applicant;

(2) *Commission consideration of delegated matter.* The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(3) *Commission authority.* Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

■ 26. Add appendices A through F to read as follows:

Appendix A to Part 150—List of Enumerated Hedges

Persons that follow specific practices outlined in the enumerated hedges in this appendix shall establish compliance with the bona fide hedging transactions or positions definition in § 150.1 and with § 150.3(a)(1)(i) without being required to request approval under § 150.3 or § 150.9 prior to exceeding the applicable federal speculative position limit. All other persons must request approval pursuant to § 150.3 or § 150.9 prior to exceeding the applicable federal speculative position limit.

Compliance with an enumerated bona fide hedge listed below does not, however, diminish or replace, in any event, the obligations and requirements of the person to comply with the regulations provided under this part 150. The enumerated bona fide hedges do not state the exclusive means for establishing compliance with the bona fide hedging transactions or positions definition in § 150.1 or with the requirements of § 150.3(a)(1).

(a) *Enumerated hedges.* The following positions comply with the bona fide hedging transactions or positions definition in § 150.1:

(1) *Hedges of unsold anticipated production.* Short positions in commodity derivative contracts that do not exceed in quantity the person's unsold anticipated production of the contract's underlying cash commodity.

(2) *Hedges of offsetting unfixed-price cash commodity sales and purchases.* Both short and long positions in commodity derivative contracts that do not exceed in quantity the amount of the contract's underlying cash commodity that has been both bought and sold by the same person at unfixed prices:

(A) Basis different delivery months in the same commodity derivative contract; or

(B) Basis different commodity derivative contracts in the same commodity, regardless of whether the commodity derivative contracts are in the same calendar month.

(3) *Hedges of anticipated mineral royalties.* Short positions in a person's commodity derivative contracts offset by the anticipated change in value of mineral royalty rights that are owned by that person, *provided that* the royalty rights arise out of the production of the commodity underlying the commodity derivative contract.

(4) *Hedges of anticipated services.* Short or long positions in a person's commodity derivative contracts offset by the anticipated change in value of receipts or payments due or expected to be due under an executed contract for services held by that person, *provided that* the contract for services arises out of the production, manufacturing, processing, use, or transportation of the commodity underlying the commodity derivative contract.

(5) *Cross-commodity hedges.* Positions in commodity derivative contracts described in paragraph (2) of the bona fide hedging transactions or positions definition in § 150.1 or in paragraphs (a)(1) through (a)(4) and paragraphs (a)(6) through (a)(9) of this appendix A may also be used to offset the risks arising from a commodity other than the cash commodity underlying a commodity derivative contract, *provided that* the fluctuations in value of the position in the commodity derivative contract, or the commodity underlying the commodity derivative contract, shall be substantially related to the fluctuations in value of the actual or anticipated cash position or pass-through swap.

(6) *Hedges of inventory and cash commodity fixed-price purchase contracts.* Short positions in commodity derivative contracts that do not exceed in quantity the sum of the person's ownership of inventory and fixed-price purchase contracts in the contract's underlying cash commodity.

(7) *Hedges of cash commodity fixed-price sales contracts.* Long positions in commodity derivative contracts that do not exceed in quantity the sum of the person's fixed-price sales contracts in the contract's underlying cash commodity and the quantity equivalent of fixed-price sales contracts of the cash products and by-products of such commodity.

(8) *Hedges by agents.* Long or short positions in commodity derivative contracts by an agent who does not own or has not contracted to sell or purchase the commodity derivative contract's underlying cash commodity at a fixed price, *provided that* the agent is responsible for merchandising the cash positions that are being offset in commodity derivative contracts and the agent has a contractual arrangement with the person who owns the commodity or holds the cash market commitment being offset.

(9) *Offsets of commodity trade options.* Long or short positions in commodity derivative contracts that do not exceed in quantity, on a futures-equivalent basis, a position in a commodity trade option that meets the requirements of § 32.3 of this chapter. Such commodity trade option transaction, if it meets the requirements of § 32.3 of this chapter, may be deemed, for purposes of complying with this paragraph (a)(9) of this appendix A, a cash commodity purchase or sales contract as set forth in paragraphs (a)(6) or (a)(7) of this appendix A, as applicable.

(10) *Hedges of unfilled anticipated requirements.* Long positions in commodity derivative contracts that do not exceed in quantity the person's unfilled anticipated requirements for the contract's underlying cash commodity, for processing, manufacturing, or use by that person, or for resale by a utility as it pertains to the utility's obligations to meet the unfilled anticipated demand of its customers for the customer's use.

(11) *Hedges of anticipated merchandising.* Long or short positions in commodity derivative contracts that offset the anticipated change in value of the underlying commodity that a person anticipates purchasing or selling, *provided that:*

(A) The position in the commodity derivative contract does not exceed in quantity twelve months' of current or anticipated purchase or sale requirements of the same cash commodity that is anticipated to be purchased or sold; and

(B) The person is a merchant handling the underlying commodity that is subject to the anticipatory merchandising hedge, and that such merchant is entering into the position solely for purposes related to its merchandising business and has a demonstrated history of buying and selling the underlying commodity for its merchandising business.

Appendix B to Part 150—Guidance on Gross Hedging Positions and Positions Held During the Spot Period

(a) *Guidance on gross hedging positions.* (1) A person's gross hedging positions may be deemed in compliance with the bona fide hedging transactions or positions definition in § 150.1, *provided that* all applicable regulatory requirements are met, including that the position is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise and otherwise satisfies the bona fide hedging definition in § 150.1, and *provided further that:*

(A) The manner in which the person measures risk is consistent and follows historical practice for that person;

(B) The person is not measuring risk on a gross basis to evade the speculative position limits in § 150.2 or the aggregation rules in § 150.4;

(C) The person is able to demonstrate compliance with paragraphs (A) and (B) upon the request of the Commission and/or of a designated contract market, including by providing information regarding the entities with which the person aggregates positions; and

(D) A designated contract market or swap execution facility that recognizes a particular gross hedging position as bona fide pursuant to § 150.9 documents the justifications for doing so, and maintains records of such justifications in accordance with § 150.9(d).

(b) *Guidance regarding positions held during the spot period.* Section 150.5(a)(2)(ii)(D) confirms the existing authority of designated contract markets and swap execution facilities to maintain rules that subject positions that comply with the bona fide hedging position or transaction definition in § 150.1 to a restriction that no such position is maintained in any physical-delivery commodity derivative contract during the lesser of the last five days of trading or the time period for the spot month in such physical-delivery contract (the ''spot period''). Any such designated contract market or swap execution facility may waive any such restriction, including if:

(1) The position complies with the bona fide hedging transaction or position definition in § 150.1;

(2) There is an economically appropriate need to maintain such position in excess of federal speculative position limits during the spot period for such contract, and such need relates to the purchase or sale of a cash commodity; and

(3) The person wishing to exceed federal position limits during the spot period:

(A) Intends to make or take delivery during that time period;

(B) Provides materials to the designated contract market or swap execution facility supporting a classification of the position as a bona fide hedging transaction or position and demonstrating facts and circumstances that would warrant holding such position in excess of limits during the spot period;

(C) Demonstrates cash-market exposure in-hand that is verified by the designated contract market or swap execution facility and that supports holding the position during the spot period;

(D) Demonstrates that, for short positions, the delivery is feasible, meaning that the person has the ability to deliver against the short position (*i.e.,* has inventory on hand in a deliverable location and in a condition in which the commodity can be used upon delivery); and

(E) Demonstrates that, for long positions, the delivery is feasible, meaning that the

person has the ability to take delivery at levels that are economically appropriate (*i.e.,* the delivery comports with the person's demonstrated need for the commodity and the contract is the cheapest source for that commodity).

Appendix C to Part 150—Guidance Regarding the Referenced Contract Definition in § 150.1

This appendix C provides guidance regarding the ''referenced contract'' definition in § 150.1, which provides in paragraph (3) that the definition of referenced contract does not include a location basis contract, a commodity index contract, or a trade option that meets the requirements of § 32.3 of this chapter. The term referenced contract is used throughout part 150 of the Commission's regulations to refer to contracts that are subject to federal limits. A position in a contract that is not a referenced contract is not subject to federal limits, and, as a consequence, cannot be netted with positions in referenced contracts for purposes of federal limits. This guidance is intended to clarify the types of contracts that would qualify as a location basis contract or commodity index contract.

Compliance with this guidance does not diminish or replace, in any event, the obligations and requirements of any person to comply with the regulations provided under this part, or any other part of the Commission's regulations. The guidance is for illustrative purposes only and does not state the exclusive means for a contract to qualify, or not qualify, as a referenced contract as defined in § 150.1, or to comply with any other provision in this part.

(a) *Guidance.* (1) As provided in paragraph (3) of the ''referenced contract'' definition in § 150.1, the following types of contracts are not deemed referenced contracts, meaning such contracts are not subject to federal limits and cannot be netted with positions in referenced contracts for purposes of federal limits: location basis contracts; commodity index contracts; swap guarantees; and trade options that meet the requirements of § 32.3 of this chapter.

(2) *Location basis contract.* For purposes of the referenced contract definition in § 150.1, a location basis contract means a commodity derivative contract that is cash-settled based on the difference in:

(i) The price, directly or indirectly, of:

(A) A particular core referenced futures contract; or

(B) A commodity deliverable on a particular core referenced futures contract, whether at par, a fixed discount to par, or a premium to par; and

(ii) The price, at a different delivery location or pricing point than that of the same particular core referenced futures contract, directly or indirectly, of:

(A) A commodity deliverable on the same particular core referenced futures contract, whether at par, a fixed discount to par, or a premium to par; or

(B) A commodity that is listed in appendix D to this part as substantially the same as a commodity underlying the same core referenced futures contract.

(3) *Commodity index contract.* For purposes of the referenced contract definition in § 150.1, a commodity index contract means an agreement, contract, or transaction based on an index comprised of prices of commodities that are not the same or substantially the same and that is not a location basis contract, a calendar spread contract, or an intercommodity spread contract as such terms are defined in this guidance, where:

(i) A calendar spread contract means a cash-settled agreement, contract, or transaction that represents the difference between the settlement price in one or a series of contract months of an agreement, contract, or transaction and the settlement price of another contract month or another series of contract months' settlement prices for the same agreement, contract, or transaction; and

(ii) An intercommodity spread contract means a cash-settled agreement, contract, or transaction that represents the difference between the settlement price of a referenced contract and the settlement price of another contract, agreement, or transaction that is based on a different commodity.

Appendix D to Part 150—Commodities Listed as Substantially the Same for Purposes of the Term ''Location Basis Contract'' As Used in the Referenced Contract Definition

The following table lists core referenced futures contracts and commodities that are treated as substantially the same as a commodity underlying a core referenced futures contract for purposes of the term ''location basis contract'' as used in the referenced contract definition under § 150.1, and as discussed in the associated appendix, Appendix C—Guidance Regarding the Referenced Contract Definition in § 150.1.

LOCATION BASIS CONTRACT LIST OF SUBSTANTIALLY THE SAME COMMODITIES

Core referenced futures contract	Commodities considered substantially the same (regardless of location)	Source(s) for specification of quality
NYMEX Light Sweet Crude Oil futures contract (CL):	1. Light Louisiana Sweet (LLS) Crude Oil.	NYMEX Argus LLS vs. WTI (Argus) Trade Month futures contract (E5). NYMEX LLS (Argus) vs. WTI Financial futures contract (WJ). ICE Futures Europe Crude Diff—Argus LLS vs WTI 1st Line Swap futures contract (ARK). ICE Futures Europe Crude Diff—Argus LLS vs WTI Trade Month Swap futures contract (ARL).
NYMEX New York Harbor ULSD Heating Oil futures contract (HO):	1. Chicago ULSD	NYMEX Chicago ULSD (Platts) vs. NY Harbor ULSD Heating Oil futures contract (5C).
	2. Gulf Coast ULSD	NYMEX Group Three ULSD (Platts) vs. NY Harbor ULSD Heating Oil futures contract (A6). NYMEX Gulf Coast ULSD (Argus) Up-Down futures contract (US). NYMEX Gulf Coast ULSD (Argus) Up-Down BALMO futures contract (GUD). NYMEX Gulf Coast ULSD (Platts) Up-Down BALMO futures contract (1L). NYMEX Gulf Coast ULSD (Platts) Up-Down Spread futures contract (LT). ICE Futures Europe Diesel Diff- Gulf Coast vs Heating Oil 1st Line Swap futures contract (GOH). CME Clearing Europe Gulf Coast ULSD(Platts) vs. New York Heating Oil (NYMEX) Spread Calendar swap (ELT). CME Clearing Europe New York Heating Oil (NYMEX) vs. European Gasoil (IC) Spread Calendar swap (EHA).
	3. California Air Resources Board Spec ULSD (CARB no. 2 oil).	NYMEX Los Angeles CARB Diesel (OPIS) vs. NY Harbor ULSD Heating Oil futures contract (KL).
	4. Gas Oil Deliverable in Antwerp, Rotterdam, or Amsterdam Area.	ICE Futures Europe Gasoil futures contract (G).

LOCATION BASIS CONTRACT LIST OF SUBSTANTIALLY THE SAME COMMODITIES—Continued

Core referenced futures contract	Commodities considered substantially the same (regardless of location)	Source(s) for specification of quality
		ICE Futures Europe Heating Oil Arb—Heating Oil 1st Line vs Gasoil 1st Line Swap futures contract (HOT).
		ICE Futures Europe Heating Oil Arb—Heating Oil 1st Line vs Low Sulphur Gasoil 1st Line Swap futures contract (ULL).
		NYMEX NY Harbor ULSD Heating Oil vs. Gasoil futures contract (HA).
NYMEX RBOB Gasoline futures contract (RB):	1. Chicago Unleaded 87 gasoline	NYMEX Chicago Unleaded Gasoline (Platts) vs. RBOB Gasoline futures contract (3C).
		NYMEX Group Three Unleaded Gasoline (Platts) vs. RBOB Gasoline futures contract (A8).
	2. Gulf Coast Conventional Blendstock for Oxygenated Blending (CBOB) 87.	NYMEX Gulf Coast CBOB Gasoline A1 (Platts) vs. RBOB Gasoline futures contract (CBA).
		NYMEX Gulf Coast Unl 87 (Argus) Up-Down futures contract (UZ).
	3. Gulf Coast CBOB 87 (Summer Assessment).	NYMEX Gulf Coast CBOB Gasoline A2 (Platts) vs. RBOB Gasoline futures contract (CRB).
	4. Gulf Coast Unleaded 87 (Summer Assessment).	NYMEX Gulf Coast 87 Gasoline M2 (Platts) vs. RBOB Gasoline futures contract (RVG).
		NYMEX Gulf Coast 87 Gasoline M2 (Platts) vs. RBOB Gasoline BALMO futures contract (GBB).
		NYMEX Gulf Coast 87 Gasoline M2 (Argus) vs. RBOB Gasoline BALMO futures contract (RBG).
	5. Gulf Coast Unleaded 87	NYMEX Gulf Coast Unl 87 (Platts) Up-Down BALMO futures contract (1K).
		NYMEX Gulf Coast Unl 87 Gasoline M1 (Platts) vs. RBOB Gasoline futures contract (RV).
		CME Clearing Europe Gulf Coast Unleaded 87 Gasoline M1 (Platts) vs. New York RBOB Gasoline (NYMEX) Spread Calendar swap (ERV).
	6. Los Angeles California Reformulated Blendstock for Oxygenate Blending (CARBOB) Regular.	NYMEX Los Angeles CARBOB Gasoline (OPIS) vs. RBOB Gasoline futures contract (JL).
	7. Los Angeles California Reformulated Blendstock for Oxygenate Blending (CARBOB) Premium.	NYMEX Los Angeles CARBOB Gasoline (OPIS) vs. RBOB Gasoline futures contract (JL).
	8. Euro-BOB OXY NWE Barges ...	NYMEX RBOB Gasoline vs. Euro-bob Oxy NWE Barges (Argus) (1000mt) futures contract (EXR).
		CME Clearing Europe New York RBOB Gasoline (NYMEX) vs. European Gasoline Euro-bob Oxy Barges NWE (Argus) (1000mt) Spread Calendar swap (EEXR).
	9. Euro-BOB OXY FOB Rotterdam	ICE Futures Europe Gasoline Diff—RBOB Gasoline 1st Line vs. Argus Euro-BOB OXY FOB Rotterdam Barge Swap futures contract (ROE).

Appendix E to Part 150—Speculative Position Limit Levels

Contract	Spot month	Single-month and all months
Legacy Agricultural:		
Chicago Board of Trade Corn (C)	1,200	57,800.
Chicago Board of Trade Oats (O)	600	2,000.
Chicago Board of Trade Soybeans (S)	1,200	27,300.
Chicago Board of Trade Soybean Meal (SM)	1,500	16,900.
Chicago Board of Trade Soybean Oil (SO)	1,100	17,400.
Chicago Board of Trade Wheat (W)	1,200	19,300.
Chicago Board of Trade KC HRW Wheat (KW)	1,200	12,000.
Minneapolis Grain Exchange Hard Red Spring Wheat (MWE)	1,200	12,000.
ICE Futures U.S. Cotton No. 2 (CT)	1,800	11,900.
Other Agricultural:		
Chicago Board of Trade Rough Rice (RR)	800	Not Applicable.
Chicago Mercantile Exchange Live Cattle (LC)	[1] 600/300/200	Not Applicable.
ICE Futures U.S. Cocoa (CC)	4,900	Not Applicable.
ICE Futures U.S. Coffee C (KC)	1,700	Not Applicable.
ICE Futures U.S. FCOJ–A (OJ)	2,200	Not Applicable.
ICE Futures U.S. Sugar No. 11 (SB)	25,800	Not Applicable.

Contract	Spot month	Single-month and all months
ICE Futures U.S. Sugar No. 16 (SF)	6,400	Not Applicable.
Energy:		
New York Mercantile Exchange Henry Hub Natural Gas (NG)	[2] 2,000	Not Applicable.
New York Mercantile Exchange Light Sweet Crude Oil (CL)	[3] 6,000/5,000/4,000	Not Applicable.
New York Mercantile Exchange NY Harbor ULSD (HO)	2,000	Not Applicable.
New York Mercantile Exchange RBOB Gasoline (RB)	2,000	Not Applicable.
Metal:		
Commodity Exchange, Inc. Copper (HG)	1,000	Not Applicable.
Commodity Exchange, Inc. Gold (GC)	6,000	Not Applicable.
Commodity Exchange, Inc. Silver (SI)	3,000	Not Applicable.
New York Mercantile Exchange Palladium (PA)	50	Not Applicable.
New York Mercantile Exchange Platinum (PL)	500	Not Applicable.

Appendix F to Part 150—Guidance on, and Acceptable Practices in, Compliance With § 150.5

The following are guidance and acceptable practices for compliance with § 150.5. Compliance with the acceptable practices and guidance does not diminish or replace, in any event, the obligations and requirements of the person to comply with the other regulations provided under this part. The acceptable practices and guidance are for illustrative purposes only and do not state the exclusive means for establishing compliance with § 150.5.

(a) *Acceptable practices for compliance with § 150.5(b)(2)(i) regarding exchange-set limits or accountability outside of the spot month.* A designated contract market or swap execution facility that is a trading facility may satisfy § 150.5(b)(2)(i) by complying with either of the following acceptable practices:

(1) *Non-spot month speculative position limits.* For any commodity derivative contract subject to § 150.5(b), a designated contract market or swap execution facility that is a trading facility sets individual single month or all-months-combined levels no greater than any one of the following:

(i) The average of historical position sizes held by speculative traders in the contract as a percentage of the average combined futures and delta-adjusted option month-end open interest for that contract for the most recent calendar year;

(ii) The level of the spot month limit for the contract;

(iii) 5,000 contracts (scaled-down proportionally to the notional quantity per contract relative to the typical cash-market transaction if the notional quantity per contract is larger than the typical cash market transaction, and scaled up proportionally to the notional quantity per contract relative to the typical cash-market transaction if the notional quantity per contract is smaller than the typical cash market transaction); or

(iv) 10 percent of the average combined futures and delta-adjusted option month-end open interest in the contract for the most recent calendar year up to 50,000 contracts, with a marginal increase of 2.5 percent of open interest thereafter.

(2) *Non-spot month position accountability.* For any commodity derivative contract subject to § 150.5(b), a designated contract market or swap execution facility that is a trading facility adopts position accountability, as defined in § 150.1.

(b) [Reserved]

PART 151—[REMOVED AND RESERVED]

■ 27. Under the authority of section 8a(5) of the Commodity Exchange Act, 7 U.S.C. 12a(5), remove and reserve part 151.

Issued in Washington, DC, on January 31, 2020, by the Commission.

Christopher Kirkpatrick,

Secretary of the Commission.

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

Appendices to Position Limits for Derivatives—Commission Voting Summary, Chairman's Statement, and Commissioners' Statements

Appendix 1—Commission Voting Summary

On this matter, Chairman Tarbert and Commissioners Quintenz and Stump voted in the affirmative. Commissioners Behnam and Berkovitz voted in the negative.

Appendix 2—Supporting Statement of Chairman Heath Tarbert

I am pleased to support the Commission's proposed rule on limits for speculative positions in futures and derivatives markets. Today's proposal is a pragmatic approach that will protect our agricultural, energy, and metals markets from excessive speculation. But just as importantly, it will ensure fair and easy access to these markets for businesses producing, consuming, and wholesaling commodities under our jurisdiction.

When I came to the Commission, I set out several strategic goals. Among them is to regulate our derivatives markets to promote the interests of all Americans. Another goal is to enhance the regulatory experience of market participants. The proposal we are issuing today will deliver on both. We also drew from each of our agency core values to craft it—commitment, forward-thinking, teamwork, and clarity. Clarity is of particular importance here because, ultimately, markets and their participants deserve regulatory certainty. We provide that today.

Making Our Markets Work for the American Economy

If adopted, our proposal will help ensure that futures markets in agricultural, energy and metals commodities work for American households and businesses. Farmers, ranchers, energy producers, utilities, and manufacturers are the backbone of the American economy. Our derivatives markets generally, and in particular the markets addressed in this proposal, are designed specifically to allow these businesses to hedge their exposure to price changes.

This Commission's proposal will protect Americans from some of the most nefarious machinations in our derivatives markets. First, capping speculative positions in the covered derivatives contracts will help prevent cornering and squeezing. Such manipulative schemes can cause artificial prices and can injure the users of commodities linked to the futures markets. Limiting speculative positions can also reduce the likelihood of chaotic price swings caused by speculative gamesmanship. In effect, position limits should help ensure that prices in our markets reflect real supply and demand.

Position limits are not a solution born inside the Washington Beltway and imposed

[1] Step-down spot month limits would be for positions net long or net short as follows: 600 contracts at the close of trading on the first business day following the first Friday of the contract month; 300 contracts at the close of trading on the business day prior to the last five trading days of the contract month; and 200 contracts at the close of trading on the business day prior to the last two trading days of the contract month.

[2] *See* § 150.3 regarding the conditional spot month limit exemption for cash-settled positions in natural gas.

[3] Step-down spot month limits would be for positions net long or net short as follows: 6,000 contracts at the close of trading three business days prior to the last trading day of the contract; 5,000 contracts at the close of trading two business days prior to the last trading day of the contract; and 4,000 contracts at the close of trading one business day prior to the last trading day of the contract.

on the market from afar. Instead, they are one of many tools that exchanges have used since the 19th century to mitigate the potentially damaging effects of excessive speculation. They are a pragmatic, Midwestern solution to a real-world problem. Recognizing the usefulness of exchange-set limits, the Commission has worked collaboratively with our exchanges since 1981 to put sensible position limits and accountability levels on speculative positions in all physical commodity futures markets.

Our proposal would also end the ''risk management'' exemption that has allowed banks, hedge funds, and trading firms to take large and purely speculative positions in agricultural markets. Nearly a decade ago, Congress directed the Commission to address this issue. Today we are acting.

Some observers have gone so far as to call position limits ''at best, a cure for a disease that does not exist or a placebo for one that does.'' [1] I respectfully disagree. To be sure, position limits are not a silver bullet against the damaging impact of excessive speculative activity. But I also believe, as did Congress when it amended the Commodity Exchange Act, that position limits can help to ''diminish, eliminate, or prevent'' potential damage to the commodities markets that are so critical to our real economy.

Still, setting limits requires balancing the competing need for liquidity in our markets against the potential for disruptive speculative positions. I believe that the spot month levels we are proposing are reasonably calibrated. They are based on the current rule of thumb that limits should be no more than 25 percent of the deliverable supply of the referenced commodity, in order to prevent corners and squeezes that everyone can agree are bad for the market.

For the nine grain futures contracts currently subject to position limits,[2] revising non-spot limits required the Commission to consider an additional complication. Eliminating the risk management exemption could potentially take away a source of liquidity further out the curve. For a farmer who needs to hedge the price risk on crops that are still in the ground, a bank with a risk management exemption may be the only willing buyer. To mitigate the impact of eliminating the risk management exemption, we have raised the non-spot month limits for the grain contracts. This should allow a broader set of market participants to provide liquidity and help farmers hedge their crop risk as far in advance as they need.

Ensuring Access for Bona Fide Hedgers

Position limits is the rare rule where the exception is as important as the rule itself. It cannot be said too often that these limits are on speculative activity. Congress has always intended that positions that are a bona fide hedge of price risk should not be subject to limits.

It is critical, therefore, that we not disrupt the regulatory experience of American producers, middlemen, and end-users of commodities. The greatest risk of a position limits rule is that hedgers are caught in the limits aimed at speculators. This could reduce their ability to protect themselves from risk, which could in turn negatively impact the broader economy. If a farmer cannot offset a risk on next year's crop—if a refiner cannot offset a risk on crude oil for a new plant—or if a wholesaler cannot offset risks on inventory it is buying, those businesses will not expand their operations.

Any position limits rule must therefore be written with those hedging needs in mind. Congress and the American people expect nothing less. The proposal addresses those needs through (i) a broad exemption for ''bona fide'' hedging, and (ii) a streamlined and non-intrusive process for recognizing those exemptions.

On the first point, the proposal will expand the types of hedging strategies that are presumed to meet the bona fide hedging definition—and therefore be eligible for an exemption from position limits. For the first time, we have included anticipated merchandising, meaning that wholesalers and middlemen connecting producers and consumers could more readily hedge their risks. We have also expanded the definition to conform to the hedging strategies that are common in energy markets. This will ensure that the new federal speculative limits on energy markets do not inadvertently undermine the producers, refiners, pipeline operators, and utilities that keep this country running.

On the second point, we have built on prior proposals to create a practical and efficient way for hedgers to avail themselves of the bona fide hedging exemption. Creating burdensome red tape or slowing down approvals to take on hedging positions could result in lost business opportunities for the participants we are called to protect.

For parties whose hedging needs fit within the enumerated list, they could exceed federal position limits without requesting approval from the Commission. They also would not need to submit information on their cash market positions—a duplicative and burdensome exercise that is better handled by the exchanges.

For parties whose hedging needs do not fit within the enumerated list, we are offering a process whereby an exchange could evaluate that hedging need. If the exchange finds that the need is a bona fide hedge not captured by our list, the exchange would notify the Commission. Unless the Commission votes to reject it within 10 business days, the exchange's recognition would be deemed effective for purposes of federal position limits. Given our expanded definition of bona fide hedging, I anticipate that it would be a rare case that a market participant finds its legitimate hedging needs are not already covered in the list of enumerated exemptions. Still, this process would provide flexibility and legal certainty, without excessive red tape.

Striking the Right Balance

The Commission has grappled with position limits for a decade. The 2011 proposal was finalized, but struck down by a court because of concerns over its legal justification. Subsequent proposals in 2013 and 2016 were never finalized, following pushback from market participants about access to bona fide hedge exemptions. The Commission and staff have worked with diligence and good faith to solve this puzzle. There are difficult, often competing interests to address in this seemingly simple rule. If an easy solution exists, I have no doubt that the Commission would have found it.

Today's proposal is the culmination of ten years of effort across four Chairmen's tenures. I sincerely thank my predecessors, as well as the Commission staff, who have worked so hard for so long to strike the right balance. Each proposal and every piece of feedback has helped improve the proposal before the Commission today. I believe that the proposal offers the pragmatic, workable solution that would protect markets from corners and squeezes while preserving the ability of American businesses to manage their risks.

Putting the Burden in the Right Place

Finally, I want to draw attention to one fundamental shift in approach between prior position limits rules and the present proposal. Previously, the Commission had read the Commodity Exchange Act to require federal limits to be placed on every futures contract for a physical commodity. This would have required the Commission to evaluate approximately 1,200 individual contracts to determine the appropriate levels.

The 2011 position limits rule was challenged in court on this ground and was struck down. The court found that the statute was ambiguous about whether the Commission must impose limits on all futures, or whether it should impose limits only ''as the Commission finds are necessary[.]'' The court said that ''it is incumbent upon the agency not to rest simply on its parsing of the statutory language. It must bring its experience and expertise to bear in light of competing interests at stake to resolve the ambiguities in the statute.'' [3]

The Commission is now bringing its experience and expertise to bear on this matter. We have taken a big picture approach to determine when position limits are in fact necessary. In short, we are proposing that speculative limits are necessary for those futures contracts that are physically delivered and where the futures market is important in the price discovery process for the underlying commodity. The Commission also examined whether a disruption in the distribution of that commodity would have a significant impact on our economy. This has led us to propose limits on 25 physically delivered futures contracts,[4] which covers the vast majority of trading volume and open interest in physically delivered derivatives. In addition to the nine grain futures contracts currently subject to federal limits, this

[1] *https://www.cftc.gov/PressRoom/SpeechesTestimony/dunnstatement101811.*

[2] The proposal would not set non-spot month limits on the 16 contracts that are not currently subject to federal position limits.

[3] *Int'l Swap Dealers Assoc.* v. *CFTC,* 887 F.Supp.2d 259, 281 (D.D.C. 2012).

[4] The proposal would also impose limits on approximately 400 other futures contracts that are linked, directly or indirectly, to the 25 core physically delivered contracts.

includes the largest energy, metals, and other agricultural futures contracts.

Position limits are like medicine; they can help cure a symptom but can have undesirable side effects. And like medicine, position limits should be prescribed only when necessary. I believe this change in the underlying rationale for the proposal will require thoughtful reflection before imposing additional position limits on additional contracts in the future. Position limits will always create a burden on someone in the market—whether a compliance burden on parties having to track their positions relative to limits, or potentially the loss of a business opportunity because the risks cannot be hedged.

The statutory provisions on position limits can reasonably be read in two ways. The first reading would put the burden on the Commission to find position limits to be necessary before imposing them on new contracts. The second reading would mandate federal limits on all futures contracts irrespective of any need, reflexively putting placing a burden on all markets and all market participants. Given the choice of burdening a government agency or private enterprise, I think it is more prudent to put the burden on the government. That is what today's proposal does. As Thomas Jefferson said, ''Government exists for the interests of the governed, not for the governors.''

Appendix 3—Supporting Statement of Commissioner Brian Quintenz

I am pleased to support the agency's revitalized approach to position limits. Today's iteration marks the CFTC's fifth proposed position limits rule since the Dodd-Frank Act [1] amended the Commodity Exchange Act's (CEA) section on position limits. This proposal is, by far, the strongest of them all.

Today's proposed rule promotes flexibility, certainty, and market integrity for end-users—farmers, ranchers, energy producers, transporters, processors, manufacturers, merchandisers, and all who use physically-settled derivatives to risk manage their exposure to physical goods. The proposal includes an expansive list of enumerated and self-effectuating bona fide hedge exemptions, and a streamlined, exchange-centered process to adjudicate non-enumerated bona fide hedge exemption requests.

Of the five proposed rules, this proposal is the most true to the CEA in many significant respects: By requiring, as has long been the Commission's practice, a necessity finding before imposing limits, by including economically equivalent swaps, and, perhaps most importantly, by following Congress' instruction that, ''to the maximum extent practicable,'' any limits set by the Commission balance the interests among promoting liquidity, deterring manipulation, squeezes, and corners, and ensuring the price discovery function of the underlying market is not disrupted.[2] The confluence of these factors occurs most acutely in the spot month for physically-settled contracts where the delivery process and price convergence is most vulnerable to potential manipulation or disruption due to outsized positions. By focusing exclusively on spot month position limits in the new set of physically-settled (and closely related cash-settled) contracts, the proposal elegantly balances the countervailing policy interests enumerated in the statute.

Necessity Finding

Today's proposal, unlike the recent prior proposals, premises new limits on a finding that they are necessary to diminish, eliminate, or prevent the burden on interstate commerce from extraordinary price movements caused by excessive speculation (''necessity finding'') in specific contracts, as Congress has long required in the CEA and its legislative precursors since 1936.[3] I am pleased that the proposal complies with the District Court's ruling in the ISDA-position limits litigation: That the Commission must decide whether section 4a of the CEA mandates the CFTC set new limits or only permits the CFTC to set such limits pursuant to a necessity finding.[4] As the District Court noted, ''the Dodd-Frank amendments do not constitute a clear and unambiguous mandate to set position limits.'' [5] I agree with the proposal's determination that, when read together, paragraphs (1) and (2) of section 4a demand a necessity finding.

Section 4a(a)(2)(A) states that the Commission shall establish limits ''in accordance with the standards set forth in paragraph (1) of this subsection.'' [6] Paragraph (1) establishes the Commission's authority to, ''proclaim and fix such limits on the amounts of trading . . . as the Commission finds are necessary to diminish, eliminate or prevent [the] burden'' on interstate commerce caused by unreasonable or unwarranted price moves associated with excessive speculation. This language dates back almost verbatim to legislation passed in 1936, in which Congress directed the CFTC's precursor to make a necessity finding before imposing position limits. The Congressional report accompanying the CEA from the 74th Congress includes the following directive, ''[Section 4a of the CEA] gives the Commodity Exchange Commission the power, after due notice and opportunity for hearing and a finding of a burden on interstate commerce caused by such speculation, to fix and proclaim limits on futures trading . . .'' [7] In its ISDA opinion, the District Court noted the following: ''This text clearly indicated that Congress intended for the CFTC to make a 'finding of a burden on interstate commerce caused by such speculation' prior to enacting position limits.'' [8]

I support the proposal's view that the most natural reading of section 4a(a)(2)(A)'s reference to paragraph (1)'s ''standards'' is that it logically includes the ''necessity'' standard. Paragraph (1)'s requirement to make a necessity finding, along with the aggregation requirement, provide substantive guidance to the Commission about when and how position limits should be implemented.

If Congress intended to mandate that the Commission impose position limits on all physical commodity derivatives, there is little reason it would have referred to paragraph (1) and the Commission's long established practice of necessity findings. Instead, Congress intended to focus the Commission's attention on whether position limits should be considered for a broader set of contracts than the legacy agricultural contracts, but did not mandate those limits be imposed.

Setting New Limits ''As Appropriate''

The proposal preliminarily determines that position limits are necessary to diminish, eliminate, or prevent the burden on interstate commerce posed by unreasonable or unwarranted prices moves that are attributable to excessive speculation in 25 referenced commodity markets that each play a crucial role in the U.S. economy. I am aware that there is significant skepticism in the marketplace and among academics as to whether position limits are an appropriate tool to guard against extraordinary price movements caused by extraordinarily large position size. Some argue there is no evidence that excessive speculation currently exists in U.S. derivatives markets.[9] Others believe that large and sudden price fluctuations are not caused by hyper-speculation, but rather by market participants' interpretations of basic supply and demand fundamentals.[10] In contrast, still

[1] 76 FR 4752 (Jan. 26, 2011); 78 FR 75680 (Dec. 12, 2013); 81 FR 38458 (June 13, 2016) (''supplemental proposal''); and 81 FR 96704 (Dec. 30, 2016). The CEA addresses position limits in section (sec.) 4a (7 U.S.C. 6a).

[2] Sec. 4a(a)(3).

[3] Sec. 4a(1).

[4] *ISDA et al.* v *CFTC,* 887 F. Supp. 2d 259, 278 and 283–84 (D.D.C. Sept. 28, 2012).

[5] *Id.* at 280.

[6] Sec. 4a(a)(2)(A) (''In accordance with the standards set forth in paragraph (1) of this subsection and consistent with the good faith exception cited in subsection (b)(2), with respect to physical commodities other than excluded commodities as defined by the Commission, the Commission shall by rule, regulation, or order establish limits on the amount of positions, as appropriate, other than bona fide hedge positions, that may be held by any person with respect to contracts of sale for future delivery or with respect to options on the contracts or commodities traded on or subject to the rules of a designated contract market.'')

[7] H.R. Rep. 74–421, at 5 (1935).

[8] 887 F. Supp. 2d 259, 269 (fn 4).

[9] Testimony of Erik Haas (Director, Market Regulation, ICE Futures U.S.) before the CFTC at 70 (Feb. 26, 2015) (''We point out the makeup of these markets, primarily to show that any regulations aimed at excessive speculation is a solution to a nonexistent problem in these contracts.''), *available at: https://www.cftc.gov/idc/groups/public/@aboutcftc/documents/file/emactranscript022615.pdf.*

[10] BAHATTIN BUYUKSAHIN & JEFFREY HARRIS, CFTC, THE ROLE OF SPECULATORS IN THE CRUDE OIL FUTURES MARKET 1, 16–19 (2009) (''Our results suggest that price changes leads the net position and net position changes of speculators and commodity swap dealers, with little or no feedback in the reverse direction. This uni-directional causality suggests that traditional speculators as well as commodity swap dealers are generally trend followers.''), *available at http://www.cftc.gov/idc/groups/public/@swaps/documents/file/plstudy_19_cftc.pdf*; Testimony of Philip K. Verleger, Jr. before the CFTC, Aug. 5, 2009 (''The increase in crude prices between 2007 and 2008 was caused by the incompatibility of environmental regulations with the then-current

others believe that outsized speculative positions, however defined, may aggravate price volatility, leading to price run-ups or declines that are not fully supported by market fundamentals.[11]

In my opinion, position limits should not be viewed as a means to counteract long-term directional price moves. The CFTC is not a price setting agency and we should not impede the market from reflecting long term supply and demand fundamentals. It is worth noting that the physically-settled contract which has seen the largest sustained price increase recently is palladium,[12] which has also seen its exchange-set position limit decline four times since 2014 to what is now the smallest limit of any contract in the referenced contract set.[13] Nevertheless, between the start of 2018 and the end of 2019, palladium futures prices rose 76%.[14] Taking these conflicting views and facts into account, it is clear the Commission correctly stated in its 2013 proposal, ''there is a demonstrable lack of consensus in the [academic] studies'' as to the effectiveness of position limits.[15]

With that healthy dose of skepticism, I think the proposal appropriately focuses on the time period and contract type where position limits can have the most positive, and the least negative, impact—the spot month of physically settled contracts—while also calibrating those limits to function as just one of many tools in the Commission's regulatory toolbox that can be used to promote credible, well-functioning derivatives and cash commodity markets.

Because of the significance of these 25 core referenced futures contracts to the underlying cash markets, the level of liquidity in the contracts, as well as the importance of these cash markets to the national economy, I think it is appropriate for the Commission to protect the physical delivery process and promote convergence in these critical commodity markets. Further, the limits proposed today are higher than in the past, notably because the proposal utilizes current estimates of deliverable supply—numbers which haven't been updated since 1999.[16] I am interested to hear feedback from commenters about whether the estimates of deliverable supply, and the calibrated limits based off of them, are sufficiently tailored for the individual contracts.

Taking End-Users Into Account

Perhaps more than any other area of the CFTC's regulations, position limits directly affect the participants in America's real economy: Farmers, ranchers, energy producers, manufacturers, merchandisers, transporters, and other commercial end-users that use the derivatives market as a risk management tool to support their businesses. I am pleased that today's proposal takes into account many of the serious concerns that end-users voiced in response to the CFTC's previous five unsuccessful position limits proposals.

Importantly, and in response to many comments, this proposal, for the first time, expands the possibility for enterprise-wide hedging,[17] proposes an enumerated anticipated merchandising exemption,[18] eliminates the ''five-day rule'' for enumerated hedges,[19] and no longer requires the filing of certain cash market information with the Commission that the CFTC can obtain from exchanges.[20] Regarding enterprise-wide hedging—otherwise known as ''gross hedging''—the proposal would provide an energy company, for example, with increased flexibility to hedge different units of its business separately if those units face different economic realities.

With respect to cross-commodity hedging, today's proposal completely rejects the arbitrary, unworkable, ill-informed, and frankly, ludicrous ''quantitative test'' from the 2013 proposal.[21] That test would have required a correlation of at least 0.80 or greater in the spot markets prices of the two commodities for a time period of at least 36 months in order to qualify as a cross-hedge.[22] Under this test, longstanding hedging practices in the electric power generation and transmission markets would have been prohibited. Today's proposal not only shuns this Government-Knows-Best approach, it also proposes new flexibility for the cross-commodity hedging exemption, allowing it to be used in conjunction with other enumerated hedges.[23] For example, a commodity merchant could rely on the enumerated hedge for unsold anticipated production to exceed limits in a futures contract subject to the CFTC's limits in order to hedge exposure in a commodity for which there is no futures contract, provided that the two commodities share substantially related fluctuations in value.

Bona Fide Hedges and Coordination With Exchanges

For those market participants who employ non-enumerated bona fide hedging practices in the marketplace, this proposal creates a streamlined, exchange-focused process to approve those requests for purposes of both exchange-set and federal limits. As the marketplaces for the core referenced futures contracts addressed by the proposal, the DCMs have significant experience in, and responsibility towards, a workable position limits regime. CEA core principles require DCMs and swap execution facilities to set position limits, or position accountability levels, for the contracts that they list in order to reduce the threat of market manipulation.[24] DCMs have long administered position limits in futures contracts for which the CFTC has not set limits, including in certain agricultural, energy, and metals markets. In addition, the exchanges have been strong enforcers of their own rules: during 2018 and 2019, CME Group and ICE Futures US concluded 32 enforcement matters regarding position limits.

As part of their stewardship of their own position limits regimes, DCMs have long granted bona fide hedging exemptions in those markets where there are no federal limits. Today's proposal provides what I believe is a workable framework to utilize exchanges' long standing expertise in granting exemptions that are not enumerated by CFTC rules.[25] This proposed rule also recognizes that the CEA does not provide the Commission with free rein to delegate all of the authorities granted to it under the statute.[26] The Commission itself, through a majority vote of the five Commissioners, retains the ability to reject an exchange-granted non-enumerated hedge request within 10 days of the exchange's approval. The Commission has successfully and responsibly used a similar process for both new contract listings as well as exchange rule filings, and I am pleased to see the proposal expand that approach to non-enumerated hedge exemption requests that will limit the uncertainty for bone fide commercial market participants.

I look forward to hearing from end-users about whether this proposal provides them the flexibility and certainty they need to manage their exposures in a way that reflects the complexities and realities of their physical businesses. In particular, I am interested to hear if the list of enumerated bona fide hedging exemptions should be broadened to recognize other types of common, legitimate commercial hedging activity.

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global crude supply. Speculation had nothing to do with the price rise.''), *available athttps://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/hearing080509_verleger.pdf.*

[11] For a discussion of studies discussing supply and demand fundamentals and the role of speculation, *see* 81 FR 96704, 96727 (Dec. 30, 2016). *See, e.g.,* Hamilton, Causes and Consequences of the Oil Shock of 2007–2008, Brookings Paper on Economic Activity (2009); Chevallier, Price Relationships in Crude oil Futures: New Evidence from CFTC Disaggregated Data, Environmental Economics and Policy Studies (2012).

[12] *Platinum, gold slide as dollar soars; palladium eases off record,* Reuters (Sept. 30, 2019), available at: *https://www.reuters.com/article/global-precious/precious-platinum-gold-slide-as-dollar-soars-palladium-eases-off-record-idUSL3N26L3UV.*

[13] Between 2014 and 2017, the CME Group lowered the spot month position limit in the contract four times, from 650, to 500, to 400, to 100, to the current limit of 50 (NYMEX regulation 40.6(a) certifications, filed with the CFTC, 14–463 (Oct. 31, 2014), 15–145 (Apr. 14, 2015), 15–377 (Aug. 27, 2015), and 17–227 (June 6, 2017)), *available at: https://sirt.cftc.gov/sirt/sirt.aspx?Topic=ProductTermsandConditions.*

[14] Palladium futures were at $1,087.35 on Jan. 2, 2018 and at $1,909.30 on Dec. 31, 2019. Historical prices *available at: https://futures.tradingcharts.com/historical/PA_/2009/0/continuous.html.*

[15] 78 FR 75694 (Dec. 12, 2013).

[16] 64 FR 24038 (May 5, 1999).

[17] Proposed Appendix B, paragraph (a).

[18] Proposed Appendix A, paragraph (a)(11).

[19] Preamble discussion of Proposed Enumerated Bona Fide Hedges for Physical Commodities.

[20] Elimination of CFTC Form 204.

[21] 78 FR 75,717 (Dec. 12, 2013).

[22] *Id.*

[23] Proposed Appendix A, paragraph (a)(5).

[24] DCM Core Principle 5 (sec. 5 of the CEA, 7 U.S.C. 7) (implemented by CFTC regulation 38.300) and SEF Core Principle 6 (sec. 5h of the CEA, 7 U.S.C. 7b-3) (implemented by CFTC regulation 37.600).

[25] Proposed regulation 150.9.

[26] Preamble discussion of proposed regulation 150.9, including references to cases pointing out the extent to which an agency can delegate to persons outside of the agency.

Proposed Limits on Swaps

The CEA requires the Commission to consider limits not only on exchange-traded futures and options, but also on ''economically equivalent'' swaps.[27] Today's proposal provides the market with far greater certainty on the universe of such swaps than the previous proposals. Prior proposals failed to sufficiently explain what constituted an ''economically equivalent swap,'' thereby ensuring that compliance with position limits was essentially unworkable, given real-time aggregation requirements and ambiguity over in-scope contracts. In stark contrast, today's proposed rule narrows the scope of ''economically equivalent'' swaps to those with material contractual specifications, terms, and conditions that are identical to exchange-traded contracts.[28] For example, in order for a swap to be considered ''economically equivalent'' to a physically-settled core referenced futures contract, that swap would also have to be physically-settled, because settlement type is considered a material contractual term. I believe the proposed narrowly-tailored definition will provide market participants with clarity over those contracts subject to position limits. I also welcome suggestions from commenters regarding ways in which the definition can be further refined to complement limits on exchange-traded contracts.

Conclusion

Section 2a(10) of the CEA is not an often cited passage of text. It describes the Seal of the United States Commodity Futures Trading Commission, and in particular, lists a number of symbols on the seal which represent the mission and legacy of our agency: The plough showing the agricultural origin of futures markets; the wheel of commerce illuminating the importance of hedging markets to the broader economy; and, the scale of balanced interests, proposing a fair weighing of competing or contradicting forces.

As I think about the proposal in front of us today, I believe it speaks to all of those elements enshrined in our agency's legacy, but the scale of balanced interests comes most to mind with this rule: new flexibility combined with new regulation, the removal of a few exemptions with the expansion or addition of others, the reliance on exchange expertise but with Commission review and oversight, and the balance of liquidity and price discovery against the threat of corners and squeezes. I am very pleased to support today's revitalized, confined, and tempered approach to position limits and look forward to comment letters, particularly from the end-user community.

Appendix 4—Dissenting Statement of Commissioner Rostin Behnam

Introduction

The ceremony for the 92nd Academy Awards will air in a little over a week. I haven't seen too many movies this year given my two young girls and hectic work schedule, but I did see ''Ford v Ferrari.'' [1] ''Ford v Ferrari'' earned four award nominations, including best motion picture of the year. The film tells the true story of American car designer Carroll Shelby and British-born driver Ken Miles who built a race car for Ford Motor Company and competed with Enzo Ferrari's dominating and iconic red racing cars at the 1966 24 Hours of Le Mans.[2] This high drama action film focuses foremost on the relationship between Shelby and Miles—the co-designers and driver of Ford's own iconic GT40—and their triumph over the competition, the course, the rulebook, and the bureaucracy. Even if you aren't a car enthusiast, the action, acting, and accuracy of the story are well worth your time. However, there is a lot more to this movie than racing.

There is a great scene where Miles is talking to his son about achieving the ''perfect lap''—no mistakes, every gear change, and every corner perfect. In response to his son's observation that you can't just ''push the car hard'' the whole time, Miles agrees, pensively staring down the track towards the setting sun. He says, ''If you are going to push a piece of machinery to the limit, and expect it to hold together, you have to have some sense of where that limit is.''

It's been nine years since the Commission first set out to establish the position limits regime required by amendments to section 4a of the Commodity Exchange Act (the ''Act'' or ''CEA''),[3] under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.[4] While I would like to be in a position to say that today's proposed rule addressing Position Limits for Derivatives (the ''Proposal'') is leading us towards that ''perfect lap,'' I cannot. While the Proposal purports to respect Congressional intent and the purpose and language of CEA section 4a, in reality, it pushes the bounds of reasonable interpretation by deferring to the exchanges [5] and setting the Commission on a course where it will remain perpetually in the draft, unable to acquire the necessary experience to retake the lead in administering a position limits regime.

In 2010 and the decades leading up to it, Congress understood that for the derivatives markets in physical commodities to perform optimally, there needed to be limits on the amount of control exerted by a single person (or persons acting in agreement). In tasking the Commission with establishing limits and the framework around their operation, Congress was aware of our relationship with the exchanges, but nevertheless opted for our experience and our expertise to meet the policy objectives of the Act.

Right now, we are pushing to go faster and just get to the finish line, making real-time adjustments without regard for even trying for that ''perfect lap.'' It is unfortunate, but despite the Chairman's leadership and the talented staff's hard work, I do not believe that this Proposal will hold itself together. I must therefore, with all due respect, dissent.

Deference to Our Detriment

While I have a number of concerns with the Proposal, my principal disagreement is with the Commission's determination to in effect disregard the tenets supporting the statutorily created parallel federal and exchange-set position limit regime, and take a back seat when it comes to administration and oversight. In doing so, the Commission claims victory for recognizing that the exchanges are better positioned in terms of resources, information, knowledge, and agility, and therefore ought to take the wheel. While the Commission believes it can withdraw and continue to maintain access to information that is critical to oversight, I fear that giving way absent sufficient understanding of what we are giving up, and planning for ad hoc Commission (and staff) determinations on key issues that are certain to come up, will let loose a different set of responsibilities that we have yet to consider.

I believe the Proposal has many flaws that could be the subject of dissent. I am focusing my comments on those issues that I think are most critical for the public's review. Based on consideration of the Commission's mission, and Congressional intent as evinced in the Dodd-Frank Act amendments to CEA section 4a and elsewhere in the Act, I believe that (1) the Commission is required to establish position limits based on its reasoned and expert judgment within the parameters of the Act; (2) the Commission has not provided a rational basis for its determination *not* to propose federal limits outside of the spot month for referenced contracts based on commodities other than the nine legacy agricultural commodities; and (3) the Commission's seemingly unlimited flexibility in proposing to (a) significantly broaden the bona fide hedging definition, (b) codify an expanded list of self-effectuating enumerated bona fide hedges, (c) provide for exchange recognition of non-enumerated bona fide hedge exemptions with respect to federal limits, and (d) simultaneously eliminate notice and reporting mechanisms, is both inexplicably complicated to parse and inconsistent with Congressional intent.

The Commission Is Required To Establish Position Limits

The Proposal goes to great lengths to reconcile whether the CEA section 4a(a)(2)(A) requires the Commission to make an antecedent necessity finding before establishing any position limit,[6] with the implication that if a necessity finding is required, then the Commission could rationalize imposing no limits at all. I do not believe it was necessary to rehash the legislative and regulatory histories to determine the Commission's authority with respect to CEA section 4a. Nor do I believe it was worthwhile here to reply in such great

[27] Sec. 4a(5).

[28] Proposed regulation 150.1.

[1] Ford v Ferrari (Twentieth Century Fox 2019).

[2] Ford v Ferrari, Fox Movies, *https://www.foxmovies.com/movies/ford-v-ferrari* (Last visited Jan. 28, 2020, 1:55 p.m.).

[3] *See* Position Limits for Derivatives, 76 FR 4752 (proposed Jan. 26, 2011) (the ''2011 Proposal'').

[4] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203 section 737, 124 Stat. 1376, 1722–25 (2010) (the ''Dodd-Frank Act'').

[5] As in the Proposal, unless otherwise indicated, the use of the term ''exchanges'' throughout this statement refers to designated contract markets (''DCMs'') and swap execution facilities (''SEFs'').

[6] *See* Proposal at III.

depth to the U.S. District Court for the District of Columbia's opinion vacating the Commission's 2011 final rulemaking on Position Limits for Futures and Swaps.[7] The Proposal uses a tremendous amount of text to try and flesh out what is meant by ''necessary'', and yet I fear it does not demonstrate the Commission's ''bringing its expertise and experience to bear when interpreting the statute,'' giving effect to the meaning of each word in the statute, and providing an explanation for how any interpretation comports with the policy objectives of the Act as amended by the Dodd-Frank Act, as directed by the District Court.[8] The Commission ought to avoid the temptation to retract when doing so requires the torture of strawmen. Not only do we look complacent, but we invite criticism for our unnecessary affront to the sensibilities of the public we serve.

Looking back at the record, what is necessary is that the Commission complies with the mandate.[9] In response to the District Court's directive, the Commission could have gone back through its own records to the 2011 Proposal. If it had done so, it would have found that the Commission provided a review of CEA section 4a(a)—interpreting the various provisions, giving effect to each paragraph, acknowledging the Commission's own informational and experiential limitations regarding the swaps markets at that time, and focusing on the Commission's primary mission of fostering fair, open and efficient functioning of the commodity derivatives markets.[10] Of note, ''Critical to fulfilling this statutory mandate,'' the Commission pronounced, ''is protecting market users and the public from undue burdens that may result from 'excessive speculation.' '' [11] Federal position limits, as predetermined by Congress, are most certainly the only means towards addressing the burdens of excessive speculation when such limits must address a ''proliferation of economically equivalent instruments trading in multiple trading venues.'' [12] Exchange-set position limits or accountability levels simply cannot meet the mandate.

In exercising its authority, the Commission may evaluate whether exchange-set position limits, accountability provisions, or other tools for contracts listed on such exchanges are currently in place to protect against manipulation, congestion, and price distortions.[13] Such an evaluation—while permissible—is just one factor for consideration. The existence of exchange-set limits or accountability levels, on their own, can neither predetermine deference nor be justified absent substantial consideration. The authority and jurisdiction of individual exchanges are necessarily different than that of the Commission. They do not always have congruent interests to the Commission in monitoring instruments that do not trade on or subject to the rules of their particular platform or the market participants that trade them. They do not have the attendant authority to determine key issues such as whether a swap performs or affects a significant price discovery function, or what instruments fit into the universe of economically equivalent swaps. They are not permitted to define bona fide hedging transactions or grant exemptions for purposes of federal position limits. It is therefore clear that CEA section 4a, as amended by the Dodd-Frank Act ''warrants extension of Commission-set position limits beyond agricultural products to metals and energy commodities.'' [14]

Unsupportable Deference

In spite of all of this—the foregoing mandate; the clear Congressional intent in CEA section 4a(a)(3)(A); and the Commission's real experience and expertise (including its unique data repository)—the Commission only proposes to maintain federal non-spot month limits for the nine legacy agricultural contracts (with questionably appropriate modifications), ''because the Commission has observed no reason to eliminate them.'' [15] Essentially, in the Commission's reasoned judgment, ''if it ain't broke, don't fix it.'' And so, the Commission, in keeping with this relatively riskless course of action, similarly was able to conclude that federal non-spot month limits are not necessary for the remaining 16 proposed core referenced futures contracts identified in the Proposal.

The Commission provides two reasons in support of its determination, and neither sufficiently demonstrates that the Commission utilized its experience and expertise. Rather, the Commission backs into deferring to the exchanges' authority to establish position limits or accountability levels. This course of action ignores the reality that Commission-set position limits serve a higher purpose than just addressing threats of market manipulation [16] or creating parameters for exchanges in establishing their own limits.[17] The Proposal advocates that there is no need to disturb the status quo, despite the fact that we have nothing to compare it to. The Commission places a higher value on minimizing the impact on industry—which it appears to have not quantified for purposes of the Proposal—than actually evaluating the appropriateness of limits in light of the purposes of the Act and as described in CEA section 4a(a)(3).

The first reason the Commission submits in defense of not proposing federal limits outside of the spot month for the 16 aforementioned contracts is that ''corners and squeezes cannot occur outside the spot month . . . and there are other tools other than federal position limits for deterring and preventing manipulation outside of the spot month.'' [18] The ''other tools'' include surveillance by the Commission and exchanges, coupled with exchange-set limits and/or accountability levels. As laid out in several paragraphs of the Proposal, the Commission would maintain a window into the setting of any limits or accountability levels that in its view are ''an equally robust'' alternative to federal non-spot month speculative position limits. In describing how accountability levels implemented by exchanges work, the Commission touts the flexibility in application because they provide exchanges—and not the Commission—the ability to ask questions about positions, determine if a position raises any concerns, provide an opportunity to intervene—or not—etc.[19]

While all of this reads well, it ignores Congressional intent. The Proposal never considers that Congress directed the Commission to establish limits—not accountability levels. Given the Commission's ''decades of experience in overseeing accountability levels implemented by the exchanges,'' Congress would have been well aware that this alternative path would be a viable option if it were truly as robust in choosing the legislative language. But the Commission has failed to make that case. Foremost, federal position limits are aimed at diminishing, eliminating, and preventing sudden and unwarranted price changes. These sudden price changes may occur regardless of manipulative, intentional or reckless activity—both within and outside of the spot month. The Commission provides no explanation regarding how exchange-set limits or accountability levels would compare, in terms of effectiveness, to federal position limits, which among other things, must apply in the aggregate as mandated by CEA section 4a(a)(6). It is difficult to measure the robustness of a regime when there is nothing to compare it to. As well, the Commission's observation that exchange-set accountability levels have ''functioned as-intended'' until this point time, ignores the wider purpose and function of aggregate position limits established by the Commission, and is shortsighted given the ever expanding universe of economically equivalent instruments trading across multiple trading venues. Not to belabor the point, but it seems odd to conclude that Congress envisioned that its painstaking amendments to CEA section 4a were a directive for the Commission to check the box that the current system is working perfectly.

The Commission's second reason is that layering federal non-spot limits for the 16 contracts on top of existing exchange-set limit/accountability levels may only provide minimal benefits—if any—while sacrificing the benefits associated with flexible accountability levels.[20] The Commission,

[7] *Int'l Swaps & Derivatives Ass'n* v. *CFTC,* 887 F. Supp. 2d 259 (D.D.C. 2012).

[8] *Id.* at 284.

[9] The Proposal's analysis in support of its denial of a mandate misconstrues form over substance and assumes the answer it is looking for by providing a misleading recitation of *Michigan* v. *EPA,* 135 S.Ct. 2699 (2015). In doing so, the Proposal seems to suggest that the Commission is free to ignore a Congressional mandate if it determines that Congress is wrong about the underlying policy. *See* Proposal at III.D.

[10] 76 FR at 4752–54.

[11] *Id.* at 4753.

[12] *Id.* at 4754–55.

[13] *See* 76 FR at 4755.

[14] *Id.*

[15] Proposal at II.B.2.d.

[16] *See* 7 U.S.C. 7(d)(5) and 7b–3(f)(6).

[17] *See, e.g.,* 7 U.S.C. 6a(e).

[18] Proposal at II.B.2.d.

[19] *See id.*

[20] *See id.*

again, ignores that Congress was clearly aware of the possible layering effect, and did not find it to be comparable let alone as robust.[21] Moreover, the Commission fails to support or otherwise quantify its argument with data. Presumably, the Commission could calculate anticipated non-spot month position limits—based on the formula in the proposed part 150.2(e) (and described in section II.B.2. e. of the Proposal)—for the 16 proposed core referenced futures contracts that have never been subject to such limits. The Commission could have based its determination on aggregate position data it collects through surveillance, and it could have provided a rough estimate of the potential impact that limits may have, absent consideration of any of the proposed enumerated bona fide hedges or spread exemptions. While I am not sure such evidence if presented would have changed my mind, it certainly would have been helpful in determining the reasonableness of the Commission's determination.

What if?

When muscles are overly flexible, they require appropriate strength to ensure that they can perform under stress. In addition to largely deferring to the exchanges in addressing excessive speculation outside of the spot-month for the majority of the 25 core referenced futures contracts, the Proposal also incorporates flexibility in a multitude of other ways. The Proposal would provide for significantly broader bona fide hedging opportunities that will be largely self-effectuating; it would defer to the exchanges in recognizing non-enumerated bona fide hedging; and it would eliminate longstanding notice and reporting mechanisms. In proposing these various provisions, the Proposal flexes and contorts to accommodate each piece. In doing so, it seems the Commission will be left insufficient strength to accomplish its mandated role of exercising appropriate surveillance, monitoring, and enforcement authorities—and this will be to the detriment of the derivatives markets and the public we serve.

The main point to get across here is that while I support enhancing the cooperation between the Commission and the exchanges, the Commission here is cooperating by dropping back and promising to remain in the draft—never able to fully compete, or take advantage of a ''slingshot effect.'' We will simply never gain the necessary direct experience with the new regime. The Commission lacks experience in administering spot month limits for 16 of the 25 core referenced futures contracts and lacks familiarity with both common commercial hedging practices for the 16 contracts and the proliferation of the use of the dozen or so self-effectuating enumerated hedges and spread exemptions (also largely self-effectuating) being proposed. While prior drafts of the Proposal admitted this as recently as two weeks ago, the Commission determined to change course and quickly let go of the line. The Commission's decision to essentially give up primary authority to recognize non-enumerated bona fide hedges, and to rely on the exchanges to collect and hold relevant cash market data for the Commission's use only after requesting it, seems both careless and inconsistent with Congressional intent.

For example, while the Proposal provides the Commission with the authority to reject an exchange's granting of a non-enumerated bona fide hedge recognition, this determination must be in the form of a ''Commission action,'' and it must take place in the span of ten business days (or two in the case of sudden or unforeseen circumstances). Furthermore, the Proposal offers no guidance as to what factors the Commission may consider, or the criteria it may use to make the determination. This narrow window of time likely will not provide Commission staff with a reasonable timeframe to prepare the necessary documentation for the full Commission to deliberate and either request additional information, stay the application, or vote to accept the recognition.[22] It seems more likely that the Commission will be unable to act within the ten or two-day window and the recognition will default to being approved. Regardless of what the Commission determines—even if it ultimately determines that a position for which an application for a bona fide hedge recognition does not meet the CEA definition of a bona fide hedge or the requirements in proposed part 150.9(b)—the Commission could not determine that the person holding the position has committed a position limits violation during the Commission's ongoing review or upon issuing its determination. I have so many ''what ifs'' in response to this set up that I feel trapped.

In the Proposal, the Commission requires exchanges to collect cash-market information from market participants requesting bona fide hedges, and to provide it to the Commission only upon request. The Proposal also eliminates Commission Form 204, which market participants currently file each month when they have bona fide hedging positions in excess of the federal limits. This form is a necessary mechanism by which market participants demonstrate cash-market positions justifying such overages. These changes may be well-intentioned, but they are ill-conceived in consideration of the various changes being proposed to the federal position limits regime.

Foremost, under the Proposal, the Commission would receive a monthly report showing the exchange's disposition of any applications to recognize a position as a bona fide hedge (both enumerated and non-enumerated) or to grant a spread or other exemption (including any renewal, revocation of, or modification of a prior recognition or exemption).[23] While the Proposal argues that the monthly report would be a critical element of the Commission's surveillance program by facilitating its ability to track bona fide hedging positions and spread exemptions approved by the exchanges,[24] it would not itself appear to be useful in discerning any market participants ongoing justification for, or compliance with, self-effectuating or approved bona fide hedge, spread, or other exemption requirements. While the contents of the report may prompt the Commission to request records from the exchange, it is unclear what may be involved in the making of, and response to, such requests—including time and resources on both sides. Not to mention that the Proposal opines that exchanges would only collect responsive information on an annual basis,[25] and part 150.9(e) does not require exchanges to notify the Commission of any renewal applications. Of course, the Proposal posits that the Commission would likely only need to make such requests ''in the event that it noticed an issue that could cause market disruptions.'' [26] My guess is that our surveillance staff and Division of Enforcement may have other ideas, but I will leave that with the ''what ifs.''

Conclusion

The 24 Hours of Le Mans awards the victory to the car that covers the greatest distance in 24 hours. While the Proposal shoots for victory by similarly attempting to achieve a great amount over a short time period, I am concerned that all of it will not hold together. The Proposal attempts to justify deferring to the exchanges on just about everything, and in-so-doing it pushes to the back any earnest interpretation of the Commission's mandate or the guiding Congressional intent. This is not cooperation, this is stepping-aside, backing down, giving way, and getting comfortable in the draft. I am not comfortable in this or any draft. It's my understanding that the Commission has the tools and resources to develop a better sense of where federal position limits ought to be in order to achieve the purposes for which they were designed, while maintaining our natural, Congressionally-mandated lead. The Proposal fails to recognize that Congress already set the course in directing us that our derivatives markets will operate optimally with limits—we just need to provide a sense of where they are. Perhaps the Proposal was just never aiming for the ''perfect lap.''

Appendix 5—Statement of Commissioner Dawn D. Stump

Reasonably designed. Balanced in approach. And workable in practice—both for market participants and for the Commission. These are the 3 guideposts by which I have evaluated the proposal before us to update the Commission's rules regarding position limits for derivatives. Is it reasonable in its design? Is it balanced in its approach? And is it workable in practice for

[21] *See, e.g.,* 7 U.S.C. 6a(e) (providing, among other things and consistent with core principles for DCMs and SEFs, that exchange-set position limits shall not be higher that the limits fixed by the Commission).

[22] *See* Proposed part 150.9(e).

[23] *See* Proposed Commission regulation 150.5(a)(4).

[24] *See* Proposal at II.D.4.

[25] *See* Proposal at I.B.7.a. and b.

[26] *Id.* As well, the Proposal opines that the Commission's reliance on the ''limited circumstances'' set forth in proposed part 150.9(f) under which it would revoke a bona fide hedge recognition granted by an exchange would be rarely exercised, suggesting a preference to defer to the judgment of the exchange. *See* Proposal at II.G.3.f.

both market participants and the Commission? Overall, I believe the answer to each of these questions is yes, and I therefore support the publication of this proposal for public comment.

There is one question that I have not asked: Is it perfect? It is not. There are two particular areas discussed below that I believe can be improved—the list of enumerated hedging transactions and positions, and the process for reviewing hedging practices outside of that list.

But in reality, how could a position limits proposal ever achieve perfection? In section 4a(a) of the Commodity Exchange Act (''CEA''),[1] Congress has given the Commission the herculean task of adopting position limits that:

- It finds necessary to diminish, eliminate, or prevent an undue and unnecessary burden on interstate commerce as a result of excessive speculation in derivatives;
- Deter and prevent market manipulation, squeezes, and corners;
- Ensure sufficient market liquidity for bona fide hedgers; [2]
- Ensure that the price discovery function of the underlying market is not disrupted;
- Do not cause price discovery to shift to trading on foreign boards of trade; and
- Include economically equivalent swaps.

And it must do so, according to the CEA's purposes set out in section 3(b), through a system of effective self-regulation of trading facilities.[3]

These statutory objectives are not only numerous, but in many instances they are in tension with one another. As a result, it is not surprising that each of us will have a different view of the perfect position limits framework. Perfection simply cannot be the standard by which this proposal is judged.

But after nearly a decade of false starts, I believe the proposal before us brings us close to the end of that long journey. It is reasonably designed. It is balanced in its approach. And it is workable in practice. I am pleased to support putting it before the public for comment.

The Commission Has a Mandate To Impose Position Limits It Finds Are Necessary

Background

Before digging into the substantive provisions of the proposal, let me offer my view on a legal issue that has been debated seemingly without end throughout the past decade in the Commission's rulemaking proceedings and in federal court. As noted in testimony by the CFTC's General Counsel in July 2009, a year before the Dodd-Frank Act [4] became law, the CEA has always given the Commission a mandate to impose federal position limits—that is, a mandate to impose federal position limits that it finds are necessary.[5] The issue that has consumed the agency, the industry, and the bar is this: Did the amendments to the CEA's position limits provisions that were enacted as part of the Dodd-Frank Act strip the Commission of its discretion not to impose limits if it does not find them to be necessary?

I consider it unfortunate that the Commission has spent so much time, energy, and resources on this debate. That time, energy, and resources would have been much better spent focusing on the development of a position limits framework that is reasonably designed, balanced in approach, and workable in practice for both market participants and the Commission—which simply cannot be said of the Commission's prior efforts in this area. But, in the words of American writer Isaac Marion in his ''zombie romance'' novel *Warm Bodies:* ''We are where we are, however we got here.'' [6] And so, a few thoughts on necessity and mandates.

In the *ISDA* v. *CFTC* case, a federal district court in 2012 vacated the Commission's first post-Dodd-Frank Act attempt to adopt a position limits rulemaking. The court concluded that the Dodd-Frank Act amendments to the position limits provisions of the CEA ''are ambiguous and lend themselves to more than one plausible interpretation.'' Accordingly, it remanded the position limits rulemaking to the Commission to ''bring its experience and expertise to bear in light of competing interests at stake'' in order to ''fill in the gaps and resolve the ambiguities.'' [7]

The Commission attempted to follow the court's directive in a proposed position limits rulemaking published in 2013. There, the Commission concluded that the Dodd-Frank Act required the agency to adopt position limits even in the absence of finding them necessary but, ''in an abundance of caution,'' also made a finding of necessity with respect to the position limits that it was proposing.[8] The Commission promulgated this same analysis when, three years later, it re-proposed its position limits rulemaking in 2016.[9] The proposal before us today, by contrast, bases its proposed limits solely on finding them to be necessary—albeit a finding of necessity that is different from the one relied upon in the 2013 Proposal and the 2016 Re-Proposal.

Practical Considerations

I find the analysis put forward by our General Counsel's Office in the proposed rulemaking before us today—which explains the Commission's legal interpretation that its mandate to impose position limits under the CEA exists only when it finds the limits are necessary—to be well-reasoned and compelling. I add two practical considerations in support of that conclusion.

First, if Congress in the Dodd-Frank Act had wanted to eliminate a necessity finding as a prerequisite to the imposition of position limits, it could simply have removed the requirement to find necessity that already existed in the CEA. That it did not do so indicates that on this point, the CEA both before and after the Dodd-Frank Act provides that the Commission has a mandate to impose position limits that it finds are necessary.

Second, I do not believe that Congress would have directed the Commission to spend its limited resources developing and administering position limits that are not necessary. We must be careful stewards of the taxpayer dollars entrusted to us, and absent a clear statement of Congressional intent to do so, I do not believe those dollars should be spent on position limits that the Commission does not find to be necessary to achieve the objectives of the CEA.

Statutory Analysis

This section walks through some of the statutory text in CEA section 4a(a) that is relevant to the question of whether a finding of necessity is a prerequisite to the Commission's mandate of imposing position limits. A diagram entitled ''Commodity Exchange Act Section 4a(a): Finding Position Limits Necessary is a Prerequisite to the Mandate for Establishing Such'' accompanies this statement on the Commission's website, which may aid in reading the discussion.

Subsection (1) of section 4a(a) is legacy text that has been in the CEA for decades. As noted above, it has long mandated that the Commission impose position limits that it finds necessary to diminish, eliminate, or prevent the burden on interstate commerce resulting from excessive speculation in derivatives. Subsection (2) of section 4a(a), on the other hand, was added to the CEA by the Dodd-Frank Act.

[1] CEA section 4a(a), 7 U.S.C. 6a(a).

[2] Section 4a(c) of the CEA further requires that the Commission's position limit rules ''permit producers, purchasers, sellers, middlemen, and users of a commodity or a product derived therefrom to hedge their legitimate anticipated business needs . . .'' CEA section 4a(c), 7 U.S.C. 6a(c).

[3] CEA section 3(b), 7 U.S.C. 5(b).

[4] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010) (''Dodd-Frank Act'').

[5] ''Position Limits and the Hedge Exemption, Brief Legislative History,'' Testimony of General Counsel Dan M. Berkovitz, Commodity Futures Trading Commission, before Hearing on Speculative Position Limits in Energy Futures Markets at 1 (July 28, 2009) (''Today, I will provide a brief legislative history of the *mandate* in the CEA concerning position limits and the exemption from those limits for bona fide hedging transactions. . . . Since its enactment in 1936, the Commodity Exchange Act (CEA) . . . has directed the Commodity Futures Trading Commission (CFTC) to establish such limits on trading 'as the Commission finds are necessary to diminish, eliminate, or prevent such burden [on interstate commerce].' The basic statutory *mandate* in Section 4a of the CEA to establish position limits to prevent such burdens has remained unchanged over the past seven decades) (emphasis added), *available at https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement072809; see also, id.* at 5 (''By the mid-1930s . . . Congress finally provided a federal regulatory authority with the *mandate* and authority to establish and enforce limits on speculative trading. In Section 4a of the 1936 Act (CEA), the Congress . . . . directed the Commodity Exchange Commission [the CFTC's predecessor agency] to establish such limits on trading 'as the commission finds is [sic] necessary to diminish, eliminate, or prevent' such burdens . . .'') (emphasis added).

[6] Isaac Marion, Warm Bodies and The New Hunger: A Special 5th Anniversary Edition, 97, Simon and Schuster (2016).

[7] *International Swaps and Derivatives Association* v. *U.S. Commodity Futures Trading Commission,* 887 F.Supp. 2d 259, 281–282 (D.D.C. 2012) (emphasis in the original) (''*ISDA* v. *CFTC*''), *citing PDK Labs. Inc.* v. *U.S. DEA,* 362 F.3d 786, 794, 797–98 (D.C. Cir. 2004).

[8] Position Limits for Derivatives, 78 FR 75680, 75685 (proposed Dec. 12, 2013) (''2013 Proposal'').

[9] Position Limits for Derivatives, 81 FR 96704, 96716 (proposed Dec. 30, 2016) (''2016 Re-Proposal'').

In my view, subsections (1) and (2) are linked, and cannot each be considered in isolation, because the Dodd-Frank Act specifically tied them together. First, subparagraph (A) of subsection (2) links the Commission's obligation to set position limits to the ''standards'' set forth in subsection (1)—including the standard of finding necessity as a prerequisite to the mandate of imposing position limits. Then, subparagraph (B) of subsection (2) links the timing of issuing position limits to the limits required under subparagraph (A)—which, as noted, is connected to the standards set forth in subsection (1), including the standard of finding necessity.

In sum, the new timing provisions in subparagraph (2)(B) apply to the requirement in subparagraph (2)(A). Subparagraph (2)(A), in turn, informs how Congress intended the Commission to establish limits, *i.e.,* in specific accordance with the standards in subsection (1)—which includes the necessity standard. They are all linked.

Yet, some have relied in isolation on the ''shall . . . establish limits'' wording in subparagraph (A) of subsection (2) to argue that the Dodd-Frank Act imposed a mandate on the Commission to establish position limits even in the absence of a finding of necessity. Some also have pointed to the timing provisions in subparagraph (B) of subsection (2) to argue that the Dodd-Frank Act imposed a mandate on the Commission to establish position limits because subparagraph (B) twice says that position limits ''shall be established.'' I agree that, under subparagraph (B), position limits ''shall be established'' as required under subparagraph (A)—but as noted, subparagraph (A) states that the Commission shall establish limits ''[i]n accordance with the standards set forth in [subsection (1)].'' This latter point cannot be overlooked or ignored.

Some also have asked why Congress would add all this new language to CEA section 4a(a) if not to impose a new mandate. Yet, it makes perfect sense to me that while expanding the Commission's authority to regulate swaps in the Dodd-Frank Act, Congress took the opportunity to review and enhance the Commission's position limit authorities to ensure they were fit for purpose considering the addition of the new expanded authorities, including how swaps would be considered in the context of position limits. The timing of the review period was spelled out and the manner in which the Commission would go about establishing limits was refined to account for this massive change in oversight.

But never did anyone suggest that the legacy language in subsection (1) of section 4a(a), including the required prerequisite of a necessity finding, had effectively been eliminated and replaced with a new mandate that would apply even in the absence of a necessity finding.

Subsequent History

Finally, as noted above, the court in *ISDA* v. *CFTC* instructed the Commission to use its ''experience and expertise'' to resolve the ambiguity it found in the statute. That experience and expertise cannot look only to the era in which these position limit provisions were enacted. We are where we are, and so the application of the Commission's experience and expertise must include a consideration of the substantial changes in the markets since that time.

Given the intervention of a global financial crisis, it is hard to recall that the Dodd-Frank Act amendments to the CEA's position limit provisions were borne at a time of skyrocketing energy prices during 2007–2008. The price of oil climbed to over $147 a barrel in July 2008, which represented a 50% increase in one year and a seven-fold increase since 2002.[10] Gas prices at the pump peaked at over $4 a gallon in June and July of 2008.[11]

Some at the time charged that these price spikes were caused by excessive speculation in futures contracts on energy commodities traded on U.S. futures exchanges—another topic of debate on which I will save my views for another day. But not surprisingly, legislation soon followed. By the end of 2008, the House of Representatives had passed amendments to the CEA's position limit provisions,[12] and after the Senate failed to act, the issue was subsequently addressed in the Dodd-Frank Act.

How times have changed. The United States, due to a boom in oil and natural gas production relating to shale drilling and the development of liquefied natural gas, will soon become a net energy exporter.[13] Although no new federal position limits have been imposed, prices of energy commodities have generally dropped and stabilized, and cries of excessive speculation in the derivatives markets are rare. Also, our derivatives markets have grown substantially. Global trading in listed futures and options increased from 22.4 billion contracts in 2010 to a record 34.47 billion contracts in 2019. Global open interest increased to a record 900 million contracts from 718.5 million in 2010.[14]

Applying our experience and expertise, what these developments teach us is that economic conditions change over time. Technology marches on. Markets evolve. And prices fluctuate in response to a myriad of influences. Having lived through the energy price increases of the mid-2000s, I do not minimize the pain they caused, or the importance of the Commission taking appropriate steps to prevent excessive speculation in derivatives markets that can contribute to a burden on interstate commerce. Given the history of the past decade, however, I do not believe Congress intended, based on the moment in time of 2007–2008, to forever lock our derivatives markets into a straightjacket, or to deny the Commission the flexibility to draw conclusions of necessity based on particular circumstances.

Returning to our zombie romance, I'm afraid I have not been fair to its author. That is because there is a second line to the quotation, which reads: ''We are where we are, however we got here. What matters is where we go next.'' [15]

It is my fervent hope that the majority of comment letters we receive on today's proposal provide constructive input on where the proposal would take us next with respect to position limits—and not simply fan the flames of the necessity debate. And it is the topic of where we go next that I will now turn.

What position limits are necessary?

Having concluded that the CEA mandates the Commission to impose position limits that it finds are necessary, the question then becomes: What position limits are necessary?

In the 2013 Proposal, the Commission's necessity finding determined that federal spot month position limits were necessary for 28 core referenced futures contracts on various agricultural, energy, and metals commodities. In the 2016 Re-Proposal, the Commission utilized the same necessity finding to determine that federal spot month limits were necessary for 25 of the 28 core referenced futures contracts for which they had been found necessary in 2013.[16] And today's proposal, although utilizing a different approach to the necessity finding, determines that federal spot month limits are necessary for the same 25 core referenced futures contracts for which they were found to be necessary in the 2016 Re-Proposal.

In other words, three different iterations of the Commission have found federal spot month position limits to be necessary for these 25 core referenced futures contracts. That degree of consistency alone demonstrates the reasonableness of this determination.

To be sure, both the 2013 Proposal and the 2016 Re-Proposal found federal position limits for non-spot months to be necessary for these 25 contracts, whereas today's proposal does so for only the nine legacy agricultural contracts that are currently subject to federal non-spot month limits. Yet, the necessity findings in the 2013 Proposal and the 2016 Re-Proposal were based largely, if not entirely, on just two episodes: (1) The activity of the Hunt Brothers in the silver market in 1979–1980; and (2) the activity of the Amaranth hedge fund in the natural gas market in the mid-2000s.

[10] Rebeka Kebede, *Oil Hits Record Above $147,* Reuters Business News, July 10, 2008, *available at https://www.reuters.com/article/us-markets-oil/oil-hits-record-above-147-idUST14048520080711.*

[11] Leigh Ann Caldwell, *Face the Facts: A Fact Check on Gas Prices,* CBS News Face the Nation, March 21, 2012, *available at https://www.cbsnews.com/news/face-the-facts-a-fact-check-on-gas-prices/.*

[12] Commodity Markets Transparency and Accountability Act of 2008, H.R. 6604, 110th Cong. sec. 8 (2008).

[13] Tom DiChristopher, *US to Become a Net Energy Exporter in 2020 for First Time in Nearly 70 Years, Energy Dept. Says,* CNBC Business News, Energy, Jan. 24, 2019, *available at https://www.cnbc.com/2019/01/24/us-becomes-a-net-energy-exporter-in-2020-energy-dept-says.html.*

[14] Futures Industry Association, *Global Futures and Options Trading Reaches Record Level in 2019,* Jan. 16, 2020, *available at https://fia.org/articles/global-futures-and-options-trading-reaches-record-level-2019.*

[15] *See* fn. 6, *supra,* at 97.

[16] The 2016 Re-Proposal did not propose that federal position limits be imposed on three cash-settled futures contracts (Class III Milk, Feeder Cattle, and Lean Hogs) that were included as core referenced futures contracts in the 2013 Proposal. *See* 2016 Re-Proposal, 81 FR at 96740 n.368.

The Hunt Brothers silver episode and Amaranth natural gas episode occurred over 30 and over 15 years ago, respectively. It also should be noted that the Commission settled enforcement actions against both the Hunt Brothers and Amaranth charging that they had engaged in manipulation and/or attempted manipulation.[17] Since that time, Congress has provided the Commission with enhanced anti-manipulation enforcement authority as part of the Dodd-Frank Act, which the Commission has used aggressively and serves as an effective tool to deter and combat potential manipulation involving trading in non-spot months.

Again, I do not minimize the seriousness of the Hunt Brothers and Amaranth episodes, both of which had significant ramifications. But I am comfortable with the proposal's determination that two dated episodes of manipulation during the past 30 years do not establish that it is necessary to take the drastic step of restricting trading (and liquidity) in non-spot months by imposing position limits for the core referenced futures contracts in these two commodities—let alone for the other 14 contracts at issue. I therefore support publishing the necessity finding in the proposal before us—including the limitation on proposed non-spot month limits to the nine legacy agricultural contracts—for public comment.

Setting Limit Levels

With respect to setting position limit levels, the Commission's historical practice has been to set federal spot month levels at or below 25 percent of deliverable supply based on estimates provided by the exchanges and verified by the Commission. Yet, some of the deliverable supply estimates underlying the existing federal spot month limits on the nine legacy agricultural futures contracts have remained the same for decades, notwithstanding the revolutionary changes in U.S. futures markets and the explosive growth in trading volume over the years. These outdated delivery supply estimates require updating.

The proposal adheres to the Commission's historical approach, which is reasonable given the Commission's years of experience administering federal spot month limits on the legacy agricultural contracts. And it provides a long-overdue update to deliverable supply estimates for those legacy contracts to reflect the realities of today's markets. The proposed spot month limits for the 25 core referenced futures contracts are based on deliverable supply estimates of the exchanges that know their markets best, but that have been carefully analyzed by Commission staff to assure that they strike an appropriate balance between protecting market integrity and restricting liquidity for bona fide hedgers.

For limit levels outside the spot month, the Commission historically has used a formula based on 10% of open interest for the first 25,000 contracts, with a marginal increase of 2.5% of open interest thereafter. Again, the proposal reasonably adheres to this general formula with which the Commission is familiar in proposing non-spot month limits for the nine legacy agricultural contracts, but it would apply the 2.5% calculation to open interest above 50,000 contracts rather than the current level of 25,000 contracts.

Open interest has roughly doubled since federal limits were set for these markets, which has made the current non-spot month limits significantly more restrictive as the years have gone by. Nevertheless, I appreciate that such a change to established limits may raise concern. I am therefore pleased that the proposal includes a question asking whether the proposed increases in federal non-spot month limits should be implemented incrementally over a period of time, rather than immediately at the effective date. (There is additionally a question seeking input on the impact of increases in non-spot month limits for convergence that is of great interest to me.)

Finally, it is important to remember that the 16 core referenced futures contracts for which federal non-spot month limits are not being proposed remain subject to exchange-set position limit levels or position accountability levels.[18] The Commission has decades of experience overseeing accountability levels implemented by exchanges, including for all 16 contracts that would not be subject to federal limits outside the spot month under this proposal. Position accountability enables the exchange to obtain information about a potentially problematic position while it is at a relatively low level, and to require a trader to halt increasing that position or to reduce the position if the exchange considers it warranted. Exchange position accountability rules, in combination with market surveillance by both the exchanges and the Commission and the Commission's enhanced anti-manipulation authority granted by the Dodd-Frank Act, provide a robust means of detecting and deterring problems in the outer months of a contract. The proposal reasonably continues to rely on these tools in the non-legacy contracts.

Undoubtedly, there will be those who believe the proposed spot and non-spot month limits are too high, and others who consider them too low. I look forward to receiving public comments along these lines, but expect that any such comments will include market data and analysis for the Commission to consider in developing final rules.

Bona Fide Hedging Transactions and Positions

The CEA provides that the Commission's position limit rules shall not apply to bona fide hedging transactions or positions. It gives the Commission the authority to define ''bona fide hedging transactions and positions'' with the purpose of ''permit[ting] producers, purchasers, sellers, middlemen, and users of a commodity or a product derived therefrom to hedge their legitimate anticipated business needs . . .'' [19] This serves as a statutory reminder of the fundamental point that the Commission is imposing *speculative* position limits, and since bona fide hedging is outside the scope of speculative activity, it is by definition outside the scope of the position limit rules.

The Commission's current definition of the term ''bona fide hedging transactions and positions'' is set out in what is referred to as ''Rule 1.3(z).'' In addition to providing a definition, Rule 1.3(z) also identifies certain specific ''enumerated'' hedging practices that the Commission recognizes as falling within the scope of that definition and therefore not subject to position limits. Other ''non-enumerated'' hedging practices can still be recognized as bona fide hedging, but only after a Commission review process.

I am delighted that the proposal before us recognizes an expanded list of enumerated bona fide hedging practices than are currently recognized in Rule 1.3(z). This is entirely appropriate. Hedging practices at companies that produce, process, trade, and use agricultural, energy, and metals commodities are far more sophisticated, complex, and global than when the Commission last considered Rule 1.3(z). This is yet one more instance where the Commission's position limit rules simply have not kept pace with developments in, and the realities of, the marketplace. In addition, the proposal would expand federal limits to contracts in commodities not previously subject to federal limits, and thus common hedging practices in the markets for those commodities must be considered for inclusion in the list of enumerated bona fide hedges.

I am particularly pleased that, at my request, the proposal recognizes anticipatory merchandising as an enumerated bona fide hedge. After all, the CEA itself identifies anticipatory merchandising as bona fide hedging activity,[20] and the Commission has previously granted non-enumerated hedge recognitions for anticipatory merchandising. There is no policy basis for distinguishing merchandising or anticipated merchandising from other activities in the physical supply chain. Although there must be appropriate safeguards against abuse, where merchandisers anticipate taking price risk, they should have the same opportunity as others in the physical supply chain to manage their risk through recognized risk-reducing transactions that qualify as bona fide hedging.

Although the proposal refers to enumerated bona fide hedges as ''self-effectuating'' for purposes of federal limits, this is a bit of a misnomer. Even if a hedge is enumerated, the trader still must receive approval from the relevant exchange to

[17] The 2016 Re-Proposal acknowledged that ''both episodes involved manipulative intent.'' 2016 Re-Proposal, 81 FR at 96716.

[18] The use of position accountability in lieu of hard limits is expressly permitted by the CEA for both designated contract markets, CEA section 5(d)(5), 7 U.S.C. 7(d)(5), and swap execution facilities, CEA section 5h(f)(6), 7 U.S.C. 7b-3(f)(6).

[19] CEA section 4a(c)(1), 7 U.S.C. 6a(c)(1).

[20] CEA section 4a(c)(2)(A)(iii)(I), 7 U.S.C. 6a(c)(2)(A)(iii)(I) (bona fide hedging transaction or position is a transaction or position that, among other things, ''arises from the potential change in the value of . . . assets that a person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or *merchandising* . . .'' (emphasis added)).

exceed the exchange-set limits.[21] This, too, is entirely appropriate. The exchanges know their markets, and they are very familiar with current hedging practices in agricultural, energy, and metals commodities, and thus are well-suited to apply the enumerated bona fide hedges in real-time. And, as noted above, Congress has declared it a purpose of the CEA to serve the public interest with respect to derivatives trading ''through a system of effective self-regulation of trading facilities . . .''[22]

I find perplexing what the proposal refers to as a ''streamlined'' process for recognizing non-enumerated bona fide hedging practices with respect to federal position limits. Pursuant to proposed 150.9, if an exchange recognizes a non-enumerated practice as a bona fide hedge for purposes of the exchange's position limits, that recognition would apply to the federal limits as well, unless the Commission notifies the exchange and market participant otherwise. The Commission would have 10 business days for an initial application, or 2 business days in the case of a sudden or unforeseen increase in the applicant's bona fide hedging needs, to approve or reject the exchange's bona fide hedging recognition.

I do not believe this ''10/2-Day Rule'' is workable in practice for either market participants or the Commission because it is both too long and too short. It is too long to be workable for market participants that may need to take a hedging position quickly, and it is too short for the Commission to meaningfully review the relevant circumstances and make a reasoned determination related to the exchange's recognition of the hedge as bona fide.

My preference would have been to propose that recognition of non-enumerated hedges be the responsibility of the exchanges that, again, are most familiar both with their own markets and with the hedging practices of participants in those markets. The Commission would monitor this process through our routine, ongoing review of the exchanges. I welcome public comment on the proposal's legal discussion of the sub-delegation of agency decision making authority as relevant to this question, and on how the proposed 10/2-Day Rule might be improved in a final rulemaking to make the process workable for market participants and the Commission alike.

A Word About Economically Equivalent Swaps

CEA section 4a(a)(5) provides that ''[n]otwithstanding any other provision'' in section 4a, the Commission's position limit rules shall establish limits, ''as appropriate,'' with respect to economically equivalent swaps, and that such limits must be ''develop[ed] concurrently'' and ''establish[ed] simultaneously'' with the limits imposed on futures contracts and options on futures contracts.[23] I share the view that section 4a(a)(5) thereby requires that this rulemaking encompass economically equivalent swaps, although I invite public comment from those who believe another interpretation may be permissible and appropriate.

The proposal sets forth a narrow definition of the term ''economically equivalent swap,'' which I believe is appropriate. A measured approach is reasonable given that: (1) The Commission's regulatory regime for swaps remains in its relative infancy; (2) swaps have never been subject to position limits, be it federal or exchange-set limits; and (3) the implications of imposing position limits on economically equivalent swaps cannot be predicted with any degree of confidence at this time. Further, a measured approach is more workable because it is the Commission, rather than an exchange, that will be responsible for administering the new position limits regime for swaps given that: (1) Many swaps trade over-the-counter (''OTC'') so there is no exchange to fulfill this responsibility; and (2) for swaps traded on swap execution facilities (''SEFs''), those SEFs lack the information about a trader's swap positions on other SEFs and OTC that would be necessary to fulfill this responsibility.

That said, the proposed definition of an ''economically equivalent swap'' is broader than that used in the European position limits regime. In Europe, economic equivalence requires identical terms; the proposal, by contrast, requires only that material terms be identical. I look forward to receiving comment on this distinction, and the experience that market participants have had with the European application of position limits to swaps.

Conclusion

The fact that the Commission has been trying to update these rules for nearly a decade demonstrates the challenge presented by position limits. I am extremely grateful to the many members of our staff in the Division of Market Oversight, the Office of General Counsel, and the Chief Economist's Office who have dedicated a significant portion of their lives to helping us try to meet that challenge. I also appreciate the efforts of my fellow Commissioners as well.

Each of us has committed that we would work to finish a position limits rulemaking. The time has come. Overall, today's proposal is reasonable in design, balanced in approach, and workable for both market participants and the Commission. I therefore support it.

I ask market participants to view the proposal in that spirit. Please provide us with your constructive input on how we can make a good proposal even better.

Appendix 6—Dissenting Statement of Commissioner Dan M. Berkovitz

Introduction

I dissent from today's position limits proposal (''Proposal''). The Proposal would create an uncertain and unwieldy process with the Commission demoted from head coach over the hedge exemption process to Monday-morning quarterback for exchange determinations.[1] The Proposal would abruptly increase position limits in many physical delivery agricultural, metals, and energy commodities, in some instances to multiples of their current levels. It would provide no opportunity for the Commission to monitor the effect of these increases, or to act if necessary to preserve market integrity. The Proposal provides inadequate explanation for other key approaches in the document, including the use of position accountability rather than numerical limits for energy and metals commodities in non-spot months. The Proposal also ignores Congress's mandate in the Dodd-Frank Act, and reverses decades of legal interpretations of the Commodity Exchange Act (''CEA'') by the Commission and the courts regarding the Commission's authority and responsibility to impose position limits. It would require, for the first time, the Commission to find that position limits are necessary for each commodity prior to imposing limits.

I Support an Effective Position Limits Framework With Transparency and Certainty

Position limits is one of the last remaining items in the Commission's reform agenda arising from the Dodd-Frank Act. In the wake of the 2008 oil price spike to $147 per barrel, the Amaranth hedge fund's dominance of the natural gas futures and swaps market, the rise of commodity index funds, and the financial crisis, Congress mandated that the Commission promptly establish, as appropriate, position limits and hedge exemptions for exempt and agricultural commodities and economically equivalent swaps. We must not forget the lessons from the financial crisis or prior episodes of excessive speculation, nor be lulled back into the belief that unfettered markets yield optimal outcomes. A meaningful, effective position limits regime was important to the reform agenda in 2010, and it must remain our goal today.

I support an effective position limits regime that includes both effective limits on speculative positions and appropriate bona fide hedge exemptions to meet market participants' legitimate commercial needs. Position limits are critical to preventing market manipulation or distortion due to excessively large speculative positions. Together, position limits and bona fide hedge exemptions promote the market integrity and the price discovery process, while enabling producers, end-users, merchants, and others to use the futures and swaps markets to manage their commercial risks. The Dodd-Frank Act, adopted by Congress in 2010 in the midst of the financial crisis, affirmed Congress's commitment to federal speculative position limits and its determination that the Commission should act decisively to address excessive speculation in physical commodity markets.

Since joining the Commission, I have traveled the country to meet with market participants in many segments of the physical commodity markets. I have been to soybean farms and rice mills in Arkansas, feedlots in Colorado, dairy co-ops and

[21] Further, the absence of Commission approval of an enumerated bona fide hedge does not mean that the Commission has no access to data about the position or insight into the hedger's trading activity.

[22] *See* fn. 3, *supra*.

[23] CEA section 4a(a)(5), 7 U.S.C. 6a(a)(5).

[1] *See* Position Limits for Derivatives (''Proposal'') at rule text section 150.9(e).

cornfields in Minnesota, and grain mills and elevators in Kansas, Arkansas, Colorado, and Minnesota. I have met with coffee and cocoa graders in New York, energy companies in Texas, cotton merchandisers from Tennessee, and many others to understand how end-users participate in our markets. I have visited the CME in Chicago, ICE in New York, and the Minneapolis Grain Exchange in Minneapolis. The fundamental purpose of the commodity markets we oversee is to enable end-users to manage the price risks they face in their businesses. I am committed to ensuring that this rule is workable for end-users and provides them with sufficient clarity, predictability, and transparency.

In my view, a position limits rule must meet three basic criteria. First, the rule must provide effective limits on speculative positions. Second, the rule must recognize legitimate bona fide hedging activities. The Commission should provide market participants with certainty regarding which activities constitute bona fide hedging and establish a workable, transparent process for qualifying additional types of activities as bona fide hedging. Such a process should recognize both the traditional role of the Commission in determining, generally, which activities constitute bona fide hedging, and the role of the exchanges in determining whether the specific activities of particular commercial market participants fall within such bona fide hedging categories as determined by the Commission.

Third, from a legal perspective, a final rule must recognize that Congress has authorized and directed the Commission to promulgate position limits—without a predicate finding that position limits are necessary to prevent excessive speculation—and that the Commission has the flexibility to determine the appropriate tools and limits to accomplish that Congressional directive.

Unfortunately, the Proposal fails to satisfy any of these criteria. The Proposal would greatly increase position limits in many physical delivery agricultural, metals, and energy commodities in spot and individual non-spot months, with no opportunity to monitor for or guard against adverse market impacts. Although I am pleased that the Proposal would no longer recognize risk management exemptions as bona fide hedges for physical commodities,[2] the higher limits allowed under the Proposal could accommodate substantially more speculative positions,[3] with potentially adverse impacts on markets. There is solid evidence that the financialization and growth of commodity index investments can raise commodity prices and negatively affect end-users in the real economy.[4]

The Proposal departs from the well-established roles of the Commission and exchanges in the bona fide hedge framework. As affirmed by the Dodd-Frank Act, it is the Commission's responsibility to define what constitutes a bona fide hedge.[5] For practical reasons, including limited Commission resources, I support delegating to exchanges the authority to determine whether a particular position, under the particular facts and circumstances presented, constitutes a bona fide hedge as defined by the Commission. The exchanges are well suited for this role and have decades of experience in making such determinations. However, the initial legal and policy determination of what types of positions constitute bona fide hedges must remain the Commission's responsibility.

The Proposal carries forward all of the bona fide hedges currently enumerated in the Commission's rules, adds several additional categories to the list of enumerated hedges, and opens the door to an unlimited number of additional, undefined non-enumerated exemptions. The Proposal states, ''the proposed enumerated hedges are in no way intended to limit the *universe* of hedging practices which could otherwise be recognized as bona fide.'' [6] The ''universe'' is a very large place indeed.

On the other hand, the Proposal does not address practices that market participants have urged the Commission to recognize as bona fide hedges, including practices currently recognized by the exchanges. The Proposal thus deprives end-users and other market participants of legal certainty regarding what constitutes a bona fide hedge for various practices currently permitted by the exchanges as bona fide hedges.

Rather than determine whether to recognize these practices as bona fide hedges through notice and comment in today's rulemaking, the Proposal contemplates that additional non-enumerated bona fide hedges should first be considered by the exchanges, and then reviewed by the Commission during a cramped 10-day retrospective review period.[7] Determination of what constitutes a bona fide hedge for non-enumerated hedges would begin anew each time that an exchange must decide whether a purported bona fide hedge held by a market participant is consistent with the CEA, and then await the Commission's retrospective review. Market participants should be able to discern whether particular types of practices qualify as bona fide hedging by reading the Commission's rules and regulations rather than by engaging lawyers and lobbyists to guide them through an opaque, non-public process through the halls of the Commission's headquarters in Washington, DC.

The Commission has almost 40 years of experience with exchange implementation of position limits for energy and metals commodities, and more for agricultural commodities. Based on this experience, I support many of the types of bona fide hedges that exchanges recognize in these markets today. However, the Commission should recognize these exemptions in its own rules through prospective, notice and comment rulemaking, not delegate these determinations to the exchanges.

The legal analysis in this Proposal is a convoluted and confusing legal interpretation of the Dodd-Frank Act that defies Congressional intent. It is implausible that in the aftermath of the financial crisis and the run-up to oil at $147 per barrel, Congress made it *more* difficult for the Commission to impose position limits. Yet that is the result of the Commission's revisionist interpretation that a predicate finding of necessity (*i.e.,* that position limits are necessary) is required for the imposition of a position limit for each commodity. Moreover, the Proposal's finding of necessity for the 25 core reference futures contracts subject to the rule is unpersuasive both economically and legally, and is highly unlikely to survive legal challenge. The necessity finding largely consists of general economic statistics about the importance of the physical commodities underlying these futures contracts to commerce, together with statistics about open interest and trading volume in those futures contracts. These statistics bear little rational relationship to why position limits are necessary to prevent excessive speculation in derivative contracts for these commodities. For example, the imposition of limits on cocoa futures is justified on the basis that ''in 2010 the United States exported chocolate and chocolate-type confectionary products worth $799 million to more than 50 countries around the world.'' [8] There is a simpler, more logical, and defensible path forward, as I will outline later in this statement.

I thank the Commission staff for working with my office on the Proposal. Although I am not able to support it as currently formulated, I look forward to working with my colleagues and staff to improve the Proposal so that it effectively protects our markets from excessive speculation and provides end-users and other market participants with the regulatory certainty they need. I encourage market participants to comment on the Proposal.

Additional Flaws in the Proposal

No Phase-In for Large Increase in Speculative Position Limits

The Proposal would generally increase existing federal or exchange spot month position limits for 25 physical delivery agricultural, metals, and energy commodities by a factor of two or more.[9] It would

[2] *See* Proposal at preamble section II(A)(1)(c)(ii)(1). This change comports with amendments to the definition of bona fide hedging in CEA section 4a(c)(2) made by the Dodd-Frank Act.

[3] Proposal at preamble section II(A)(1)(c)(ii)(1).

[4] *See, e.g.,* Ke Tang & Wei Xiong, *Index Investment and Financialization of Commodities,* 68 Financial Analysts Journal 54, 55 (2012); Luciana Juvenal & Ivan Petrella, *Speculation in the Oil Market,* Federal Reserve Bank of St. Louis, Working Paper 2011–027E (June 2012), available at *http://research.stlouisfed.org/wp/2011/2011-027.pdf.*

[5] *See* CEA section 4a(c); 7 U.S.C. 6a(c).

[6] Proposal at preamble section II(A)(1)(c)(i) (emphasis added).

[7] The Proposal would establish two distinct processes for recognition of non-enumerated hedges. One process would be Commission-based, but the Proposal anticipates that this process would rarely, if ever, be used by market participants. *See* Proposal at rule text section 150.3. The other, in proposed § 150.9(e), would require the Commission to retroactively review bona fide hedge exemptions approved by an exchange. *See* Proposal at rule text section 150.9(e). Such review would need to be conducted within business10 days, would involve the five-member Commission itself, and could be stayed for a longer period.

[8] Proposal at preamble section III(F)(3).

[9] *See* Proposal at preamble section I(B).

substantially increase existing federal single month and all months combined limits for the nine legacy agricultural commodities. As examples, spot month limits on ICE's frozen concentrated orange juice contract would increase from 300 to 2,200 contracts, and single month and all months combined limits on CBOT soybean meal would increase from 6,500 to 16,900 contracts.[10] Single month and all months combined limits for CBOT corn would increase to 57,800 contracts.[11] The proposed increases are largely due to increases in deliverable supply, and the new spot and non-spot month limits continue to reflect the Commission's 25% and 10%/2.5% of deliverable supply formulas.

The Proposal does not provide for phasing in the new, higher limits or for otherwise providing a transition period.[12] It presents no analysis of the market's ability to absorb these large increases without disruption, and no analysis of how large new speculative positions may affect the price discovery process.

Large increases in the amounts of speculative activity in individual non-spot months have the potential to disrupt the convergence process and distort market signals regarding storage of commodities. The Proposal provides no analysis of whether these potential price distortions and their attendant detrimental consequences could be avoided by distributing the large increases in the numerical limits across several non-spot months, rather than permit such large positions in individual months. Instead, the Proposal would codify an abrupt increase 365 days after publication of any final rule in the **Federal Register**. A transition period or lower individual spot month limits would give the Commission the time and ability to mitigate any issues that may arise if markets are unable to absorb the higher limits in an orderly manner, and prevent disruption if necessary. It is a prudent measure that the Commission should adopt in any final rule.

2. Absence of Non-Spot Month Limits for Exempt and Certain Agricultural Commodities

I am concerned with the Proposal's failure to adopt federal non-spot limits for 16 energy, metals, and certain agricultural commodities included in the Proposal.[13] CEA section 4a(a)(3) directs that the Commission ''shall set limits'' on positions held not only in the spot month, but also ''each other month'' and ''for all months,'' ''as appropriate.'' [14] Despite this directive, the Proposal does not adopt non-spot month limits for these commodities. It includes virtually no analysis of why the Commission believes that non-spot limits are not appropriate.

Exchanges have demonstrated an ability to manage speculation and maintain orderly markets with position accountability in non-spot months. However, experiences such as the collapse of the Amaranth hedge fund in 2006 demonstrate how large trades in the non-spot month can also distort markets, widen spreads, and increase volatility.[15] I believe the exchanges have learned from the Amaranth experience and that position accountability can be an effective tool, where appropriate. The Proposal, however, also fails to demonstrate why accountability levels, rather than numerical limits, are appropriate in light of the statutory directives in the CEA. It provides no discussion of the effect of applying the 10/2.5% formula to the energy and metals contracts covered by the Proposal, and why the application of this traditional formula would not be appropriate. Similarly, there is no analysis regarding the numerical limits that could result from applying the four factors specified in 4a(a)(3), and why such numerical limits would not be appropriate.

3. Definition of Economically Equivalent Swap

The Proposal would define an economically equivalent swap as a swap that ''shares identical material contractual specifications, terms, and conditions with the referenced contract . . . .'' [16] The Proposal offers several rationales for this narrow definition that could potentially lend itself to evasion through financial engineering. One such rationale is that it would reduce market participants' ability to net down their speculative positions through swaps that are not materially identical. While this and other rationales proffered in the Proposal have merit, the Commission must also ensure that economically equivalent swaps are not structured in a manner to evade federal or exchange regulation through minor modifications to material terms. I invite public comment on this issue.

4. The Proposal's Necessity Finding Misconstrues the CEA as Amended by the Dodd-Frank Act

The Proposal states that, for any particular commodity, ''prior to imposing position limits, [the Commission] must make a finding that they are necessary.'' [17] This is a reversal of prior Commission determinations.[18] Neither the statutory language of CEA section 4a(a)(2), nor the district court's decision in *ISDA* v. *CFTC,* compels this outcome.[19] The Commission should not adopt it.

Title VII of the Dodd-Frank Act amended CEA section 4a and directed in 4a(a)(2)(A) that ''the Commission shall'' establish position limits for agricultural and exempt physical commodities ''as appropriate.'' [20] In *ISDA* v. *CFTC,* the district court directed the Commission to resolve a perceived ambiguity in section 4a(a)(2)(A) by bringing the Commission's ''experience and expertise to bear in light of the competing interests at stake . . . .'' [21] That experience includes over 80 years of position limits rulemakings, as described below. It provides ample practical and legal bases to determine that Congress intended the Commission to adopt federal position limits for certain commodities pursuant to CEA section 4a(a)(2).

Starting in 1936, and across multiple iterations of the CEA and its predecessors, the CEA has consistently and continuously reflected Congress's finding that excessive speculation in a commodity can cause sudden, unreasonable, and unwarranted movements in commodity prices that are undue burden on interstate commerce.[22] Congress also has declared that ''[f]or the purpose of diminishing, eliminating, or preventing such burden,'' the Commission shall . . . proclaim and fix such [position] limits'' that the Commission finds ''are necessary to diminish, eliminate, or prevent such burden.'' In plain English, Congress has found that excessive speculation is a burden on interstate commerce, and the CFTC is directed to impose position limits that are necessary to prevent that burden. Congress did not direct the Commission to study excessive speculation, to prepare any reports on excessive speculation, or to second-guess Congress's finding that excessive speculation was a problem that needed to be prevented. Rather, Congress directed the Commission to impose position limits that the Commission believed were necessary to accomplish the statutory objectives.

Following the passage of the 1936 Act, the Commission set position limits for grains in 1938, cotton in 1940, and soybeans in 1951. As the Proposal recognizes, in these rulemakings the Commission did not publish any analyses or make any ''necessity finding,'' other than to include a ''recitation'' of the statutory findings regarding the undue

[10] *Id.* Other notable examples include increased spot limits for ICE U.S. Sugar No. 11 (SB) from 5,000 to 25,800 contracts; increased spot month limits for ICE Cotton No. 2 (CT) from 300 to 1,800 contracts; increased single month and all months combined limits for CBOT Soybean Oil (SO) from 8,000 to 17,400 contracts; and increased single month and all months combined limits for ICE Cotton No. 2 (CT) from 5,000 to 11,900 contracts.

[11] *Id.* Although the proposed new limit for CBOT Corn (C) is less than twice the current limit (57,800 contracts proposed versus 33,000 contracts currently), it would still be a significantly larger position limit and the largest single month and all months combined limit in the Proposal.

[12] *See* Proposal at rule text section 150.2 and Appendix E.

[13] *See* Proposal at rule text section 150.5(b)(2), providing for exchange-set position limits or position accountability in non-spot months contracts not subject to federal speculative position limits.

[14] CEA section 4a(a)(3); 7 U.S.C. 6a(a)(3).

[15] *See* Excessive Speculation In the Natural Gas Market, Staff Report with Additional Minority Staff Views, Permanent Subcommittee on Investigations, United States Senate (2007).

[16] Proposal at preamble section (II)(A)(4) and proposed rule text section 150.1.

[17] Proposal at preamble section III(D). The Proposal also states that ''[t]he Commission will therefore determine whether position limits are necessary for a given contract, in light of those premises, considering facts and circumstances and economic factors.'' Proposal at preamble section III(F)(1).

[18] The Proposal acknowledges ''this approach differs from that taken in earlier necessity findings.'' Proposal at preamble section III(F)(1). Specifically, the Proposal identifies different approaches taken in position limit rulemaking undertaken by the Commission's predecessor agency, the Commodity Exchange Commission (''CEC'') from 1938 through 1951, the Commission's 1981 rulemaking that required exchanges to impose position limits for each contract not already subject to a federal limit, and the proposed rulemakings in 2013 and 2016. *Id.*

[19] *Int'l Swaps and Derivatives Ass'n (''ISDA'')* v. *CFTC,* 887 F. Supp. 2d 259 (D.D.C. 2012).

[20] CEA section 4a(a)(2)(A); 7 U.S.C. 6a(a)(2)(A).

[21] *ISDA,* 887 F. Supp. 2d at 281.

[22] Commodity Exchange Act of 1936, P.O. 76–675, 49 Stat. 1491 section 5.

burdens on commerce that can be caused by excessively large positions. These rulemakings then set numerical limits on the amounts of commodity futures contracts that could be held.

Court decisions from the 1950s through the 1970s in cases involving the application of the position limits rules reflect a common-sense reading: The statute mandates that the Commission establish position limits, while providing the Commission with discretion as to how to craft those limits. In *Corn Refining Products* v. *Benson,* [23] defendants challenged the suspension by the Secretary of Agriculture of their trading privileges on the Chicago Board of Trade for violating position limits in corn futures on the grounds that the statutory prohibition only applied to speculative positions. The U.S. Court of Appeals for the Second Circuit denied the appeal, stating in part:

The discretionary powers of the Commission and the exemptions from the 'trading limits' established under the Act are carefully delineated in [section] 4a. The Commission is given discretionary power to prescribe '* * * different trading limits for different commodities, markets futures, or delivery months, or different trading limits for the purposes of buying and selling operations, or different limits for the purposes of subparagraphs (A) (*i.e.,* with respect to trading during one business day) and (B) (*i.e.,* with respect to the net long or net short position held at any one time) of this section * * *'. . . .

Although [section] 4a expresses an intention to curb 'excessive speculation,' we think that the unequivocal reference to 'trading,' coupled with a specific and well-defined exemption for bona-fide hedging, *clearly indicates that all trading in commodity futures was intended to be subject to trading limits unless within the terms of the exemptions.* [24]

In *United States* v. *Cohen,*[25] the defendant challenged his criminal conviction for violating CEC trading limits in potato futures contracts. In upholding the conviction, the court of appeals stated that ''[t]rading in potato futures, as for other commodities, is limited by statute and by regulations issued by the Commission. *The statute here requires the Commission to fix a trading limit . . . .*'' [26] The court of appeals further observed: ''*Congress expressed in the statute a clear intention to eliminate excessive futures trading that can cause sudden or unreasonable fluctuations.*'' [27]

In *CFTC* v. *Hunt,* [28] the Hunt brothers challenged the validity of the agency's position limit on soybeans of three million bushels on the basis that the agency ''made no analysis of the relationship between the size of soybean price changes and the size of the change in the net position of large traders. They argue[d] that there is no direct relationship between these phenomena, and, therefore, the regulation limiting the positions and the trading of the large soybean traders is unreasonable.'' [29] Fundamentally, the Hunts alleged that the agency failed to demonstrate that the limits were a reasonable means—or, alternatively put, ''necessary''—to prevent unwarranted price fluctuations in soybeans. ''The essence of the Hunts' attack on the validity of the regulation is their substantive contention that there is no connection between large scale speculation by individual traders and fluctuations in the soybean trading market.'' [30]

The U.S. Court of Appeals for the Seventh Circuit denied the Hunt brothers' challenge. It held, ''[t]he Commodity Exchange Authority, *operating under an express congressional mandate to formulate limits on trading in order to forestall the evils of large scale speculation,* was deciding on whether to raise its then existing limit on soybeans. . . . There is ample evidence in the record to support the regulation.'' [31]

The *Hunt* case also illustrates the difference between the requirement for a predicate finding of necessity and the requirement that the Commission's rulemakings be supported by sufficient evidence. Under the Administrative Procedure Act (''APA''), the Commission's regulations must not be ''arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'' [32] To make this finding, ''the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'' [33]

In 1981, following the silver crisis of 1979–1980, the Commission adopted a seminal final rule requiring exchanges to establish position limits for *all* commodities that did not have federal limits.[34] In the final rulemaking, the Commission determined that predicate findings are not necessary in position limits rulemakings. It affirmed its long-standing statutory mandate going back to 1936: ''Section 4a(1) represents an express Congressional finding that excessive speculation is harmful to the market, and a finding that speculative limits are an effective prophylactic measure.'' [35] The 1981 final rule found that ''speculative position limits are appropriate for all contract markets irrespective of the characteristics of the underlying market.'' [36] It required exchanges to adopt position limits for all listed contracts, and it did so based on statutory language that is nearly identical to CEA section 4a(a)(1).[37]

In the 1981 rulemaking, the Commission also responded to comments that the Commission had failed to ''demonstrate[ ] that position limits provided necessary market protection,'' or were appropriate for futures markets in ''international soft'' commodities, such as coffee, sugar, and cocoa. The Commission rejected comments that it was required to make predicate necessity findings for particular commodities. The Commission stated:

The Commission believes that the observations concerning the general desirability of limits are contrary to Congressional findings in sections 3 and 4a of the Act and considerable years of Federal and contract market regulatory experience. . . .

* * *

As stated in the proposal, the prevention of large and/or abrupt price movements which are attributable to extraordinarily large speculative positions is a Congressionally endorsed regulatory objective of the Commission. Further, it is the Commission's view that this objective is enhanced by speculative limits since it appears that the capacity of any contract market to absorb the establishment and liquidation of large speculative positions in an orderly manner is related to the relative size of such positions, *i.e.,* the capacity of the market is not unlimited.[38]

In the ''Legal Matters'' section of the preamble, the Proposal would jettison the interpretation that has prevailed over the past four decades as the basis for the Commission's position limits regime. Relying on a non sequitur incorporating a double negative, the Preamble brushes off nearly forty years of Commission jurisprudence:

[B]ecause the Commission has preliminarily determined that section 4a(a)(2) does not mandate federal speculative limits for all commodities, it cannot be that federal position limits are 'necessary' for all physical commodities, within the meaning of section 4a(a)(1), on the basis of a property shared by all of them, *i.e.,* a limited capacity to absorb the establishment and liquidation of large speculative positions in an orderly fashion.[39]

[23] 232 F.2d 554 (2d Cir. 1956).

[24] *Id.* at 560 (emphasis added).

[25] 448 F.2d 1224 (2d Cir. 1971).

[26] *Id.* at 1225–6 (emphasis added).

[27] *Id.* at 1227 (emphasis added).

[28] 591 F.2d 1211 (7th Cir. 1979).

[29] *Id.* at 1216.

[30] *Id.*

[31] *Id.* at 1218 (emphasis added).

[32] 5 U.S.C. 706(2)(A).

[33] *Hunt,* 591 F.2d at 1216. In the proposed regulation increasing the speculative position limits for soybeans from 2 million to 3 million bushels, the Commission's predecessor, the Commodity Exchange Authority (''Authority''), did not make a soybean-specific finding that the limit of three million bushels was necessary to prevent undue burdens on commerce. Rather, the Authority relied on its 1938 and 1951 position limit rulemakings for the general principle that ''the larger the net trades by large speculators, the more certain it becomes that prices will respond directly to trading.'' Corn and Soybeans, Limits on Position and Daily Trading for Future Delivery, 36 FR 1340 (Jan. 28, 1971). The Authority then stated that its analysis of speculative trading between 1966 and 1969 ''did not show that undue price fluctuations resulted from speculative trading as the trading by individual traders grew larger.'' *Id.* Following a public hearing, the Authority adopted the proposed increase. *See* 36 FR 12163 (June 26, 1971). For the past *82 years,* the Commission has relied on this general principle to justify its position limits regime.

[34] During the silver crisis, the Hunt brothers and others attempted to corner the silver market through large physical and futures positions. The price of silver rose more than five-fold from August 1979 to January 1980.

[35] *See* Establishment of Speculative Positon Limits, 46 FR 50938, 50940 (Oct. 16, 1981) (''1981 Position Limits Rule'').

[36] 1981 Position Limits Rule at 50941.

[37] In the proposed regulation, the Commission noted that as of April 1975, position limits were in effect for ''almost all'' actively traded commodities then under regulation. Speculative Position Limits, 45 FR 79831, 79832 (Dec. 2, 1980).

[38] 1981 Position Limits Rule at 50940.

[39] Proposal at preamble section III(F)(1).

In 2010, Congress enacted Title VII of the Dodd-Frank Act and amended CEA section 4a by directing the Commission to establish speculative position limits for agricultural and exempt commodities and economically equivalent swaps.[40] Congress also set forth criteria for the Commission to consider in establishing limits, including diminishing, eliminating, or preventing excessive speculation; deterring and preventing market manipulation; ensuring sufficient liquidity for bona fide hedgers; and ensuring that price discovery in the underlying market is not disrupted.[41] Congress directed the Commission to establish the required speculative limits within tight deadlines of 180 days for exempt commodities and 270 days for agricultural commodities.

It defies history and common sense to assert that the amendments to section 4a enacted by Congress in the Dodd-Frank Act made it more difficult for the Commission to impose position limits, such as by requiring predicate necessity findings on a commodity-by-commodity basis. This is particularly true given Congress's repeated use of mandatory words like ''shall'' and ''required'' and the tight timeframe to respond to the new Congressional directives. In light of the run up in the price of oil and the financial crisis that precipitated the legislation, it is unreasonable to interpret the Dodd-Frank amendments as creating new obstacles for the Commission to establish position limits for oil, natural gas, and other commodities whose significant price fluctuations had caused economic harm to consumers and businesses across the nation. The Commission's interpretation is revisionist history.

The Commission's necessity finding that follows its legal analysis is sure to persuade no one. Unless substantially modified in the final rulemaking, it will likely doom this regulation as ''arbitrary, capricious, or an abuse of discretion'' under the APA. The necessity finding for the 25 core referenced futures contracts selected for this rulemaking boils down to simplistic assertions that the futures contracts and economically equivalent swaps for these contracts ''are large and critically important to the underlying cash markets.'' [42] As part of the necessity finding for these 25 commodities, the Proposal presents general economic measures, such as production, trade, and manufacturing statistics, to illustrate the importance of these commodities to interstate commerce, and therefore for the need for position limits. On the other hand, the Proposal fails to present any rational reason as to why the economic trade, production, and value statistics for commodities other than the 25 core referenced futures contracts are insufficient to support a similar finding that position limits are necessary for futures contracts in those other commodities.

For example, the Proposal justifies the exclusion of aluminum, lead, random length lumber, and ethanol as examples of contracts for which a necessity finding was not made on the basis that the open interest in these contracts is less than the open interest in the oat futures contracts. This comparison has no basis in rationality. The need for position limits for commodity futures contracts in aluminum, lead, lumber, and ethanol is not in any way rationally related to the open interest in those commodity futures contracts relative to the open interest in oat futures. The Proposal is rife with other such illogical statements.

Fundamentally, general economic measures of commodity production, trade, and value are irrelevant with respect to the need for position limits to prevent excessive speculation. The Congress has found that position limits are an effective prophylactic tool to prevent excessive speculation for all commodities. The Congressional findings in CEA section 4a regarding the need for position limits are not limited to only the most important or the largest commodity markets. General economic data regarding a commodity in interstate commerce is irrelevant to the need for position limits for futures contracts for that commodity.

The collapse of the Amaranth hedge fund in 2006 is another strong example of why a position limits regime is necessary to prevent excessive speculation, in this case in non-spot months. Amaranth was a large speculative hedge fund that at one point held some 100,000 natural gas contracts, or approximately 5% of all natural gas used in the U.S. in a year. As the Commission has explained in other position limits proposals since 2011, the collapse of Amaranth was a factor in the Dodd-Frank's amendments to CEA section 4a.

The Commission has ample practical experience and legal precedent to resolve the perceived ambiguity in CEA section 4a(a)(2) as instructed by the district court in *ISDA* v. *CFTC* without making the antecedent necessity finding now incorporated in the Proposal. Our remaining task is to design the overall position limits framework, including determining the appropriate limit levels, defining bona fide hedges through prospective rulemaking, and appropriately considering other options such as position accountability and exchange-set limits.

Conclusion

In CEA section 4a, Congress directed the Commission to establish position limits and appropriate hedge exemptions to prevent the undue burdens on interstate commerce that result from excessive speculation. Congress has also entrusted to the Commission's discretion the appropriate regulatory tools to meet this mandate. Congress' overarching policy directive for position limits is straightforward and has been remarkably consistent for 84 years. The Commission has had ten years, three prior proposals, one supplemental proposal, and hundreds of pages of comment letters to define bona fide hedge exemptions. Now is the time to finish the job, and to do it the right way.

[FR Doc. 2020–02320 Filed 2–26–20; 8:45 am]

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[40] *See* CEA section 4a(a)(2); 7 U.S.C. 6a(a)(2); CEA section 4a(a)(5); 7 U.S.C. 6a(a)(5).

[41] *See* CEA section 4a(a)(3); 7 U.S.C. 6a(a)(3).

[42] Proposal at preamble section III(F)(2).

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Part IV

Department of Defense

General Services Administration

National Aeronautics and Space Administration

48 CFR Chapter 1
Federal Acquisition Regulations; Final Rules

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR–2020–0051, Sequence No. 1]

Federal Acquisition Regulation; Federal Acquisition Circular 2020–05; Introduction

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of a final rule.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rule agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) in this Federal Acquisition Circular (FAC) 2020–05. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC.

DATES: For effective date see the separate document, which follows.

FOR FURTHER INFORMATION CONTACT: Ms. Mahruba Uddowla, Procurement Analyst, at 703–605–2868 or by email at *mahruba.uddowla@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2020–05, FAR Case 2014–002.

RULE LISTED IN FAC 2020–05

Subject	FAR case	Analyst
Set-Asides Under Multiple-Award Contracts	2014–002	Uddowla.

ADDRESSES: The FAC, including the SECG, is available via the internet at *http://www.regulations.gov*.

SUPPLEMENTARY INFORMATION: A summary for the FAR rule follows. For the actual revisions and/or amendments made by this FAR case, refer to the specific subject set forth in the document following this item summary. FAC 2020–05 amends the FAR as follows:

Set-Asides Under Multiple-Award Contracts (FAR Case 2014–002)

This final rule amends the FAR to implement regulatory changes made by the Small Business Administration (SBA) in its final rule at 78 FR 61114 on October 2, 2013. SBA's final rule implements the statutory requirements set forth at section 1331 of the Small Business Jobs Act of 2010 (15 U.S.C. 644(r)). Section 1331 provided authority for three acquisition techniques to facilitate contracting with small businesses on multiple-award contracts:

(1) Setting aside part or parts of the requirement for small businesses.

(2) Reserving one or more contract awards for small business concerns under full and open multiple-award procurements.

(3) Setting aside orders placed against multiple-award contracts, notwithstanding the fair opportunity requirements of 10 U.S.C. 2304c(b) and 41 U.S.C. 4106(c).

This final rule provides contracting officers additional guidance on the use of partial set-asides, reserves, and set-asides of orders under multiple-award contracts. This final rule may have a positive economic impact on any small business entity that wishes to participate in the Federal marketplace. The section 1331 authorities are expected to provide small businesses greater access to multiple-award contracts, including orders issued against such contracts. There is an upward adjustment to the annual burden associated with an existing information collection, to account for size and socioeconomic status rerepresentations for individual task and delivery orders.

This rule also finalizes the interim rule published November 2, 2011, under FAR Case 2011–024.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Federal Acquisition Circular (FAC) 2020–05 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator of National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2020–05 is effective February 27, 2020 except for FAR Case 2014–002, which is effective March 30, 2020.

Linda W. Neilson,

Director, Defense Acquisition Regulations, Department of Defense.

Jeffrey A. Koses,

Senior Procurement Executive/Deputy CAO, Office of Acquisition Policy, U.S. General Services Administration.

William G. Roets II,

Acting Assistant Administrator, Office of Procurement, National Aeronautics and Space Administration.

[FR Doc. 2020–02027 Filed 2–26–20; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 4, 7, 8, 9, 10, 13, 15, 16, 19, 42, and 52

[FAC 2020–05; FAR Case 2014–002; Docket No. FAR–2014–0002; Sequence No. 1]

RIN 9000–AM93

Federal Acquisition Regulation; Set-Asides Under Multiple-Award Contracts

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement regulatory changes made by the Small Business Administration, which provide Governmentwide policy for partial set-asides and reserves, and for set-asides of orders for small business concerns under multiple-award contracts.

DATES: Effective March 30, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Mahruba Uddowla, Procurement Analyst, at 703–605–2868 or by email at *Mahruba.uddowla@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2020–05, FAR Case 2014–002.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 81 FR 88072 on December 6, 2016, to revise the FAR to implement regulatory changes made by the Small Business Administration (SBA) in its final rule at 78 FR 61114, dated October 2, 2013, regarding the use of small business partial set-asides, reserves, and set-asides of orders placed under multiple-award contracts. As part of the implementation of reserves of multiple-award contracts, the proposed rule removed the term ''reserve'' in the FAR where it is not related to reserves of multiple-award contracts. SBA's final rule implements the statutory requirements set forth at section 1331 of the Small Business Jobs Act of 2010 (Jobs Act) (15 U.S.C. 644(r)). This final FAR rule also finalizes the interim FAR rule published at 76 FR 68032 on November 2, 2011, under FAR Case 2011–024.

Fourteen respondents submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments received and any changes made to the rule as a result of the public comments are provided as follows:

A. Summary of Significant Changes

This final rule makes the following significant changes from the proposed rule:

- Removal of the term ''HUBZone order.'' This term has been removed throughout the final rule.
- Requirement to assign a North American Industry Classification System (NAICS) code. The final rule clarifies that NAICS code(s) must be assigned to all solicitations, contracts, and task and delivery orders, and that the NAICS code assigned to a task or delivery order must be a NAICS code assigned to the multiple-award contract. This clarification appears at FAR 19.102, with cross references in 8.404, 8.405–5, and 16.505.
- Requirement to assign more than one NAICS code and associated size standard for multiple-award contracts where a single NAICS code does not describe the principal purpose of both the contract and all orders to be issued under the contract. In the proposed rule, the date for implementation of this particular requirement was listed as January 31, 2017. For the final rule, this date has been extended to October 1, 2022. This is when Governmentwide systems are expected to accommodate the requirement. This date also allows time for Federal agencies to budget and plan for internal system updates across their multiple contracting systems to accommodate the requirement. Use of this date in the final rule means that the assignment of more than one NAICS code for multiple-award contracts is authorized only for solicitations issued after October 1, 2022. Before this date, agencies may continue awarding multiple-award contracts using any existing authorities, including any addressed in this rule, but shall continue to report one NAICS code and size standard which best describes the principal purpose of the supplies or services being acquired.
- Rerepresentation of size status for multiple-award contracts with more than one NAICS code. FAR 19.301–2 is revised to clarify that, for multiple-award contracts with more than one NAICS code assigned, a contractor must rerepresent its size status for each of those NAICS codes. A new Alternate I is added for the clause at 52.219–28 to allow rerepresentations for multiple NAICS codes, and a prescription is added at 19.309(c). Alternate I will be included in solicitations that will result in multiple-award contracts with more than one NAICS code.
- Rerepresentation for orders under multiple-award contracts. The clause at 52.219–28 is revised to relocate the paragraph addressing rerepresentation for orders closer to the beginning of the clause and to renumber subsequent paragraphs.
- Representation of size and socioeconomic status. FAR 19.301–1 is revised to clarify that, for orders under basic ordering agreements and FAR part 13 blanket purchase agreements (BPAs), offerors must be a small business concern identified at 19.000(a)(3) at the time of award of the order, and that a HUBZone small business concern is not required to represent twice for an award under the HUBZone Program. A HUBZone small business concern is required to represent at the time of its initial offer and be a HUBZone small business concern at time of contract award.
- Applicability of the limitations on subcontracting to orders issued directly to one small business under a reserve. The final rule clarifies that the limitations on subcontracting and the nonmanufacturer rule apply to orders issued directly to one small business concern under a multiple-award contract with reserves. This clarification appears in multiple locations in parts 19 and 52. The final rule also clarifies the limitations on subcontracting compliance period for orders issued directly, under multiple-award contracts with reserves, to small businesses who qualify for any of the socioeconomic programs. These clarifications appear in subparts 19.8, 19.13, 19.14, and 19.15, and in the clauses at 52.219–3, 52.219–14, 52.219–27, 52.219–29, and 52.219–30.
- Compliance period for the limitations on subcontracting. The final rule revises the proposed text at sections 19.505, 19.809, 19.1308, 19.1407, and 19.1507 to be consistent with the implementing clauses for those sections. The clauses reflect that the contracting officer has discretion on whether the compliance period for a set-aside contract is at the contract level or at the individual order level.
- Fair opportunity and orders issued directly to one small business under a reserve. The final rule addresses orders issued directly to one small business under a reserve at FAR 16.505.
- Conditions under which an order may be issued directly to an 8(a) contractor under a reserve. The final rule clarifies in 19.804–6 the conditions under which an order can be issued directly to an 8(a) contractor on a multiple-award contract with a reserve.
- Set-asides of orders under multiple-award contracts. At FAR 19.507, the prescription for Alternate I of the clause at 52.219–13 is revised to apply to any multiple-award contract under which orders will be set aside, regardless of whether the multiple-award contract contains a reserve.
- Consistent language for ''rule of two'' text. FAR 19.502–3, 19.502–4, and 19.503 are revised for consistency with FAR 19.502–2(a), which most closely matches the ''rule of two'' in the Small Business Act (15 U.S.C. 644(j)(1)).
- Documentation of compliance with limitations on subcontracting. The requirement for contracting officers to document contractor compliance with the limitations on subcontracting is removed from subparts 19.5, 19.8, 19.13, 19.14, and 19.15. FAR part 4 and subpart 42.15 already prescribe documentation of contractor compliance

with various contract terms and conditions, including the limitations on subcontracting. FAR subpart 42.15 is revised to clarify that performance assessments shall include, as applicable, a contractor's failure to comply with the limitations on subcontracting.

- Clarification of ''domestically produced or manufactured product.'' FAR 19.6 is revised to use the phrase ''end item produced or manufactured in the United States or its outlying areas'' instead of ''domestically produced or manufactured product.''
- Subcontracting plans for multiple-award contracts with more than one NAICS code. FAR subpart 19.7 is revised to provide guidance to contracting officers on how to apply the requirement for small business subcontracting plans to multiple-award contracts assigned multiple NAICS codes. With the requirement to assign multiple NAICS codes, it will be possible for a contractor to be both a small business concern and an other than small business concern for a single contract.
- HUBZone price evaluation preference and reserves. FAR subpart 19.13 is revised to clarify that the HUBZone price evaluation preference shall not be used for the reserved portion of a solicitation for a multiple-award contract. The price evaluation preference shall be used in the portion of a solicitation for a multiple-award contract that is not reserved. In addition, the clause at 52.219–4 is revised to remove the proposed text that stated the HUBZone price evaluation preference did not apply to solicitations that have a reserve for HUBZone small business concerns, since that is not accurate.
- Performance by a HUBZone small business concern. FAR 19.1308 is revised to specify performance by a HUBZone small business concern instead of performance in a HUBZone. The related changes that were proposed in the clause at 52.219–4, paragraph (d)(2), are not being adopted as they are no longer accurate.
- Separate provision for reserves and clause for orders issued directly under a reserve. The final rule provides a new solicitation provision at 52.219–31, Notice of Small Business Reserve, and prescription at 19.507 to address information and requirements that are related to reserves of multiple-award contracts and are appropriate for inclusion only in the solicitation. These requirements and information were proposed as part of the clause at 52.219–XX (now 52.219–32); however, since they only apply prior to contract award, the final rule relocates them to a separate provision. The final rule also revises the clause at 52.219–32 to address only orders issued directly to one small business under a reserve. The title of the clause reflects the revised content.

B. Analysis of Public Comments

1. Support for the Rule

Comment: Multiple respondents stated support for the changes in the proposed rule. More specifically, one respondent supported the overall changes and clarifications in the proposed rule. Three respondents supported the clarifications regarding the partial set-aside process; the guidance for the new concept of reserves; and the flexibility of contracting officers to establish terms that state that all task orders under a multiple-award contract will be set aside. Additionally, one respondent supported the clarifications regarding agencies taking credit following small business size and socioeconomic status rerepresentations.

Response: The Councils acknowledge these areas of support.

2. Mandatory Set-Aside of Orders at or Below the Simplified Acquisition Threshold (15 U.S.C. 644(j))/ Kingdomware Decision

Comment: Two respondents, citing *Kingdomware Techs., Inc.* v. *United States,* 136 S. Ct. 1969 (2016), stated that because Congress used ''shall'' at 15 U.S.C. 644(j) and ''may'' at 15 U.S.C. 644(r), statutory construction requires that small business set-asides and reserves described in section 1331 of the Jobs Act are mandatory, not discretionary. In addition, several respondents stated that if ''whole contracts'' under $150,000 are automatically reserved for small businesses, task orders within the same dollar value should also be reserved for small businesses. Further, one respondent commented that the FAR Council may not interpret 15 U.S.C. 644(j).

Response: The Kingdomware decision focused on the Veterans Benefits, Health Care, and Information Technology Act of 2006 (VA statute), 38 U.S.C. 8127, not a requirement in the Small Business Act. The Kingdomware decision is silent on the construction of the Small Business Act. The VA statute and the Small Business Act are constructed differently, with the former statute applying only to acquisitions of the Department of Veterans Affairs. Further, the Councils agree that it is not within the scope of this FAR case to interpret 15 U.S.C. 644(j). The purpose of this case is to amend the FAR to incorporate regulatory changes made by SBA in its final rule at 78 FR 61114, dated October 2, 2013. SBA's final rule implements discretionary use of order set-asides, partial set-asides, and reserves of multiple-award contracts at 13 CFR 125.2(e)(1)(ii), consistent with section 1331 of the Jobs Act (15 U.S.C. 644(r)). As a result, no revisions are made in the final rule in response to the comments.

Comment: Several respondents stated that because the court in Kingdomware held that a task order was a contract, ''contract'' as written in 15 U.S.C. 644(j) includes task orders issued from multiple-award contracts, making order set-asides on multiple-award contracts mandatory not discretionary when applying the ''rule of two.'' The ''rule of two'' refers to the requirement in the Small Business Act (15 U.S.C. 644(j)(1)) that mandates setting aside a contract with an anticipated value between the micro-purchase threshold and the simplified acquisition threshold for small business unless two or more small businesses are not expected to submit offers that are competitive in terms of price, quality, and delivery. Respondents also cited to Aldevra, B–406205, 2012 CPD ¶ 112 (Comp. Gen. Mar. 14, 2012), emphasizing that SBA clarified that orders under $150,000 shall be exclusively reserved for small business concerns, including Federal Supply Schedule (FSS) orders and commercially available off-the-shelf (COTS) items. Additionally, one respondent stated that an exclusive reservation of contracts at or below the simplified acquisition threshold for multiple-award contracts will increase economic opportunity for small business.

Response: The ''rule of two'' described in Kingdomware refers to the VA statute, 38 U.S.C. 8127, not a requirement in the Small Business Act. The Kingdomware decision is silent on the construction of the Small Business Act. The VA statute and the Small Business Act are written differently, with the former statute applying only to acquisitions of the U.S. Department of Veterans Affairs. The VA statute only speaks to contracts and is silent on the handling of orders. Because of this silence, the Court concluded that the mandate applicable to contracts also applied to orders, since orders have the legal effect of contracts. By contrast, the Small Business Act has separate and distinct provisions addressing contracts and orders and addresses each in a different manner. Section 1331 of the Jobs Act (15 U.S.C. 644(r)) addresses order set-asides and makes the application of the ''rule of two''

discretionary for orders placed under multiple-award contracts only. 15 U.S.C. 644(j) applies to contracts and mandates application of the ''rule of two'' for contracts valued at the simplified acquisition threshold or less.

15 U.S.C. 644(r) is specific in that it only applies to multiple-award contracts. Legislative history demonstrates that prior to 15 U.S.C. 644(r), there was a mixed record of small business participation on multiple-award contracts. Congress was clear in section 1331 of the Jobs Act that under a multiple-award contract, agencies may, at their discretion, effectuate a partial set-aside or reserve of a multiple-award contract or conduct a set-aside of orders under a multiple-award contract. As a result, no revisions are made in the final rule in response to the comments.

3. Conflicts Between FAR and SBA Regulations

a. Old Limitations on Subcontracting

Comment: Multiple respondents commented that the text related to the limitations on subcontracting and the nonmanufacturer rule in the proposed rule does not align with SBA's final rule as stated in 81 FR 34259 and in current 13 CFR 121.406 and 125.6. To address this conflict, respondents requested the related text in the FAR rule be revised to state the SBA current rules.

Response: This FAR case was initiated prior to the publication of the SBA final rule (81 FR 34243, May 31, 2016), which updated the limitations on subcontracting and the nonmanufacturer rule to implement section 1651 of the National Defense Authorization Act for Fiscal Year 2013. DoD, GSA, and NASA opened a separate FAR case (2016–011, Revision of Limitations on Subcontracting) to implement SBA's final rule. Therefore, this final FAR rule will not be revised to incorporate the May 31, 2016, SBA final rule.

b. Other Conflicts

Comment: One respondent commented that the timeframe for protests under a Multiple Award Schedule established at FAR 19.302(d)(3) appears to contradict SBA's regulations on timeliness stated in 13 CFR 121.1001(a)(3). The respondent quotes FAR 19.302(d), ''In order to affect a specific solicitation, a protest must be timely. SBA's regulations on timeliness are contained in 13 CFR 121.1004'' and follows this by stating, ''FAR 19.302(d)(3) is in conflict with SBA's timeliness regulations'' at 13 CFR 121.1004(a)(3).

Response: The proposed rule did not amend FAR 19.302(d)(3). The Councils agree that the language should be clarified. However, the comment is not within the scope of this rule, and the Councils will address this issue in a separate FAR case.

4. Information Collections

a. Two Representations for HUBZone Small Business Concerns

Comment: One respondent asserted that the rule is adding a new information collection requirement at FAR 19.301–1(c) by requiring a HUBZone small business concern to represent its size and socioeconomic status twice—first at the time of the initial offer and again at the time of contract award. Moreover, the respondent stated that there is no corresponding procedure in FAR part 19 requiring the contracting officer to obtain the representation at the time of contract award, nor is there a requirement in the provisions at FAR 52.212–3 or FAR 52.219–1 for the offeror to make a second representation of size and socioeconomic status at the time of contract award.

Response: The Councils did not intend to create a second representation requirement for HUBZone small business concerns. The text has been revised at proposed FAR 19.301–1(c) to reflect the existing requirement at FAR 19.1303(d).

b. Compliance Reporting for the Limitations on Subcontracting

Comment: In reference to the requirement for the contracting officer to document a contractor's compliance with the limitations on subcontracting as part of their performance evaluation, one respondent asserted that the FAR rule does not include a corresponding recordkeeping or reporting requirement. As a result, the respondent stated that contracting officers will begin to impose their own unique recordkeeping and reporting requirements through the use of local clauses, which is the kind of uncoordinated information collection the Paperwork Reduction Act was designed to prevent. The respondent recommended that the rule obtain an OMB control number.

Response: The requirement for contracting officers to document contractor compliance with various contract terms and conditions, including compliance with the limitations on subcontracting, is already prescribed in FAR part 4 and subpart 42.15. Therefore, the additional language requiring documentation related to compliance with the limitations on subcontracting has been removed from the final rule. For clarification, failure to comply with the limitations on subcontracting has been added as an example at section 42.1503.

5. North American Industry Classification System (NAICS) Codes

a. Burden and Impact on Small Business Participation

Comment: One respondent commented that while the proposed rule is consistent with the guidance in SBA's regulations at 13 CFR 121.402, the proposed rule could increase administrative burden and workload for GSA Schedule contractors and contracting officers. The respondent stated the proposed rule could also possibly eliminate some small companies from participating in GSA schedule contracts. The respondent identified possible strategies for GSA to comply with the NAICS code assignment procedures proposed at FAR 19.102(b)(2)(ii) and the impacts associated with each strategy. The respondent urged GSA and SBA to work together to develop a more cost-efficient mechanism for assigning NAICS codes to Schedule contracts. In addition, the respondent commented that depending on the implementation strategy pursued, some Schedule contractors could lose their small business status under the Schedule contract.

Response: As noted by the respondent, the proposed requirement at FAR 19.102(b)(2)(ii) is consistent with SBA's regulations at 13 CFR 121.402. GSA, as the manager of the FSS/Multiple Award Schedule Program, is responsible for ensuring the solicitations and resultant contracts under that Program comply with FAR requirements regarding NAICS code assignment. GSA will take sufficient time to implement the requirement to ensure industry partners are aware of upcoming changes and are given an opportunity to provide feedback during the process, as appropriate. The Councils note that the basic premise of assigning NAICS codes to requirements is that the selected NAICS code best describes the principal purpose of the supply or service being acquired.

b. Application to Subcontracting Plans

Comment: One respondent recommended changes to FAR subpart 19.7, The Small Business Subcontracting Program, to clarify whether or not a subcontracting plan is required if an offeror represents itself as other than small under any distinct portion or category of a multiple-award contract for which it submits an offer in

accordance with proposed FAR 19.301–1(a)(1)(ii).

Response: The Councils have revised FAR subpart 19.7 in the final rule to provide the recommended clarification. When an offeror represents itself as other than small for any portion or category of a solicitation for a multiple-award contract, that offeror may be required to submit a small business subcontracting plan either for that portion or category, or for the entirety of the contract, at the offeror's discretion. The estimated value for the distinct portion(s) or category(s) for which an offeror is considered other than small, and whether there are subcontracting opportunities, should be the basis for the decision to require a subcontracting plan.

c. Small Business Eligibility

Comment: One respondent recommended that proposed FAR 19.301–1(a)(1)(ii) be revised to address the current GSA Schedule contract practices and clarify that if an agency lists more than one NAICS under a Special Item Number (SIN) that the offeror is eligible as a small business if it meets the size standard of one or more NAICS under that SIN.

Response: The practice of assigning more than one NAICS code to a particular SIN is not compliant with the proposed FAR 19.102(b)(2)(ii)(B), which requires that a single NAICS code be assigned to each distinct portion or category of the solicitation (*e.g.,* SIN). As such, the Councils have determined that no changes to FAR 19.301–1(a)(1)(ii) are necessary.

Comment: One respondent recommended revisions to the proposed FAR 19.301–2(d)(1) and (2) to clarify that an agency may not include in its contracting goal achievements the value of orders after the date of a former small business concern's rerepresentation as other than small.

Response: The Councils did not adopt the suggested revision to proposed FAR 19.301–2(d)(1) since it is inconsistent with the existing text at FAR 19.301–2(d) that size status is revised in the Federal Procurement Data System (FPDS) for actions under a particular contract going forward from the point when the contracting officer modifies the contract to reflect the rerepresentation. FAR 19.301–2(d)(2) addresses a contractor's rerepresentation in response to a specific order, therefore the respondent's clarification is not applicable. The proposed FAR text already states that the value of the order cannot be included in the ordering agency's small business prime contracting goal achievements.

6. Contracting Officer Discretion

Comment: A number of respondents stated support for the greater flexibility in the proposed rule but are concerned that agencies are inappropriately structuring large contracts that restrict competition for women-owned small businesses and HUBZone small businesses. In addition, one respondent stated that allowing the contracting officer discretion in selecting a partial set-aside or reserve for multiple-award contracts will be in direct conflict to the stated goals of strengthening small business programs.

Response: Section 1331 (15 U.S.C. 644(r)) provides discretion to the contracting officer in using an array of tools to enhance small business participation on multiple-award contracts. Additionally, the proposed rule included a documentation requirement for multiple-award contracts when contracting officers do not use at least one of the tools provided by section 1331.

7. Further Clarifications

a. When Is a Reserve Appropriate

Comment: One respondent asserted that there is a conflict between the language at FAR 19.503 and FAR 19.504(c)(1) because the proposed regulation regarding reserves makes it appear that a reserve is appropriate when there is no expectation that there will be competition among small businesses but proposed 19.504(c) establishes a process for setting aside and competing orders under a reserve. The respondent recommended that either FAR 19.503 be clarified or that 19.504(c)(1) be deleted.

Response: The language at FAR 19.503 addresses factors the contracting officer must consider at the contract level. Multiple-award solicitations with reserves may result in contract awards to more than one small business. FAR 19.504(c)(1) addresses procedures at the order level when more than one small business receives an award under a multiple-award solicitation with a reserve. Therefore, additional clarification is not required in the final rule.

b. Applicability of the Limitations on Subcontracting and the Nonmanufacturer Rule to Reserves

Comment: One respondent pointed out that it appears in the proposed rule that the limitations on subcontracting and the nonmanufacturer rule will not apply to orders issued directly to a small business under a reserve. The respondent recommended the language should be clarified if that application is not the intent.

Response: The final rule clarifies that the limitations on subcontracting and the nonmanufacturer rule apply to orders issued directly to a small business under a reserve.

Comment: One respondent recommended adding clarification to FAR 19.501(h) to be consistent with the language at FAR 19.503(d).

Response: The Councils determined that additional clarification at FAR 19.501(h), now redesignated as 19.501(g), would be redundant. However, 19.501(h) is revised to remove duplicative text and refer the reader to FAR 19.505, which addresses the limitations on subcontracting and the nonmanufacturer rule.

c. Setting Aside Orders Against Set-Aside Multiple-Award Contracts

Comment: One respondent suggested adding language to FAR 19.504(a) to clarify the ability to set aside orders for a socioeconomic business type under a multiple-award contract that has been set aside for small business.

Response: The proposed FAR rule did not explicitly address whether orders can be set aside under a multiple-award contract that is itself set aside, but neither did it prohibit such an action. SBA's regulations at 13 CFR 125.2(e)(6) only address setting aside orders under ''full and open'' multiple-award contracts. FAR 19.504 is consistent with SBA's current regulations.

SBA contemplated setting aside orders against set-aside multiple-award contracts in their final rule published at 78 FR 61114. The concerns identified in that SBA final rule have since been addressed to enable fair and proper implementation of these set-aside orders. Specifically, the SBA final rule published at 81 FR 34243 standardized the limitations on subcontracting and the nonmanufacturer rule across the socioeconomic programs. In addition, some agencies have pursued the strategy of allowing set-aside orders against set-aside multiple-award contracts, including notification and incorporation of the clause at FAR 52.219–13, and have not encountered any industry concerns.

Therefore, this final FAR rule cannot provide further clarity. The Councils note that SBA is exploring providing guidance on this issue through a separate rulemaking, and the Councils may pursue a separate FAR rule on the subject.

d. Sole Sourcing Under Multiple-Award Contracts

Comment: One respondent recommended adding a sentence to the end of FAR 19.504(a) to clarify that set-asides are for competition and do not include sole source orders. The respondent also suggested a revision to FAR 19.504(c)(2) and FAR 52.219–XX(d) (now 52.219–32(b)) to clarify that orders issued directly to a small business concern under reserves should not be considered a sole source or a set-aside award.

Response: The Councils agree that orders issued directly under a reserve are neither sole source awards nor set asides as identified in the FAR. Orders issued directly under a reserve have a distinct authority based on 15 U.S.C. 644(r)(2) and (3). The Councils do not consider it necessary to include the recommended sentence at FAR 19.504(a), 19.504(c)(2), and 52.219–32.

However, the title of the FAR 19.504 is retitled ''Orders under multiple-award contracts'' to more accurately describe the guidance provided. In addition, the final rule is amended to add language at FAR 16.505(b)(1)(i)(B) to identify orders issued directly to a small business concern under a reserve as allowable. Such orders are permissible per section 1331 (15 U.S.C. 644(r)) and SBA's final rule at 78 FR 61114, dated October 2, 2013.

Comment: One respondent asserted that the language in FAR 6.302–5(b)(4) provides sole source authority for all of the small business concerns identified in FAR 19.000(a)(3) except the small business category. The respondent recommended that small businesses be added to the ''list'' of sole source acquisition strategies at 6.302–5(b), since the proposed language at FAR 19.504(c)(2) provides that the contracting officer may issue orders directly to one small business concern for work that it can perform when there is only one contract award to any one type of small business concern identified in FAR 19.000(a)(3).

Response: The sole source authorities identified in FAR 6.302–5(b) for women-owned small business, service-disabled veteran-owned small business, 8(a) participants, and HUBZone small business concerns apply to contracts, not orders. However, the Councils addressed the concern at the order level by adding language to FAR 16.505(b)(1)(i)(B) to identify orders issued directly to a small business concern under a reserve as allowable. Such orders are permissible per section 1331 (15 U.S.C. 644(r)) and SBA's final rule at 78 FR 61114, dated October 2, 2013.

e. Application of the HUBZone Price Evaluation Preference to Full and Open Multiple-Award Contracts

Comment: One respondent wanted to ensure that the price evaluation preference (PEP) for HUBZone small business concerns may be used in acquisitions conducted using full and open competition for multiple-award contracts.

Response: FAR subpart 19.13 allows use of the PEP in acquisitions conducted using full and open competition for multiple-award contracts.

8. Multiple Award Schedule/FSS Issues

a. Compliance With Limitations on Subcontracting by End of Contract Period

Comment: One respondent commented that, with regard to the proposed language in FAR 19.505(b), it is not clear why contracting officers on GSA schedules and multiple-award contracts are not given the option to require compliance with the limitations on subcontracting by the end of the base contract as with other contracts. The respondent stated that it would be reasonable to afford Schedules and other multiple-award contracts that option and recommended that the FAR rule remove the proposed text at FAR 19.505(b)(2), which specifies that for orders that are set aside, compliance with the limitations on subcontracting is required for the performance period of that order.

Response: FAR 19.505(b) provides guidance on the compliance period for the limitations on subcontracting for all relevant scenarios: for contracts that have been set aside and for orders that have been set aside. Paragraph (b)(1) provides guidance for contracts that are set aside. The term ''contract'' includes Multiple Award Schedule contracts and other multiple-award contracts. Thus, contracting officers for those contract vehicles that are set aside have the option of requiring compliance with the limitations on subcontracting by the end of the performance period of the contract or by the performance period of each individual order under the contract. Paragraph (b)(2) provides guidance for orders that are set aside. When an order is set aside, compliance with the limitations on subcontracting must apply only to the performance period of that order because the multiple-award contract under which it is placed may not have been set aside. Therefore, FAR 19.505(b)(2) remains in the final rule.

b. Nonmanufacturer Rule Application

Comment: One respondent suggested clarification that the exception under $25,000 to the nonmanufacturer rule, which applies to orders set aside under a multiple-award contract, also applies to orders set aside under a ''Federal Supply Schedule'' contract.

Response: The Councils believe it is unnecessary to clarify that a ''multiple-award contract'' includes a FSS contract, given that FAR 2.101 already defines the term ''multiple-award contract'' as including a ''Multiple Award Schedule contract issued by GSA,'' *i.e.,* a FSS contract. Therefore, no clarification is made in the final rule.

c. Assigning NAICS Codes to FSS Orders

Comment: One respondent stated that the proposed text at FAR 19.102(b)(3)(i), which requires that orders under multiple-award contracts whose solicitations were issued on or before January 31, 2017, be assigned the same NAICS code and corresponding size standard designated in the multiple-award contract under which they are placed, will be problematic for FSS orders and suggested removing the text. The respondent explained that under the FSS program, each contractor under the same Schedule may have a different NAICS code assigned to the FSS contract because NAICS codes are assigned based on the contractor's ''primary'' SIN, and the primary SIN may differ across contractors under the same Schedule. As a result, the respondent questioned whether compliance with proposed 19.102(b)(3)(i) will result in FSS contractors being eliminated from competition for a given order if that contractor has a different primary SIN (and associated NAICS code) than the SIN under which an order is placed.

Response: The Councils note that the proposed text at FAR 19.102(b)(3)(i) is explaining the current practice for assigning NAICS codes to orders placed against FSS contracts prior to implementation of this FAR rule: Orders, including FSS orders, are assigned the same NAICS code as the parent, multiple-award contract. The Councils are not aware that FSS contractors are being eliminated from competition for FSS orders due to the NAICS code assigned to their FSS contract. Once the open and continuous FSS solicitations are amended and FSS contracts are modified in accordance with FAR 19.102(b)(2)(ii), FSS orders

will be required to comply with the proposed text at 19.102(b)(3)(ii)(B).

9. Order-Level Rerepresentations of Small Business Status

Comment: One respondent recommended against providing authority for a contracting officer to require rerepresentation of size and socioeconomic status prior to issuance of a task order. The respondent believes that small businesses should be allowed to grow larger without losing any small business opportunities.

Response: Providing authority for the contracting officer to require rerepresentation of size and socioeconomic status for task orders is consistent with SBA's final rule implementing section 1331 of the Jobs Act. Therefore, the proposed text at FAR 19.301–2(b)(4) remains in the final rule, though it has been renumbered as 19.301–2(b)(2).

10. Rule of Two Is Inconsistent Across Small Business Programs

Comment: One respondent commented that the proposed rule is inconsistent regarding when a total set-aside, partial set-aside, or reserve is appropriate. Specifically, the respondent commented that FAR 19.502–2(a), 19.502–3(a)(4), 19.502–4(a)(4), and 19.503 in the proposed rule each referred to the ''rule of two'' using different terminology (*e.g.,* ''fair market price'', ''quality'', ''delivery''). The respondent recommended that the ''rule of two'' be referenced consistently across total set-asides, partial set-asides, and reserves.

Response: The Councils reviewed the proposed language that was identified by the respondent as inconsistent and have amended the final rule at FAR 19.502–3(a)(4), 19.502–4(a)(4), and 19.503(a)(1) such that it is congruent with the ''rule of two'' terminology used at FAR 19.502–2(a), which most closely matches the ''rule of two'' in the Small Business Act (15 U.S.C. 644(j)(1)).

11. Small Disadvantaged Business Set-Asides

Comment: One respondent asked if the rule will address small disadvantaged business set-asides.

Response: The rule will not address small disadvantaged business set asides. The Councils note that the FAR rule is consistent with SBA's regulation, which does not include a small disadvantaged business set-aside program. All small businesses who participate in SBA's 8(a) Business Development (BD) program are small disadvantaged businesses. Set-asides and reserves under the 8(a) BD program are addressed in this rule.

12. Technical Edits

a. Baseline Edits

Comment: One respondent suggested revising the text at FAR 19.804–6 to include updates made in FAC 2005–95, which was published January 13, 2017 at 82 FR 4708.

Response: This final rule has been updated to include all recently published changes to the FAR.

b. Conforming Edits

Comment: One respondent pointed out that the provision at FAR 52.212–3, Offeror Representations and Certifications—Commercial Items, was not changed to conform with changes made to the provision at FAR 52.219–1, Small Business Program Representations. The respondent recommended the Councils make conforming changes to FAR 52.212–3.

Response: The Councils agree that conforming changes are needed. Therefore, in the final rule, the provision at FAR 52.212–3 has been revised to allow for the use of multiple NAICS codes.

c. Edits Regarding Full and Open Multiple-Award Contracts

Comment: One respondent suggested removing references to 8.405–5 and 16.505(b)(2)(i)(F) throughout the text and replacing them with the phrase ''full and open multiple-award contract.'' The respondent considered this revision to be necessary because the proposed language assumed every multiple-award contract awarded under FAR subpart 16.5 and FAR part 38 would be awarded on a full and open basis.

Response: The Councils reviewed the areas of the rule identified by the respondent and found no evidence of an assumption that every multiple-award contract awarded under FAR subpart 16.5 and FAR part 38 would be awarded on a full and open basis. Therefore, the suggested revisions have not been included in the final rule.

d. Revision to Definition of ''HUBZone order''

Comment: One respondent suggested a revision to the proposed definition of ''HUBZone order'' at FAR 2.101 to remove the phrase, ''which had been awarded under full and open competition.'' The respondent suggested the revision because a multiple-award contract can be set aside for small business at the contract level and can be awarded to small businesses that may also meet the requirements for various socioeconomic programs, including the HUBZone Program. The respondent requested clarification regarding whether the FAR Council intended to disallow set-asides of orders under such contracts for the HUBZone Program or other socioeconomic programs.

Response: The Councils have determined that a definition of ''HUBZone order'' is unnecessary for this rule and have deleted all use of the term ''HUBZone order'' from the rule.

e. Edit to FAR Subpart 16.5

Comment: One respondent commented that the proposed rule changes the dollar value in the heading of FAR 16.505(b)(6) from ''$5.5 million'' to ''$5 million.'' The respondent pointed out that there is no corresponding change to the text of FAR 16.505(b)(6). This paragraph instructs contracting officers to notify unsuccessful awardees when an order exceeds $5.5 million.

Response: The Councils did not intend to change the dollar value in the heading of FAR 16.505(b)(6). This inadvertent change has been corrected in the final rule.

f. Edit Regarding Contracting Officer Discretion

Comment: One respondent suggested adding the phrase ''at their discretion'' after ''contracting officers may'' at FAR 19.502–4(a). The rationale was that the phrase appears in the statute and in FAR 19.503.

Response: The Councils have adopted the respondent's recommendation at 19.502–4(a) where the text cites section 1331. However, for the clause at 52.219–32, the Councils have removed ''at his or her discretion'' since there is no reference to section 1331 and the FAR already uses the word ''may'' to indicate a discretionary action, *i.e.,* an action that contracting officers have the discretion to perform or not perform.

13. Federal Data Systems Concerns

Comment: Two respondents voiced concerns with potential delays to the implementation of the rule due to necessary system upgrades to Federal data systems (*e.g.,* Federal Procurement Data System (FPDS) and FedBizOpps (FBO)).

Response: The only portion of the rule that is not expected to be implemented in time for publication of the rule is the requirement associated with assigning multiple NAICS codes to some multiple-award contracts. As a result, the rule has been revised to reflect that the requirement to assign multiple NAICS codes will apply after October 1, 2022, which is when the Councils expect a Governmentwide system solution to capture and reflect this information.

14. Requiring Documentation for Partial Set-Aside

Comment: One respondent recommended making it clear that the contracting officer must document the rationale for any part of a multiple-award contract that is not partially set aside or for any awards not reserved for small businesses. The respondent asserts that a literal reading of FAR 19.506(a)(2) could result in the interpretation that, as long as any part of a multiple-award contract is partially set-aside, no such documentation requirement exists for the remaining non-set aside parts of that contract.

Response: The Councils reviewed the area of the rule identified by the respondent and made a clarification at 19.506(a)(1). When a contract is not totally set aside for small business in accordance with 19.502–2, documentation of the rationale is required.

C. Other Changes

This final rule contains editorial changes in order to (1) ensure the rule reflects revisions to the current version of the FAR; (2) provide greater clarity; and (3) conform to the significant changes made in the final rule. These changes include removal of the obsolete term ''performance of work requirements,'' clarification that ''orders'' refers to ''task and delivery'' orders, deletion of a paragraph in section 19.501, as well as relocation of text within a section.

III. Applicability to Acquisitions not Greater Than the Simplified Acquisition Threshold, Commercial Items, and Commercially Available Off-the-Shelf Items

The Federal Acquisition Regulatory Council has made determinations, in accordance with 41 U.S.C. 1905 and 41 U.S.C. 1906, that the rule will apply to acquisitions at or below the simplified acquisition threshold (SAT) and acquisitions of commercial items. Discussion of these determinations is set forth below.

The rule will also apply to acquisitions for commercially available off-the-shelf (COTS) items. As explained below, no determination is necessary by the FAR Council in connection with applicability to COTS items, because 41 U.S.C. 1907 requires that a law be applied to the acquisition of COTS items if the law concerns authorities or responsibilities under 15 U.S.C. 644 (in the Small Business Act). The statute being implemented in this final rule involved a change to 15 U.S.C. 644.

A. Applicability to Contracts at or Below the SAT

41 U.S.C. 1905 governs the applicability of laws to contracts at or below the SAT. Section 1905 generally limits the applicability of new laws when agencies are making contracts at or below the SAT, but provides that such contracts will not be exempt from a provision of law if—

- The law contains criminal or civil penalties,
- The law specifically refers to 41 U.S.C. 1905 and states that the law applies to contracts and subcontracts in amounts not greater than the SAT, or
- The Federal Acquisition Regulatory Council (FAR Council) makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts and subcontracts in amounts not greater that the SAT from the provision of law.

Section 1331 of the Jobs Act is silent on the applicability of the requirements set forth above to contracts at or below the SAT and does not provide for criminal or civil penalties. Therefore, under 41 U.S.C. 1905, section 1331 does not apply to contracts at or below the SAT unless the FAR Council makes a written determination that such application is in the best interest of the Federal Government.

The FAR Council has made a determination that applicability of the final rule to contracts not greater than the SAT is in the best interest of the Government for the following reasons. Contracts not greater than the SAT are often well suited for performance by small businesses. While few, if any, multiple-award contracts are likely to be in values at or below the SAT, a very significant portion of orders made under multiple-award contracts could fall at or below the SAT. In addition, as a result of current legal and regulatory requirements applicable to contracts other than multiple-award contracts that call for work at or below the SAT to be set aside for small businesses, most agency practices are already geared towards taking advantage of this important tool in connection with small dollar purchases to maximize small business participation.

B. Applicability to Contracts for the Acquisition of Commercial Items

41 U.S.C. 1906 governs the applicability of laws to the acquisition of commercial items (other than COTS items). Section 1906 generally limits the applicability of new laws when agencies are acquiring commercial items, but provides that such acquisitions will not be exempt from a provision of law if—

- The law contains criminal or civil penalties;
- The law specifically refers to 41 U.S.C. 1906 and states that the law applies to the acquisition of commercial items; or
- The FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt the acquisition of commercial items from the provision of law.

Section 1331 of the Jobs Act is silent on the applicability of its requirements to contracts for commercial items and does not provide for criminal or civil penalties. Therefore, under 41 U.S.C. 1906, section 1331 does not apply to acquisitions for commercial items unless the FAR Council makes a written determination that such application is in the best interest of the Federal Government.

In making its determination of whether application of section 1331 to commercial items is in the best interest of the Federal Government, the FAR Council considered the following factors: (i) The benefits of the policy in furthering Administration goals, (ii) the extent to which the benefits of the policy would be reduced if an exemption is provided for commercial items, and (iii) the burden on contractors if the policy is applied to acquisitions for commercial items.

With respect to the first factor, this Administration has recognized the important nexus between maximizing small business participation in Federal contracting and having effective tools to promote such participation under multiple-award contracts, including the Federal Supply Schedules, through which a significant portion of Federal contract spending flows. The Interagency Task Force on Small Business Contracting, created in 2010 to identify meaningful ways to strengthen small business contracting, recommended that rules on set-asides for multiple-award contracts be clarified. In support of its recommendation, the Task Force noted that set-asides accounted for a substantial portion of all small business contract awards yet ''there has been no attempt to create a comprehensive policy for orders placed under either general task-and-delivery-order contracts or schedule contracts that rationalizes and appropriately balances the need for efficiency with the need to maximize opportunities for small businesses''. Shortly after the Task Force released its recommendations, the Jobs Act was enacted to protect the interests of small businesses and expand their opportunities in the Federal marketplace. In addition, as explained

in the Background section of this notice, DoD, GSA, and NASA published an interim rule, with SBA's concurrence, to provide general guidance ahead of SBA providing more specific guidance in its regulations. This action allowed agencies to begin taking advantage of these impactful tools instead of being required to wait until more detailed changes were promulgated. In short, the FAR Council believes these tools provide an important benefit in helping agencies to carry out the purposes of the Small Business Act and in helping the Government meet its small business contracting goals.

With respect to the second factor (the impact of excluding commercial item acquisitions on the overall benefits of the underlying policy), the FAR Council thinks, based on an analysis of FPDS data, that a significant amount of spending on new contracts is for commercial item acquisitions and a substantial amount of these activities (including all the transactions through the Federal Supply Schedules) are for commercial items, many of which can be performed by small businesses. Denying agencies the ability to apply the authorities in section 1331 to commercial item acquisitions could result in many missed opportunities for capable small business contractors seeking work in the Federal marketplace. For these reasons, the FAR Council believes exclusion could have a material negative impact.

With respect to the third factor, burden on contractors selling commercial items, there are no specific systems costs imposed by the rule and reporting costs are minimal (see discussion on the Paperwork Reduction Act under section VI).

Accordingly, for the reasons set forth above, the FAR Council has made a determination that it is in the best interest of the Government to apply section 1331 to commercial item acquisitions.

C. Applicability to Contracts for the Acquisition of COTS Items

41 U.S.C. 1907 governs the applicability of laws to the acquisition of COTS items. Section 1907 generally limits the applicability of new laws when agencies are acquiring COTS items, but provides that such acquisitions will not be exempt from a provision of law if—

- The law contains criminal or civil penalties;
- The law specifically refers to 41 U.S.C. 1907 and states that the law applies to the acquisition of COTS items;
- The law concerns authorities or responsibilities under 15 U.S.C. 644 (in the Small Business Act) or bid procedures; or
- The Administrator for Federal Procurement Policy makes a written determination that it is not in the best interest of the Federal Government to exempt the acquisition of COTS items from the provision of law.

Section 1331 amends section 15 of the Small Business Act (15 U.S.C. 644) to address the use of partial set-asides, order set-asides, and reserves under multiple-award contracts. For this reason, the rule applies to acquisitions of COTS items.

IV. Expected Impact of the Rule

This final rule is expected to benefit small business by providing contracting officers with additional guidance on tools with which to encourage small business participation in multiple-award contracts. Multiple-award contracts are commonly used in Federal procurement due to their inherent flexibility, competitive nature, and administrative efficiency. They have proven to be an effective means of contracting for large quantities of supplies and services for which the quantity and delivery requirements cannot be precisely determined at contract award. While the authority to use the tools described below has been in the FAR for several years, there was minimal guidance available for contracting officers on how to use the tools. This rule provides more guidance for contracting officers on how to—

1. Set aside part or parts of multiple-award contracts for small business;
2. Set aside orders under multiple-award contracts, notwithstanding the statutory requirement to provide contract holders fair opportunity to be considered; and
3. Reserve one or more awards for small business on multiple-award contracts that are established through full and open competition (*i.e.,* not totally or partially set aside).

The use of reserves is expected to increase opportunities for small business. Reserves allow small business concerns to have a ''seat at the table'' for multiple-award contracts in the absence of other acquisition strategies (*e.g.,* total or partial set-asides) that would have guaranteed opportunity for small business concerns.

In addition, this rule is expected to benefit small business by removing the current requirement for small business offerors to submit an offer for both the set-aside and non-set-aside portions of a partial set-aside. That requirement was burdensome for small business concerns looking to perform only the set-aside portion(s). This final rule allows small business offerors to submit an offer for only the set-aside portion if they are only interested in performing that portion. By allowing small business offerors to only submit an offer for the set-aside portion, the Government is expected to have fewer proposals to evaluate for the non-set-aside portion of the solicitation, which would result in a reduction in burden. However, there may be additional proposals received on the set-aside portion of the solicitation from offerors that previously did not submit a proposal for the requirement because they would have had to submit a proposal for all portions of the solicitation.

When awarding task or delivery orders, contracting officers currently rely on a contractor's representation of size and socioeconomic status for the multiple-award contract. This rule gives contracting officers discretion to require rerepresentation of business size or socioeconomic status for an order under a multiple-award contract. There are costs involved when a small business concern is required to represent its small business size or socioeconomic status. However, rerepresentation for orders is expected to help ensure those orders are awarded to businesses that have the required size or socioeconomic status.

Other impacts of this final rule include the following:

- The rule provides contracting officers with the authority to issue orders directly to a small business under a reserve, which will increase opportunities for small business concerns awarded a contract under a multiple-award contract reserve but will result in lost opportunity for the other contractors with awards on the multiple-award contract.
- This rule removes the ability of interested parties to protest sole source awards under the service-disabled veteran-owned small business program. There is a potential lost benefit to the interested parties who lose the ability to protest, but there are benefits to the contractors who win these awards as they will no longer be required to expend resources defending challenges to the award.
- Currently contracting officers assign only one North American Industry Classification System (NAICS) code to a multiple-award contract. This rule requires certain multiple-award contracts to be assigned more than one NAICS code. Some contractors may qualify as small under the size standards associated with one or more of the NAICS codes assigned to a

particular contract and also may qualify as other than small for other NAICS codes assigned to the same contract. Therefore, some contractors may need to negotiate and manage a small business subcontracting plan either for the portion of a multiple-award contract for which they are other than small, or for the entirety of the contract, at the contractor's discretion, while other contractors may no longer require a subcontracting plan because the value of the portion of the contract for which they are other than small is too small to require a subcontracting plan.

• Contracting officers currently verify compliance with the limitations on subcontracting at the contract level for multiple-award contracts that are set aside for a small business program. This rule requires contracting officers to specify the compliance period for the limitations on subcontracting at either the contract or order level. There is no data from which to estimate the number of contracts that would require compliance at the order level. Additionally it is unclear whether compliance at the contract level or the order level would benefit or burden industry. Public comments in response to SBA's proposed rule indicated small businesses did not support compliance at the order level because it is not always possible for every order and could reduce competition for orders that required compliance at the order level.

• This rule prohibits tiered evaluation of offers on multiple-award contracts unless the agency has statutory authority. Tiered evaluations allow the Government to evaluate offers at each tier (*e.g.,* service-disabled veteran-owned small business) and only evaluate offers at the next tier (*e.g.,* small business) if an award cannot be made at the previous tier; it reduces the number of offers that must be evaluated. There is no data available on the number of times contracting officers use tiered evaluations annually or whether these contracting officers are at agencies that have statutory authority to conduct tiered evaluations. Therefore, this change probably will result in an increased burden to the Government.

These changes drive both costs and savings that are the result of the implementation of SBA's final rule in the FAR. Therefore, these costs and savings are attributable to the SBA final rule. The impacts of this final FAR rule that are attributable to the FAR are no more than de minimis. To access the full Regulatory Cost Analysis for this rule, go to the Federal eRulemaking Portal at *www.regulations.gov,* search for ''FAR Case 2014–002,'' click ''Open Docket,'' and view ''Supporting Documents.''

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

VI. Executive Order 13771

This rule is not subject to the requirements of E.O. 13771 because this rule results in no more than de minimis costs.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

This final rule amends the FAR to provide uniform guidance consistent with SBA's final rule at 78 FR 61114, published on October 2, 2013, which implements section 1331 of the Small Business Jobs Act of 2010 (15 U.S.C. 644(r)). The objective of this rule is to provide regulatory guidance under which Federal agencies may—

(1) Set aside part or parts of multiple-award contracts for small business;

(2) Reserve one or more awards for small businesses on multiple-award contracts that are established through full and open competition; and

(3) Set aside orders under multiple-award contracts, notwithstanding the fair opportunity requirements.

The rule seeks to ensure the increased consideration of small businesses in connection with the establishment and use of multiple-award contracts. This rule provides a balance between the benefits associated with multiple-award contracts and maximizing opportunities for small businesses.

There were no significant issues raised by the public in response to the Initial Regulatory Flexibility Analysis provided in the proposed rule.

This rule may have a positive economic impact on any small business entity that wishes to participate in the Federal procurement arena. By providing clarification and additional guidance on the use of the section 1331 authorities, small businesses are expected to have greater access to multiple-award contracts, including orders issued against such contracts. Analysis of the System for Award Management (SAM) indicates there are over 338,327 small business registrants that can potentially benefit from the implementation of this rule.

This rule contains an information collection requirement. Contracting officers may, at their discretion, require contractors under a multiple-award contract to rerepresent their size and socioeconomic status on individual task or delivery orders. The reporting burden associated with OMB Control Number 9000–0163 was increased by 885 hours to account for this rule's information collection requirement. The burden calculations estimated that 590 small business contractors would be required to rerepresent their size and status on orders annually.

This rule does not impose any new recordkeeping or other compliance requirements.

This rule is not expected to have a negative impact on any small business entity.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of SBA.

VIII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies. The rule contains an information collection requirement. OMB has cleared this information collection requirement under OMB Control Number 9000–0163, titled: Small Business Size Rerepresentation, in the amount of 1,985 burden hours. No comments were received on the information collection requirement that was provided in the proposed rule; however, due to the use of more current data to calculate the burden, revisions were made to the burden estimate associated with the collection. The burden hours for 9000–0163 include both existing information collection requirements associated with rerepresentations, as well as the new information collection requirement in this rule.

List of Subjects in 48 CFR Parts 2, 4, 7, 8, 9, 10, 13, 15, 16, 19, 42, and 52

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Interim Rule Adopted as Final With Changes

Accordingly, the interim rule amending 48 CFR parts 8, 12, 16, 19, 38, and 52, which was published in the **Federal Register** at 76 FR 68032 on

November 2, 2011, is adopted as final with the following changes:

■ 1. The authority citation for 48 CFR parts 2, 4, 7, 8, 9, 10, 13, 15, 16, 19, 42 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2) by adding paragraph (4) to the definition ''HUBZone contract'' to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

HUBZone contract * * *

(4) Awards based on a reserve for HUBZone small business concerns in a solicitation for a multiple-award contract.

* * * * *

PART 4—ADMINISTRATIVE AND INFORMATION MATTERS

4.803 [Amended]

■ 3. Amend section 4.803 in paragraph (a)(6) by removing ''decision'' and adding ''decision (see 19.506)'' in its place.

■ 4. Amend section 4.1202 by revising paragraphs (a) introductory text and (a)(14) to read as follows:

4.1202 Solicitation provision and contract clause.

(a) Insert the provision at 52.204–8, Annual Representations and Certifications, in solicitations, except for commercial item solicitations issued under FAR part 12. The contracting officer shall check the applicable provisions at 52.204–8(c)(2). Use the provision with its Alternate I in solicitations issued after October 1, 2022, that will result in a multiple-award contract with more than one North American Industry Classification System code assigned (see 19.102(b)). When the provision at 52.204–7, System for Award Management, is included in the solicitation, do not separately include the following representations and certifications:

* * * * *

(14) 52.219–1, Small Business Program Representations (Basic, Alternates I, and II).

* * * * *

PART 7—ACQUISITION PLANNING

7.104 [Amended]

■ 5. Amend section 7.104 by removing from the first sentence of paragraph (d) ''entirely reserved or'' and adding ''totally'' in its place.

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

8.404 [Amended]

■ 6. Amend section 8.404 in the first sentence in paragraph (a) by removing ''requirement at 19.202–1(e)(1)(iii))'' and adding ''requirements at 19.102(b)(3) and 19.202–1(e)(1)(iii))'' in its place.

■ 7. Amend section 8.405–5 in the first sentence of paragraph (b) by removing ''against'' and adding ''under'' in its place and revising the second and last sentences.

The revisions read as follows:

8.405–5 Small business.

* * * * *

(b) * * * For purposes of reporting an order placed with a small business schedule contractor, an ordering agency may only take credit if the awardee meets a size standard that corresponds to the North American Industry Classification System code assigned to the order in accordance with 19.102(b)(3). Ordering activities should rely on the small business representations made by schedule contractors at the contract level (but see section 19.301–2(b)(2) concerning rerepresentation for an order).

* * * * *

PART 9—CONTRACTOR QUALIFICATIONS

■ 8. Amend section 9.104–3 by revising paragraph (d)(2) to read as follows:

9.104–3 Application of standards.

* * * * *

(d) * * *

(2) A small business that is unable to comply with the limitations on subcontracting may be considered nonresponsible (see 52.219–3, Notice of HUBZone Set-Aside or Sole Source Award; 52.219–4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns; 52.219–14, Limitations on Subcontracting; 52.219–27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside; 52.219–29, Notice of Set-Aside for, or Sole Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns; and 52.219–30, Notice of Set-Aside for, or Sole Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program). A small business that has not agreed to comply with the limitations on subcontracting may be considered nonresponsive.

PART 10—MARKET RESEARCH

■ 9. Amend section 10.001 by—

■ a. Removing from paragraph (a)(3)(vii) ''and'';

■ b. Redesignating paragraph (a)(3)(viii) as paragraph (a)(3)(ix);

■ c. Adding new paragraph (a)(3)(viii); and

■ d. Removing from newly designated paragraph (a)(3)(ix) ''Subpart 39.2'' and adding ''subpart 39.2'' in its place.

The addition reads as follows:

10.001 Policy.

(a) * * *

(3) * * *

(viii) Determine whether the acquisition should utilize any of the small business programs in accordance with part 19; and

* * * * *

■ 10. Amend section 10.002 by revising paragraph (b)(1)(vii) and adding paragraph (b)(2)(ix) to read as follows:

10.002 Procedures.

* * * * *

(b) * * *

(1) * * *

(vii) Whether the Government's needs can be met by small business concerns that will likely submit a competitive offer at fair market prices (see part 19).

(2) * * *

(ix) Reviewing systems such as the System for Award Management, the Federal Procurement Data System, and the Small Business Administration's Dynamic Small Business Search.

* * * * *

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

13.003 [Amended]

■ 11. Amend section 13.003 in paragraph (b)(1) by removing ''are reserved exclusively for small business concerns and'' and by removing ''shall be set aside'' and adding in its place ''shall be set aside for small business concerns''.

PART 15—CONTRACTING BY NEGOTIATION

15.101–3 [Added]

■ 12. Add section 15.101–3 to read as follows:

15.101–3 Tiered evaluation of small business offers.

An agency shall not create a tiered (or ''cascading'') evaluation of offers, as

described in 13 CFR 125.2, for multiple-award contracts unless an agency has statutory authority.

PART 16—TYPES OF CONTRACTS

■ 13. Amend section 16.500 by adding paragraph (e) to read as follows:

16.500 Scope of subpart.

* * * * *

(e) See subpart 19.5 for procedures to set aside part or parts of multiple-award contracts for small businesses; to reserve one or more awards for small business on multiple-award contracts; and to set aside orders for small businesses under multiple-award contracts.

■ 14. Amend section 16.505 by—
■ a. Adding paragraphs (a)(7)(ix) and (a)(10)(iii);
■ b. Revising paragraphs (b)(1)(i) and (b)(4);
■ c. Adding a paragraph (b)(5) subject heading;
■ d. Revising the paragraph (b)(6) subject heading; and
■ e. Adding paragraph (b)(9).

The revisions and additions read as follows:

16.505 Ordering.

(a) * * *

(7) * * *

(ix) North American Industry Classification System code (see 19.102(b)(3)).

* * * * *

(10) * * *

(iii) For protests of small business size status for set-aside orders, see 19.302.

* * * * *

(b) * * *

(1) * * *

(i) The contracting officer must provide each awardee a fair opportunity to be considered for each order exceeding $3,500 issued under multiple delivery-order contracts or multiple task-order contracts, except—

(A) As provided for in paragraph (b)(2) of this section; or

(B) Orders issued under 19.504(c)(1)(ii).

* * * * *

(4) *Cost reimbursement orders.* For additional requirements for cost-reimbursement orders, see 16.301–3.

(5*) Time-and-materials or labor-hour orders.* * * *

(6) *Postaward notices and debriefing of awardees for orders exceeding $5.5 million.* * * *

* * * * *

(9) *Small business.* The contracting officer should rely on the small business representations at the contract level (but see section 19.301–2(b)(2) for order rerepresentations).

* * * * *

PART 19—SMALL BUSINESS PROGRAMS

■ 15. Amend section 19.000 by—
■ a. Removing from paragraph (a)(3) ''aside'' and adding ''aside, in total or in part,'' in its place;
■ b. Removing from paragraph (a)(8) ''and'';
■ c. Removing the period at the end of paragraph (a)(9) and adding ''; and'' in its place; and
■ d. Adding paragraph (a)(10).

The addition reads as follows:

19.000 Scope of part.

(a) * * *

(10) The use of reserves.

* * * * *

■ 16. Amend section 19.001 by removing the definition ''Nonmanufacturer rule'' and adding in alphabetical order a definition for ''Nonmanufacturer''.

The addition reads as follows:

19.001 Definitions.

* * * * *

Nonmanufacturer means a concern that furnishes a product it did not manufacture or produce (see 13 CFR 121.406).

■ 17. Revise section 19.102 to read as follows:

19.102 Small business size standards and North American Industry Classification System codes.

(a) *Locating size standards and North American Industry Classification System codes.* (1) SBA establishes small business size standards on an industry-by-industry basis. Small business size standards and corresponding North American Industry Classification System (NAICS) codes are provided at 13 CFR 121.201. They are also available at *https://www.sba.gov/content/table-small-business-size-standards.*

(2) NAICS codes are updated by the Office of Management and Budget through its Economic Classification Policy Committee every five years. New NAICS codes are not available for use in Federal contracting until SBA publishes corresponding size standards. NAICS codes are available from the U.S. Census Bureau at *https://www.census.gov/eos/www/naics/.*

(b) *Determining the appropriate NAICS codes for the solicitation.* (1) Unless required to do otherwise by paragraph (b)(2)(ii)(B) of this section, contracting officers shall assign one NAICS code and corresponding size standard to all solicitations, contracts, and task and delivery orders. The contracting officer shall determine the appropriate NAICS code by classifying the product or service being acquired in the one industry that best describes the principal purpose of the supply or service being acquired. Primary consideration is given to the industry descriptions in the U.S. NAICS Manual, the product or service descriptions in the solicitation, the relative value and importance of the components of the requirement making up the end item being procured, and the function of the goods or services being purchased. A procurement is usually classified according to the component that accounts for the greatest percentage of contract value.

(2)(i) For solicitations issued on or before October 1, 2022, that will result in multiple-award contracts, the contracting officer shall assign a NAICS code in accordance with paragraph (b)(1) of this section.

(ii) For solicitations issued after October 1, 2022, that will result in multiple-award contracts, the contracting officer shall—

(A) Assign a single NAICS code (and corresponding size standard) that best describes the principal purpose of both the acquisition and each subsequent order; or

(B) Divide the acquisition into distinct portions or categories (*e.g.,* line item numbers, Special Item Numbers, sectors, functional areas, or equivalent) and assign each portion or category a single NAICS code and size standard that best describes the principal purpose of the supplies or services to be acquired under that distinct portion or category.

(3)(i) When placing orders under multiple-award contracts with a single NAICS code, the contracting officer shall assign the order the same NAICS code and corresponding size standard designated in the contract.

(ii) When placing orders under multiple-award contracts with more than one NAICS code, the contracting officer shall assign the order the NAICS code and corresponding size standard designated in the contract for the distinct portion or category against which the order is placed. If an order covers multiple portions or categories, select the NAICS code and corresponding size standard designated in the contract for the distinct portion or category that best represents the principal purpose of the order.

(4) The contracting officer's designation is final unless appealed in accordance with the procedures in 19.103.

(c) *Application of small business size standards to solicitations.* (1) The contracting officer shall apply the size

standard in effect on the date the solicitation is issued.

(2) The contracting officer may amend the solicitation and use the new size standard if SBA amends the size standard and it becomes effective before the due date for receipt of initial offers.

■ 18. Add section 19.103 to subpart 19.1 to read as follows:

19.103 Appealing the contracting officer's North American Industry Classification System code and size standard determination.

(a) The contracting officer's determination is final unless appealed as follows:

(1) An appeal of a contracting officer's NAICS code designation and the applicable size standard shall be served and filed within 10 calendar days after the issuance of the initial solicitation or any amendment affecting the NAICS code or size standard. However, SBA may file a NAICS code appeal at any time before offers are due.

(2) Appeals of a contracting officer's NAICS code designation or applicable size standard may be filed with SBA's Office of Hearings and Appeals (OHA) by—

(i) Any person adversely affected by a NAICS code designation or applicable size standard. However, with respect to a particular sole source 8(a) contract, only the SBA Associate Administrator for Business Development may appeal a NAICS code designation; or

(ii) The Associate or Assistant Director for the SBA program involved, through SBA's Office of General Counsel.

(3) Contracting officers shall advise the public, by amendment to the solicitation, of the existence of a NAICS code appeal (see 5.102(a)(1)). Such notices shall include the procedures and the deadline for interested parties to file and serve arguments concerning the appeal.

(4) SBA's OHA will dismiss summarily an untimely NAICS code appeal.

(5) NAICS code appeals are filed in accordance with 13 CFR 121.1103.

(6) Upon receipt of a NAICS code appeal, OHA will notify the contracting officer by a notice and order of the date OHA received the appeal, the docket number, and the Administrative Judge assigned to the case. The contracting officer's response to the appeal, if any, shall include argument and evidence (see 13 CFR part 134), and shall be received by OHA within 15 calendar days from the date of the docketing notice and order, unless otherwise specified by the Administrative Judge. Upon receipt of OHA's docketing notice and order, the contracting officer shall withhold award, unless withholding award is not in the best interests of the Government, and immediately send to OHA an electronic link to or a paper copy of both the original solicitation and all amendments relating to the NAICS code appeal. The contracting officer shall inform OHA of any amendments, actions, or developments concerning the procurement in question.

(7) After close of record, OHA will issue a decision and inform the contracting officer. If OHA's decision is received by the contracting officer before the date the offers are due, the decision shall be final and the solicitation shall be amended to reflect the decision, if appropriate. OHA's decision received after the due date of the initial offers shall not apply to the pending solicitation but shall apply to future solicitations of the same products or services.

(b) SBA's regulations concerning appeals of NAICS code designations are located at 13 CFR 121.1102 to 121.1103 and 13 CFR part 134.

■ 19. Amend section 19.201 by—

■ a. Revising the second sentence of paragraph (c) introductory text;

■ b. Removing from paragraph (c)(1) ''Director of'' and adding ''Director of the Office of'' in its place, in two places; and

■ c. Revising paragraphs (c)(3) and (5) and (d).

The revisions read as follows:

19.201 General policy.

* * * * *

(c) * * * For the Department of Defense, in accordance with section 904 of Public Law 109–163 (10 U.S.C. 144 note), the Office of Small and Disadvantaged Business Utilization has been redesignated as the Office of Small Business Programs.

* * * * *

(3) Is responsible to and reports directly to the agency head or the deputy to the agency head (except that for the Department of Defense, the Director of the Office of Small Business Programs reports to the Secretary or the Secretary's designee);

* * * * *

(5) Works with the SBA procurement center representative (PCR) (or, if a PCR is not assigned, see 19.402(a)) to identify proposed solicitations that involve bundling and work with the agency acquisition officials and SBA to revise the acquisition strategies for such proposed solicitations to increase the probability of participation by small businesses;

* * * * *

(d) Small business specialists shall be appointed and act in accordance with agency regulations.

(1) The contracting activity shall coordinate with the small business specialist as early in the acquisition planning process as practicable, but no later than 30 days before the issuance of a solicitation, or prior to placing an order without a solicitation when the acquisition meets the dollar thresholds set forth at 7.107–4(a)(1). See also 7.104(d).

(2) The small business specialist shall notify the agency's Director of the Office of Small and Disadvantaged Business Utilization, and for the Department of Defense, the Director of the Office of Small Business Programs, when the criteria relating to substantial bundling at 7.107–4(a)(1) are met.

(3) The small business specialist shall coordinate with the contracting activity and the SBA PCR on all determinations and findings required by 7.107 for consolidation or bundling of contract requirements.

■ 20. Revise section 19.202 to read as follows:

19.202 Specific policies.

In order to further the policy in 19.201(a), contracting officers shall comply with the specific policies listed in this section and shall consider recommendations of the agency Director of the Office of Small and Disadvantaged Business Utilization, or for the Department of Defense, the Director of the Office of Small Business Programs, or the Director's designee, as to whether a particular acquisition should be awarded under subpart 19.5, 19.8, 19.13, 19.14, or 19.15. Agencies shall establish procedures including dollar thresholds for review of acquisitions by the Director or the Director's designee for the purpose of making these recommendations. The contracting officer shall document the contract file whenever the Director's recommendations are not accepted, in accordance with 19.506.

■ 21. Amend section 19.202–1 by revising paragraphs (e)(1) introductory text and (e)(4) to read as follows:

19.202–1 Encouraging small business participation in acquisitions.

* * * * *

(e)(1) Provide a copy of the proposed acquisition package and other reasonably obtainable information related to the acquisition to the SBA PCR (or, if a PCR is not assigned, see 19.402(a)) at least 30 days prior to the issuance of the solicitation if—

* * * * *

(4) If the contracting officer rejects the SBA PCR's recommendation made in accordance with 19.402(c)(2), document the basis for the rejection and notify the SBA PCR in accordance with 19.502–8.

■ 22. Amend section 19.202–2 by removing from the introductory paragraph ''must'' and adding ''shall'' in its place and revising paragraph (a).

The revision reads as follows:

19.202–2 Locating small business sources.

* * * * *

(a) Before issuing solicitations, make every reasonable effort to find additional small business concerns (see 10.002(b)(2)). This effort should include contacting the agency small business specialist and SBA PCR (or, if a PCR is not assigned, see 19.402(a)).

* * * * *

19.202–4 [Amended]

■ 23. Amend section 19.202–4 in the introductory text by removing ''must'' and adding ''shall'' in its place; and in paragraph (c) by removing ''bid sets and specifications'' and adding ''solicitations'' in its place.

■ 24. Amend section 19.202–5 in the introductory text by removing ''must'' and adding ''shall'' in its place and by revising paragraph (c)(1).

The revision reads as follows:

19.202–5 Data collection and reporting requirements.

* * * * *

(c) * * *

(1) Require a contractor that represented itself as any of the small business concerns identified in 19.000(a)(3) prior to award of the contract to rerepresent its size and socioeconomic status (*i.e.,* 8(a), small disadvantaged business, HUBZone small business, service-disabled veteran-owned small business, EDWOSB, or WOSB status); and

* * * * *

19.202–6 [Amended]

■ 25. Amend section 19.202–6 in paragraph (a)(1) by removing ''set-asides'' and adding ''set-asides, and reserves'' in its place.

19.203 [Amended]

■ 26. Amend section 19.203 in paragraph (b) by removing ''exclusively reserve'' and adding ''set aside'' in its place.

Subpart 19.3—Determination of Small Business Size and Status for Small Business Programs

■ 27. Revise the heading for subpart 19.3 to read as set forth above.

■ 28. Amend section 19.301–1 by—

■ a. Revising paragraph (a);

■ b. Redesignating paragraphs (b) through (d) as paragraphs (f) through (h); and

■ c. Adding new paragraphs (b) through (d) and paragraph (e).

The revision and additions read as follows:

19.301–1 Representation by the offeror.

(a) To be eligible for award as a small business concern identified in 19.000(a)(3), an offeror is required to represent in good faith—

(1)(i) That it meets the small business size standard corresponding to the North American Industry Classification System (NAICS) code identified in the solicitation; or

(ii) For a multiple-award contract where there is more than one NAICS code assigned, that it meets the small business size standard for each distinct portion or category (*e.g.,* line item numbers, Special Item Numbers (SINs), sectors, functional areas, or the equivalent) for which it submits an offer. If the small business concern submits an offer for the entire multiple-award contract, it must meet the size standard for each distinct portion or category (*e.g.,* line item number, SIN, sector, functional area, or equivalent); and

(2) The Small Business Administration (SBA) has not issued a written determination stating otherwise pursuant to 13 CFR 121.1009.

(b) An offeror is required to represent its size and socioeconomic status in writing to the contracting officer at the time of initial offer, including offers for—

(1) Basic ordering agreements (see 16.703); and

(2) Blanket purchase agreements (BPAs) issued pursuant to part 13.

(c) To be eligible for an award of an order under a basic ordering agreement or a BPA issued pursuant to part 13 as a small business concern identified in 19.000(a)(3), the offeror must be a small business concern identified in 19.000(a)(3) at the time of award of the order.

(d) To be eligible for an award under the HUBZone Program (see subpart 19.13), a HUBZone small business concern must be a HUBZone small business concern both at the time of initial offer and at the time of contract award.

(e) Multiple-award contract representations:

(1) A business that represents as a small business concern at the time of its initial offer for the contract is considered a small business concern for each order issued under the contract (but see 19.301–2 for rerepresentations).

(2) A business that represents as a small business concern at the time of its initial offer for a distinct portion or category as set forth in paragraph (a)(1)(ii) is considered a small business concern for each order issued under that distinct portion or category (but see 19.301–2 for rerepresentations).

* * * * *

■ 29. Amend section 19.301–2 by revising paragraphs (b), (c), and (d) to read as follows:

19.301–2 Rerepresentation by a contractor that represented itself as a small business concern.

* * * * *

(b) A contractor that represented itself as any of the small business concerns identified in 19.000(a)(3) before contract award is required to rerepresent its size and socioeconomic status—

(1) For the NAICS code(s) in the contract—

(i) Within 30 days after execution of a novation agreement or within 30 days after modification of the contract to include the clause at 52.219–28, Post-Award Small Business Program Rerepresentation, if the novation agreement was executed prior to inclusion of this clause in the contract;

(ii) Within 30 days after a merger or acquisition (whether the contractor acquires or is acquired by another company) of the contractor that does not require novation or within 30 days after modification of the contract to include the clause at 52.219–28, Post-Award Small Business Program Rerepresentation, if the merger or acquisition occurred prior to inclusion of this clause in the contract;

(iii) For long-term contracts—

(A) Within 60 to 120 days prior to the end of the fifth year of the contract; and

(B) Within 60 to 120 days prior to the date specified in the contract for exercising any option thereafter; or

(2) For the NAICS code assigned to an order under a multiple-award contract, if the contracting officer requires contractors to rerepresent their size and socioeconomic status for that order.

(c) A contractor is required to rerepresent its size status in accordance with the size standard in effect at the time of its rerepresentation that corresponds to the NAICS code that was initially assigned to the contract. For multiple-award contracts where there is

more than one NAICS code assigned, the contractor is required to rerepresent its size status for each NAICS code assigned to the contract.

(d)(1) *Contract rerepresentation.* After a contractor rerepresents for a contract that it no longer qualifies as a small business concern identified in 19.000(a)(3) in accordance with 52.219–28, the agency may no longer include the value of options exercised, modifications issued, orders issued, or purchases made under BPAs on that contract in its small business prime contracting goal achievements. When a contractor's rerepresentation for a contract qualifies it as a different small business concern identified in 19.000(a)(3) than what it represented for award, the agency may include the value of options exercised, modifications issued, orders issued, or purchases made under BPAs on that contract in its small business prime contracting goal achievements, consistent with the rerepresentation. Agencies should issue a modification to the contract capturing the rerepresentation and report it to FPDS within 30 days after notification of the rerepresentation.

(2) *Rerepresentation for a task or delivery order.* (i) When a contractor rerepresents for an order that it no longer qualifies as a small business concern identified in 19.000(a)(3), the agency cannot include the value of the order in its small business prime contracting goal achievements. When a contractor's rerepresentation for an order qualifies it as a different small business concern identified in 19.000(a)(3) than what it represented for contract award, the agency can include the value of the order in its small business prime contracting goal achievement, consistent with the rerepresentation.

(ii) A rerepresentation for an order does not change the size or socioeconomic status representation for the contract.

* * * * *

■ 30. Amend section 19.302 by revising paragraphs (a) and (b) to read as follows:

19.302 Protesting a small business representation or rerepresentation.

(a)(1) The SBA regulations on small business size and size protests are found at 13 CFR part 121.

(2) An offeror, the contracting officer, SBA, or another interested party may protest the small business representation of an offeror in a specific offer for a contract. However, for competitive 8(a) contracts, the filing of a protest is limited to an offeror, the contracting officer, or the SBA.

(b) Any time after offers are received by the contracting officer, or in the case of bids, opened, the contracting officer may question the small business representation of any offeror in a specific offer by filing a contracting officer's protest (see paragraph (c) of this section).

* * * * *

19.303 [Removed and Reserved]

■ 31. Remove and reserve section 19.303.

■ 32. Amend section 19.307 by removing and reserving paragraph (a) and revising paragraph (b)(1).

The revision reads as follows:

19.307 Protesting a firm's status as a service-disabled veteran-owned small business concern.

* * * * *

(b)(1) For sole source acquisitions, the contracting officer or SBA may protest the apparently successful offeror's service-disabled veteran-owned small business status. For all other acquisitions, any interested party may protest the apparently successful offeror's service-disabled veteran-owned small business status.

* * * * *

■ 33. Amend section 19.309 by adding paragraph (a)(3) and revising paragraph (c) to read as follows:

19.309 Solicitation provisions and contract clauses.

(a) * * *

(3) Use the provision with its Alternate II in solicitations that will result in a multiple-award contract with more than one NAICS code assigned. This is authorized for solicitations issued after October 1, 2022 (see 19.102(b)).

* * * * *

(c)(1) Insert the clause at 52.219–28, Post-Award Small Business Program Rerepresentation, in solicitations and contracts exceeding the micro-purchase threshold when the contract will be performed in the United States or its outlying areas.

(2) Use the clause with its Alternate I in solicitations and the resulting multiple-award contracts with more than one NAICS code. This is authorized for solicitations issued after October 1, 2022 (see 19.102(b)).

■ 34. Amend section 19.401 by revising paragraph (b) to read as follows:

19.401 General.

* * * * *

(b) The Director of the Office of Small and Disadvantaged Business Utilization serves as the agency focal point for interfacing with SBA. The Director of the Office of Small Business Programs is the agency focal point for the Department of Defense.

■ 35. Amend section 19.402 by revising paragraphs (a), (b), and (c) introductory text to read as follows:

19.402 Small Business Administration procurement center representatives.

(a)(1) The SBA may assign one or more procurement center representatives (PCRs) to any contracting activity or contract administration office to carry out SBA policies and programs. Assigned SBA PCRs are required to comply with the contracting agency's directives governing the conduct of contracting personnel and the release of contract information. The SBA must obtain for its PCRs security clearances required by the contracting agency.

(2) If an SBA PCR is not assigned to the procuring activity or contract administration office, contact the SBA Office of Government Contracting Area Office serving the area in which the procuring activity is located for assistance in carrying out SBA policies and programs. See *https://www.sba.gov/federal-contracting/counseling-help/procurement-center-representative-directory* for the location of the SBA office servicing the activity.

(b) Upon their request and subject to applicable acquisition and security regulations, contracting officers shall give SBA PCRs (or, if a PCR is not assigned, see paragraph (a) of this section) access to all reasonably obtainable contract information that is directly pertinent to their official duties.

(c) The duties assigned by SBA to its PCR are set forth at 13 CFR 125.2(b) and include but are not limited to the following:

* * * * *

19.403 [Amended]

■ 36. Amend section 19.403 in paragraph (c)(8) by removing ''in 19.505'' and adding ''in 19.502–8'' in its place.

Subpart 19.5—Small Business Total Set-Asides, Partial Set-Asides, and Reserves

■ 37. Revise the heading of subpart 19.5 to read as set forth above.

■ 38. Revise section 19.501 to read as follows:

19.501 General.

(a)(1) The purpose of small business set-asides is to award certain acquisitions exclusively to small business concerns. A ''set-aside for

small business'' is the limiting of an acquisition exclusively for participation by small business concerns. A small business set-aside may be open to any of the small business concerns identified at 19.000(a)(3). A small business set-aside of a single acquisition or a class of acquisitions may be total or partial.

(2) The purpose of small business reserves is to award one or more multiple-award contracts to any of the small business concerns identified at 19.000(a)(3), under a full and open competition. A small business reserve shall not be used when the acquisition can be set aside, in total or in part.

(b) The contracting officer makes the determination to make a small business set-aside, in total or in part, or a reserve. The Small Business Administration (SBA) procurement center representative (PCR) (or, if a PCR is not assigned, see 19.402(a)) may make a recommendation to the contracting officer.

(c) The contracting officer shall review acquisitions to determine if they can be set aside, in total or in part, or reserved for small business, giving consideration to the recommendations of agency personnel in the Office of Small and Disadvantaged Business Utilization, or for the Department of Defense, in the Office of Small Business Programs. Agencies may establish threshold levels for this review depending upon their needs.

(d) At the request of an SBA PCR (or, if a PCR is not assigned, see 19.402(a)), the contracting officer shall make available for review at the contracting office (to the extent of the SBA representative's security clearance) all proposed acquisitions in excess of the micro-purchase threshold that have not been unilaterally set aside for small business.

(e) All solicitations involving set-asides, in total or in part, or reserves shall specify the NAICS code(s) and corresponding size standard(s) (see 19.102).

(f) Except as authorized by law, a contract may not be awarded as a result of a small business set-aside if the cost to the awarding agency exceeds the fair market price.

(g) For the applicability of the limitations on subcontracting and the nonmanufacturer rule, see 19.505.

■ 39. Amend section 19.502–1 by—

■ a. Removing from paragraph (a)(1) ''Nations'' and adding ''Nation's'' in its place;

■ b. Removing from paragraph (a)(2) ''category''; and

■ c. Revising paragraph (b).

The revision reads as follows:

19.502–1 Requirements for setting aside acquisitions.

* * * * *

(b) This requirement does not apply to purchases of $3,500 or less ($20,000 or less for acquisitions as described in 13.201(g)(1)), or purchases from required sources under part 8 (*e.g.,* Committee for Purchase From People Who are Blind or Severely Disabled).

■ 40. Amend section 19.502–2 by revising paragraphs (a) and (b)(1) and (2) and removing paragraph (c).

The revisions read as follows:

19.502–2 Total small business set-asides.

(a) Before setting aside an acquisition under this paragraph, refer to 19.203(b). Each acquisition of supplies or services that has an anticipated dollar value exceeding $3,500 ($20,000 for acquisitions as described in 13.201(g)(1)), but not over $150,000 ($750,000 for acquisitions described in paragraph (1)(i) of the simplified acquisition threshold definition at 2.101), shall be set aside for small business unless the contracting officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of fair market prices, quality, and delivery. If the contracting officer receives only one acceptable offer from a responsible small business concern in response to a set-aside, the contracting officer should make an award to that firm. If the contracting officer receives no acceptable offers from responsible small business concerns, the set-aside shall be withdrawn and the requirement, if still valid, shall be resolicited on an unrestricted basis. The small business set-aside does not preclude the award of a contract as described in 19.203.

(b) * * *

(1) Offers will be obtained from at least two responsible small business concerns; and

(2) Award will be made at fair market prices. Total small business set-asides shall not be made unless such a reasonable expectation exists (see 19.502–3 for partial set-asides). Although past acquisition history and market research of an item or similar items are always important, these are not the only factors to be considered in determining whether a reasonable expectation exists. In making research and development small business set-asides, there must also be a reasonable expectation of obtaining from small businesses the best scientific and technological sources consistent with the demands of the proposed acquisition for the best mix of cost, performances, and schedules.

■ 41. Revise section 19.502–3 to read as follows:

19.502–3 Partial set-asides of contracts other than multiple-award contracts.

(a) The contracting officer shall set aside a portion or portions of an acquisition, except for construction, for exclusive small business participation when—

(1) Market research indicates that a total set-aside is not appropriate (see 19.502–2);

(2) The requirement can be divided into distinct portions;

(3) The acquisition is not subject to simplified acquisition procedures;

(4) Two or more responsible small business concerns are reasonably expected to submit offers on the set-aside portion or portions of the acquisition that are competitive in terms of fair market prices, quality, and delivery;

(5) The specific program eligibility requirements identified in this part apply; and

(6) The solicitation will result in a contract other than a multiple-award contract (see 2.101 for definition of multiple-award contract).

(b) When the contracting officer determines that a requirement is to be partially set aside, the solicitation shall identify which portion or portions are set aside and not set aside.

(c) The contracting officer shall specify in the solicitation how offers shall be submitted with regard to the set-aside and non-set-aside portions.

(d) Offers received from concerns that do not qualify as small business concerns shall be considered nonresponsive and shall be rejected on the set-aside portion of partial set-asides. However, before rejecting an offer otherwise eligible for award because of questions concerning the size representation, an SBA determination must be obtained (see subpart 19.3).

■ 42. Revise section 19.502–4 to read as follows:

19.502–4 Partial set-asides of multiple-award contracts.

(a) In accordance with section 1331 of the Small Business Jobs Act of 2010 (15 U.S.C. 644(r)(1)), contracting officers may, at their discretion, set aside a portion or portions of a multiple-award contract, except for construction, for any of the small business concerns identified at 19.000(a)(3) when—

(1) Market research indicates that a total set-aside is not appropriate (see 19.502–2);

(2) The requirement can be divided into distinct portions;

(3) The acquisition is not subject to simplified acquisition procedures;

(4) Two or more responsible small business concerns are reasonably expected to submit an offer on the set-aside portion or portions of the acquisition that are competitive in terms of fair market prices, quality, and delivery; and

(5) The specific program eligibility requirements identified in this part apply.

(b) When the contracting officer determines that a requirement is to be partially set aside, the solicitation shall identify which portion or portions are set aside and not set aside.

(c) The contracting officer shall specify in the solicitation how offers shall be submitted with regard to the set-aside and non-set-aside portions.

(d) Offers received from concerns that do not qualify as small business concerns shall be considered nonresponsive and shall be rejected on the set-aside portion of partial set-asides. However, before rejecting an offer otherwise eligible for award because of questions concerning the size representation, an SBA determination must be obtained (see subpart 19.3).

19.502–5 [Removed]

■ 43. Remove section 19.502–5.

19.502–6 [Redesignated as 19.502–5]

■ 44. Redesignate section 19.502–6 as section 19.502–5 and revise the heading to read as follows:

19.502–5 Insufficient reasons for not setting aside an acquisition.

* * * * *

19.503 thru 19.507 [Redesignated as 19.502–6 thru 19.502–10]

■ 45. Redesignate sections 19.503 through 19.507 as sections 19.502–6 through 19.502–10.

19.502–6 [Amended]

■ 46. Amend newly designated section 19.502–6 by—

■ a. Removing from paragraph (c)(2) ''reserved for small business concerns'' and adding ''set aside'' in its place; and

■ b. Removing from paragraph (d) ''(see 19.506(a))'' and the two occurrences of ''procurement center representative'' and adding ''(see 19.502–9(a))'' and ''PCR'' twice in their places.

■ 47. Amend newly designated section 19.502–8 by—

■ a. Revising paragraph (a); and

■ b. Removing from paragraph (b) the two occurrences of ''procurement center representative'' and adding ''PCR'' in their places and removing the two occurrences of ''(or designee)''.

The revision reads as follows:

19.502–8 Rejecting Small Business Administration recommendations.

(a) If the contracting officer rejects a recommendation of the SBA, written notice shall be furnished to the appropriate SBA representative within 5 working days of the contracting officer's receipt of the recommendation.

* * * * *

■ 48. Amend newly designated section 19.502–9 by revising paragraph (a) and removing from paragraph (b) ''SBA representative'' and ''procurement center representative'' and adding ''SBA PCR'' and ''PCR'' in their places, respectively. The revision reads as follows:

19.502–9 Withdrawing or modifying small business set-asides.

(a) If, before award of a contract involving a total or partial small business set-aside, the contracting officer considers that award would be detrimental to the public interest (*e.g.,* payment of more than a fair market price), the contracting officer may withdraw the small business set-aside, whether it was unilateral or joint. The contracting officer shall initiate a withdrawal of an individual total or partial small business set-aside, by giving written notice to the agency small business specialist and the SBA PCR (or, if a PCR is not assigned, see 19.402(a)) stating the reasons. In a similar manner, the contracting officer may modify a unilateral or joint class small business set-aside to withdraw one or more individual acquisitions.

* * * * *

■ 49. Add new section 19.503 to read as follows:

19.503 Reserves.

(a) In accordance with section 1331 of the Small Business Jobs Act of 2010 (15 U.S.C. 644(r)(3)) and 13 CFR 125.2(e)(4), contracting officers may, at their discretion when conducting multiple-award procurements using full and open competition, reserve one or more contract awards for any of the small business concerns identified in 19.000(a)(3), when market research indicates—

(1) A total set-aside is not feasible because there is no reasonable expectation of receiving offers that are competitive in terms of fair market prices, quality, and delivery from at least two responsible small business concerns identified in 19.000(a)(3), that can perform the entire requirement; and

(2) A partial set-aside is not feasible because—

(i) The contracting officer is unable to divide the requirement into distinct portions; or

(ii) There is no reasonable expectation that at least two responsible small business concerns identified in 19.000(a)(3) can perform any portion of the requirement competitively in terms of fair market price, quality, and delivery.

(b) A reserve will result in one of the following:

(1) One or more contract awards to any one or more types of small business concerns identified in 19.000(a)(3).

(2) In the case of a solicitation of a bundled requirement that will result in a multiple-award contract, an award to one or more small businesses with a Small Business Teaming Arrangement.

(c) The specific program eligibility requirements identified in this part apply.

(d) The limitations on subcontracting and the nonmanufacturer rule (see 19.505) do not apply to reserves at the contract level, but shall apply to orders that are set aside or issued directly to one small business concern under 19.504(c)(1)(ii).

■ 50. Add new section 19.504 to read as follows:

19.504 Orders under multiple-award contracts.

(a) *General.* In accordance with section 1331 of the Small Business Jobs Act of 2010 (15 U.S.C. 644(r)(2)), contracting officers may, at their discretion, set aside orders placed under multiple-award contracts for any of the small business concerns identified in 19.000(a)(3).

(1) The contracting officer shall state in the solicitation and resulting contract whether order set-asides will be discretionary or mandatory when the conditions in 19.502–2 are met at the time of order set-aside, and the specific program eligibility requirements, as applicable, are also then met.

(2) When setting aside an order at or below the simplified acquisition threshold, the contracting officer may set aside the order for any of the small business concerns identified in 19.000(a)(3).

(3) When setting aside an order above the simplified acquisition threshold, the contracting officer shall first consider setting aside the order for the small business socioeconomic contracting programs (*i.e.,* 8(a), HUBZone, service-disabled veteran-owned small business, and women-owned small business) before considering a small business set-aside.

(4) The contracting officer shall comply with the specific program eligibility requirements identified in this part in addition to the ordering procedures for a multiple-award contract (for orders placed under the Federal Supply Schedules Program, see 8.405–5; for orders placed under all other multiple-award contracts, see 16.505).

(b) *Orders under partial set-aside contracts.* (1) Only small business concerns awarded contracts for the portion(s) that were set aside under the solicitation for the multiple-award contract may compete for orders issued under those portion(s).

(2) Small business awardees may compete against other than small business awardees for an order issued under the portion of the multiple-award contract that was not set aside, if the small business received a contract award for the non-set-aside portion.

(c) *Orders under reserves.* (1) The contracting officer may—

(i) Set aside orders for any of the small business concerns identified in 19.000(a)(3) when there are two or more contract awards for that type of small business concern; or

(ii) Issue orders directly to one small business concern for work that it can perform when there is only one contract award to any one type of small business concern identified in 19.000(a)(3).

(2) Small business awardees may compete against other than small business awardees for an order that is not set aside if the small business received a contract award for the supplies or services being ordered.

■ 51. Add new section 19.505 to read as follows:

19.505 Limitations on subcontracting and nonmanufacturer rule.

(a) *Limitations on subcontracting.* To be awarded a set-aside contract, an order under a set-aside, or an order in accordance with 19.504(c)(1)(ii), the small business concern is required to perform as follows:

(1) For services (except construction), at least 50 percent of the cost incurred for personnel with its own employees.

(2) For supplies or products (other than a procurement from a nonmanufacturer of such supplies or products), at least 50 percent of the cost of manufacturing the supplies or products (not including the cost of materials).

(3) For general construction, at least 15 percent of the cost (not including the cost of materials) with its own employees.

(4) For construction by special trade contractors, at least 25 percent of the cost (not including the cost of materials) with its own employees.

(b) *Compliance period.* A small business contractor is required to comply with the limitations on subcontracting—

(1) For a contract that has been set aside, either by the end of the base term and then by the end of each subsequent option period, or by the end of the performance period for each order issued under the contract, at the contracting officer's discretion; and

(2) For an order set aside under a contract as described in 19.504(a), (b), or (c)(1)(i) or an order issued in accordance with 19.504(c)(1)(ii), by the end of the performance period for the order.

(c) *Nonmanufacturer rule.* (1) To be awarded a set-aside contract or order, or an order issued in accordance with 19.504(c)(1)(ii), for supplies as a nonmanufacturer, a contractor is required to—

(i) Provide the end item of a small business manufacturer, that has been manufactured or produced in the United States or its outlying areas (but see 19.1308(e)(1)(i) for contracts and orders awarded under the HUBZone Program);

(ii) Not exceed 500 employees;

(iii) Be primarily engaged in the retail or wholesale trade and normally sell the type of item being supplied; and

(iv) Take ownership or possession of the item(s) with its personnel, equipment or facilities in a manner consistent with industry practice.

(2) In addition to the requirements set forth in (c)(1) of this section, when the end item being acquired is a kit of supplies or other goods, 50 percent of the total value of the components of the kit shall be manufactured in the United States or its outlying areas by small business concerns. Where the Government has specified an item for the kit which is not produced by U.S. small business concerns, such items shall be excluded from the 50 percent calculation. See 13 CFR 121.406(c) for further information regarding nonmanufacturer kit assemblers.

(3) For size determination purposes, there can be only one manufacturer of the end product being acquired. For the purposes of the nonmanufacturer rule, the manufacturer of the end product being acquired is the concern that transforms raw materials and/or miscellaneous parts or components into the end product. Firms which only minimally alter the item being procured do not qualify as manufacturers of the end item, such as firms that add substances, parts, or components to an existing end item to modify its performance, will not be considered the end item manufacturer, where those identical modifications can be performed by and are available from the manufacturer of the existing end item. See 13 CFR 121.406 for further information regarding manufacturers.

(4) *Waiver of nonmanufacturer rule.* (i) The SBA may grant an individual or a class waiver so that a nonmanufacturer does not have to furnish the product of a small business (but see 19.1308(e)(2)).

(A) *Class waiver.* SBA may waive the nonmanufacturer rule when SBA has determined that there are no small business manufacturers or processors in the Federal market for a particular class of products. This type of waiver is known as a class waiver and would apply to an acquisition for a specific product (or a product in a class of products). Contracting officers and other interested parties may request that the SBA issue a waiver of the nonmanufacturer rule, for a particular class of products.

(B) *Individual waiver.* The contracting officer may also request a waiver for an individual acquisition because no known domestic small business manufacturers or processors can reasonably be expected to offer a product meeting the requirements of the solicitation. This type of waiver is known as an individual waiver and would apply only to a specific acquisition.

(ii) Requests for waivers shall be sent via email to *nmrwaivers@sba.gov* or by mail to the—Director for Government Contracting, United States Small Business Administration, Mail Code 6700, 409 Third Street SW, Washington, DC 20416.

(iii) For the most current listing of class waivers, contact the SBA Office of Government Contracting or go to *https://www.sba.gov/content/class-waivers.*

(5) *Exception to the nonmanufacturer rule.* The SBA provides for an exception to the nonmanufacturer rule when—

(i) The procurement of supplies or a manufactured end product—

(A) Is processed under simplified acquisition procedures (see part 13); or

(B) Is for an order set aside for any of the small business concerns identified in 19.000(a)(3), placed under a multiple-award contract that was competed on a full and open basis;

(ii) The cost is not anticipated to exceed $25,000; and

(iii) The offeror supplies an end product that is manufactured or produced in the United States.

■ 52. Add new section 19.506 to read as follows:

19.506 Documentation requirements.

(a)(1) The contracting officer shall document the rationale when a contract is not totally set aside for small business in accordance with 19.502–2.

(2) The contracting officer shall document the rationale when a multiple-award contract is not partially set aside, not reserved, and does not allow for setting aside of orders, when these authorities could have been used.

(b) If applicable, the documentation shall include the rationale for not accepting the recommendations made by the agency Director of the Office of Small and Disadvantaged Business Utilization, or, for the Department of Defense, the Director of the Office of Small Business Programs, or the Director's designee, as to whether a particular acquisition should be awarded under subparts 19.5, 19.8, 19.13, 19.14, or 19.15.

(c) Documentation is not required if a contract award is anticipated to a small business under subpart 19.5, 19.8, 19.13, 19.14, or 19.15.

19.508 [Redesignated as 19.507]

■ 53. Redesignate section 19.508 as section 19.507 and revise paragraphs (c) through (f) and add paragraphs (g) and (h).

The revisions and additions read as follows:

19.507 Solicitation provisions and contract clauses.

* * * * *

(c) The contracting officer shall insert the clause at 52.219–6, Notice of Total Small Business Set-Aside, in solicitations and contracts involving total small business set-asides. This includes multiple-award contracts when orders may be set aside for any of the small business concerns identified in 19.000(a)(3), as described in 8.405–5 and 16.505(b)(2)(i)(F). Use the clause at 52.219–6 with its Alternate I when including FPI in the competition in accordance with 19.502–7.

(d) The contracting officer shall insert the clause at 52.219–7, Notice of Partial Small Business Set-Aside, in solicitations and contracts involving partial small business set-asides. This includes part or parts of multiple-award contracts, including those described in 38.101. Use the clause at 52.219–7 with its Alternate I when including FPI in the competition in accordance with 19.502–7.

(e) The contracting officer shall insert the clause at 52.219–14, Limitations on Subcontracting, in solicitations and contracts for supplies, services, and construction, if any portion of the requirement is to be set aside for small business and the contract amount is expected to exceed $150,000. This includes multiple-award contracts when orders may be set aside for small business concerns, as described in 8.405–5 and 16.505(b)(2)(i)(F), and when orders may be issued directly to a small business concern as described in 19.504(c)(1)(ii). For contracts that are set aside, the contracting officer shall indicate in paragraph (d) of the clause whether compliance with the limitations on subcontracting is required at the contract or order level.

(f)(1) The contracting officer shall insert the clause at 52.219–13, Notice of Set-Aside of Orders, in all solicitations for multiple-award contracts under which orders may be set aside for any of the small business concerns identified in 19.000(a)(3), and all contracts awarded from such solicitations.

(2) The contracting officer shall insert the clause at 52.219–13 with its Alternate I in all full and open solicitations and contracts for multiple-award contracts under which orders will be set aside for any of the small business concerns identified in 19.000(a)(3) if the conditions in 19.502–2 are met at the time of order set-aside, and the specific program eligibility requirements, as applicable, are also then met.

(g)(1) The contracting officer shall insert the provision at 52.219–31, Notice of Small Business Reserve, in solicitations for multiple-award contracts that have reserves.

(2) The contracting officer shall insert the clause at 52.219–32 Orders Issued Directly Under Small Business Reserves, in solicitations and the resulting multiple-award contracts that have reserves.

(h) The contracting officer shall insert the clause at 52.219–33, Nonmanufacturer Rule, in solicitations and contracts when the item being acquired has been assigned a manufacturing or supply NAICS code, and any portion of the requirement is set-aside for any of the small business concerns identified in 19.000(a)(3) including multiple-award contracts that provide for the set-aside of orders to small business concerns or for orders issued directly to one small business concern in accordance with 19.504(c)(1)(ii), or is awarded on a sole source basis in accordance with subpart 19.8, 19.13, 19.14, or 19.15. The clause shall not be used when the Small Business Administration has determined that there are no small business manufacturers of the product or end items and has waived the nonmanufacturer rule (see 19.505(c)(4)).

■ 54. Amend section 19.601 by adding paragraph (f) to read as follows:

19.601 General.

* * * * *

(f) For the purpose of receiving a COC on an unrestricted acquisition, a small business nonmanufacturer may furnish any end item produced or manufactured in the United States or its outlying areas.

19.602–3 [Amended]

■ 55. Amend section 19.602–3 in paragraph (a)(2) by removing ''Director,'' and ''(OSDBU)'' and adding ''Director of the'' and ''(OSDBU) or, for the Department of Defense, the Director of the Office of Small Business Programs,'' in their places, respectively.

■ 56. Amend section 19.602–4 by adding a sentence to the end of paragraph (b) to read as follows:

19.602–4 Awarding the contract.

* * * * *

(b) * * * Where SBA issues a COC, the contracting officer may decide not to award to that offeror for reasons unrelated to responsibility.

* * * * *

■ 57. Amend section 19.702 by revising paragraph (a) to read as follows:

19.702 Statutory requirements.

* * * * *

(a)(1) Except as stated in paragraph (b) of this section, section 8(d) of the Small Business Act (15 U.S.C. 637(d)) imposes the following requirements regarding subcontracting with small businesses and small business subcontracting plans:

(i) In negotiated acquisitions, each solicitation of offers to perform a contract that is expected to exceed $700,000 ($1.5 million for construction) and that has subcontracting possibilities, shall require the apparently successful offeror to submit an acceptable subcontracting plan. If the apparently successful offeror fails to negotiate a subcontracting plan acceptable to the contracting officer within the time limit prescribed by the contracting officer, the offeror will be ineligible for award. For a multiple-award contract with more than one North American Industry Classification System (NAICS) code, see paragraph (a)(2)(i) of this section.

(ii) In sealed bidding acquisitions, each invitation for bids to perform a contract that is expected to exceed $700,000 ($1.5 million for construction) and that has subcontracting possibilities, shall require the bidder selected for award to submit a subcontracting plan. If the selected

bidder fails to submit a plan within the time limit prescribed by the contracting officer, the bidder will be ineligible for award. For a multiple-award contract with more than one NAICS code, see paragraph (a)(2)(i) of this section.

(iii) Each contract modification that causes the value of a contract without a subcontracting plan to exceed $700,000 ($1.5 million for construction), shall require the contractor to submit a subcontracting plan for the contract, if the contracting officer determines that subcontracting opportunities exist. For a multiple-award contract with more than one NAICS code, see paragraph (a)(2)(ii) of this section.

(2)(i) For a multiple-award contract with more than one NAICS code, the solicitation referenced in paragraphs (a)(1)(i) and (ii) of this section shall require the apparently successful offeror to submit an acceptable subcontracting plan for either the distinct portion(s) or category(ies) of their proposal for which the offeror is other than small or for the entirety of their proposal, at the offeror's discretion. When determining the need for a subcontracting plan, the contracting officer shall consider the cumulative dollar value of the portion(s) or category(ies) of the offeror's proposal for which the offeror is other than small.

(ii) For a multiple-award contract with more than one NAICS code, the modification referenced in paragraph (a)(1)(iii) of this section shall require the contractor to submit an acceptable subcontracting plan for either the distinct portion(s) or category(ies) of the contract for which the contractor is other than small or for the entirety of their contract, at the contractor's discretion. When determining the need for a subcontracting plan, the contracting officer shall consider the cumulative dollar value of the portion(s) or category(ies) of the contract for which the contractor is other than small.

* * * * *

19.704 [Amended]

■ 58. Amend section 19.704 in paragraph (a) introductory text by removing ''19.702(a)(1), (2), and (3)'' and adding ''19.702(a)(1)(i), (ii), and (iii)'' in its place.

19.705–1 [Amended]

■ 59. Amend section 19.705–1 in paragraph (b)(1) by removing ''19.702(a)(1)'' and adding ''19.702(a)'' in its place.

19.705–2 [Amended]

■ 60. Amend section 19.705–2 in paragraph (f) by removing ''19.702(a)(3)'' and ''re-representation'' and adding ''19.702(a)(1)(iii)'' and ''rerepresentation'' in their place, respectively.

19.705–5 [Amended]

■ 61. Amend section 19.705–5 in paragraph (b) by removing ''19.702(a)(1) and (2)'' and adding ''19.702(a)(1)(i) and (ii)'' in its place.

19.707 [Amended]

■ 62. Amend section 19.707 in paragraph (a)(2) by removing ''19.702(a)(1) or (2)'' and adding ''19.702(a)(1)(i) or (ii)'' in its place.

19.708 [Amended]

■ 63. Amend section 19.708 in paragraph (b)(1))(iv) by removing ''19.702(a)(3)'' and adding ''19.702(a)(1)(iii)'' in its place.

■ 64. Amend section 19.804–2 by revising the first sentence of paragraph (a) to read as follows:

19.804–2 Agency offering.

(a) After completing its evaluation, the contracting office shall notify the SBA of the extent of its plans to place 8(a) contracts with the SBA for specific quantities of items or work, including 8(a) contracts that are reserved in accordance with 19.503. * * *

* * * * *

■ 65. Revise section 19.804–6 to read as follows:

19.804–6 Indefinite-delivery contracts.

(a) Separate offers and acceptances are not required for individual orders under multiple-award contracts (including the Federal Supply Schedules managed by GSA, multi-agency contracts or Governmentwide acquisition contracts, or indefinite-delivery, indefinite-quantity (IDIQ) contracts) that have been set aside for exclusive competition among 8(a) contractors, and the individual order is to be competed among all 8(a) contract holders. SBA's acceptance of the original contract is valid for the term of the contract. Offers and acceptances are required for individual orders under multiple-award contracts that have not been set aside for exclusive competition among 8(a) contractors.

(b) The contracting officer may issue an order on a sole source basis when—

(1) The multiple-award contract was set aside for exclusive competition among 8(a) participants;

(2) The order has an estimated value less than or equal to the dollar thresholds set forth at 19.805–1(a)(2); and

(3) The offering and acceptance procedures at 19.804–2 and 19.804–3 are followed.

(c) The contracting officer may issue an order directly to one 8(a) contractor in accordance with 19.504(c)(1)(ii) when—

(1) The multiple-award contract was reserved for 8(a) participants;

(2) The order has an estimated value less than or equal to $7 million for acquisitions assigned manufacturing NAICS codes and $4 million for all other acquisitions; and

(3) The offering and acceptance procedures at 19.804–2 and 19.804–3 are followed.

(d) An 8(a) contractor may continue to accept new orders under the contract, even if it exits the 8(a) program, or becomes other than small for the NAICS code(s) assigned to the contract.

(e) Agencies may continue to take credit toward their prime contracting small disadvantaged business or small business goals for orders awarded to 8(a) contractors, even after the contractor's 8(a) program term expires, the contractor otherwise exits the 8(a) program, or the contractor becomes other than small for the NAICS code(s) assigned under the 8(a) contract. However, if an 8(a) contractor rerepresents that it is other than small for the NAICS code(s) assigned under the contract in accordance with 19.301–2 or, where ownership or control of the 8(a) contractor has changed and SBA has granted a waiver to allow the contractor to continue performance (see 13 CFR 124.515), the agency may not credit any subsequent orders awarded to the contractor towards its small disadvantaged business or small business goals.

■ 66. Revise section 19.809 to read as follows:

19.809 Preaward considerations.

19.809–1 Preaward survey.

The contracting officer should request a preaward survey of the 8(a) participant whenever considered useful. If the results of the preaward survey or other information available to the contracting officer raise substantial doubt as to the participant's ability to perform, the contracting officer shall refer the matter to SBA for Certificate of Competency consideration under subpart 19.6.

19.809–2 Limitations on subcontracting and nonmanufacturer rule.

(a) *Limitations on subcontracting.* To be awarded a contract or order under the 8(a) program, the 8(a) participant is required to perform—

(1) For services (except construction), at least 50 percent of the cost incurred for personnel with its own employees;

(2) For supplies or products (other than a procurement from a

nonmanufacturer of such supplies or products), at least 50 percent of the cost of manufacturing the supplies or products (not including the cost of materials);

(3) For general construction, at least 15 percent of the cost with its own employees (not including the cost of materials); and

(4) For construction by special trade contractors, at least 25 percent of the cost with its own employees (not including the cost of materials).

(b) *Compliance period.* An 8(a) contractor is required to comply with the limitations on subcontracting—

(1) For a contract under the 8(a) program, either by the end of the base term and then by the end of each subsequent option period or by the end of the performance period for each order issued under the contract, at the contracting officer's discretion; and

(2) For an order competed exclusively among contractors who are 8(a) participants or for an order issued directly to one 8(a) contractor in accordance with 19.504(c)(1)(ii), by the end of the performance period for the order.

(c) *Waiver.* The applicable SBA District Director may waive the provisions in paragraph (b)(1) requiring a participant to comply with the limitations on subcontracting for each period of performance or for each order. Instead, the SBA District Director may permit the participant to subcontract in excess of the limitations on subcontracting where the SBA District Director makes a written determination that larger amounts of subcontracting are essential during certain stages of performance.

(1) The 8(a) participant is required to provide the SBA District Director written assurance that the participant will ultimately comply with the requirements of this section prior to contract completion. The contracting officer shall review the written assurance and inform the 8(a) participant of their concurrence or nonconcurrence. The 8(a) participant can only submit the written assurance to the SBA District Director upon concurrence by the contracting officer.

(2) The contracting officer does not have the authority to waive the provisions of this section requiring an 8(a) participant to comply with the limitations on subcontracting for each period of performance or order, even if the agency has a Partnership Agreement with SBA.

(3) Where the 8(a) participant does not ultimately comply with the limitations on subcontracting by the end of the contract, SBA will not grant future waivers for the 8(a) participant.

(d) *Nonmanufacturer rule.* See 19.505(c) for application of the nonmanufacturer rule, inclusive of waivers and exceptions to the nonmanufacturer rule.

19.810 [Amended]

■ 67. Amend section 19.810 in paragraph (b)(1)(ii) by removing ''Director for Small'' and ''Director of'' and adding ''Director for the Office of Small'' and ''Director of the Office of'' in their places, respectively.

■ 68. Amend section 19.811–3 by revising paragraphs (d) and (e) to read as follows:

19.811–3 Contract clauses.

* * * * *

(d) The contracting officer shall insert the clause at 52.219–18, Notification of Competition Limited to Eligible 8(a) Participants, in competitive solicitations and contracts when the acquisition is accomplished using the procedures of 19.805. The clause at 52.219–18 with its Alternate I shall be used when competition is to be limited to 8(a) participants within one or more specific SBA districts pursuant to 19.804–2.

(e) For contracts or orders resulting from this subpart, see 19.507(e) for use of 52.219–14, Limitations on Subcontracting, and 19.507(h) for use of 52.219–33, Nonmanufacturer Rule.

19.1303 [Amended]

■ 69. Amend section 19.1303 by removing paragraph (e).

■ 70. Amend section 19.1307 by—

■ a. Removing from paragraph (a)(1) ''or'';

■ b. Removing the period from the end of paragraph (a)(2) and adding ''; or'' in its place; and

■ c. Adding paragraph (a)(3).

The addition reads as follows:

19.1307 Price evaluation preference for HUBZone small business concerns.

(a) * * *

(3) For the reserved portion of a solicitation for a multiple-award contract (see 19.503).

* * * * *

■ 71. Revise section 19.1308 to read as follows:

19.1308 Limitations on subcontracting and nonmanufacturer rule.

(a) *Definitions.* See 13 CFR 125.1 for definitions of terms used in paragraph (b) of this section.

(b) *Limitations on subcontracting.* To be awarded a contract or order under the HUBZone program, the HUBZone small business concern is required—

(1) For services (except construction), to spend at least 50 percent of the cost of performance incurred for personnel on its own employees or on the employees of other HUBZone small business concerns;

(2) For supplies or products (other than a procurement from a nonmanufacturer of such supplies or products), to spend at least 50 percent of the cost of manufacturing, excluding the cost of materials, performed by the concern or other HUBZone small business concerns;

(3) For general construction—

(i) To spend at least 15 percent of the cost of performance incurred for personnel on its own employees; and

(ii) To spend at least 50 percent of the cost of performance incurred for personnel on its own employees or on a combination of its own employees and employees of HUBZone small business concern subcontractors; or

(4) For construction by special trade contractors—

(i) To spend at least 25 percent of the cost of contract performance incurred for personnel on its own employees; and

(ii) To spend at least 50 percent of the cost of the contract incurred for personnel on its own employees or on a combination of its own employees and employees of HUBZone small business concern subcontractors.

(c) *Construction.* Before issuing a solicitation for general construction or construction by special trade contractors, the contracting officer shall determine if at least two HUBZone small business concerns can spend at least 50 percent of the cost of contract performance to be incurred for personnel on their own employees or subcontract employees of other HUBZone small business concerns. If the contracting officer is unable to make this determination, the contracting officer may waive the 50 percent requirement; however, the HUBZone small business concern is still required to meet the cost incurred for personnel requirements in paragraphs (b)(3)(i) and (b)(4)(i).

(d) *Compliance period.* A HUBZone small business contractor is required to comply with the limitations on subcontracting—

(1) For a contract that has been set aside or awarded on a sole source basis to a HUBZone small business concern, either by the end of the base term and then by the end of each subsequent option period or by the end of the performance period for each order issued under the contract, at the contracting officer's discretion; and

(2) For an order set aside for HUBZone small business concerns as

described in 8.405–5 and 16.505(b)(2)(i)(F) or for an order issued directly to a HUBZone small business contractor in accordance with 19.504(c)(1)(ii), by the end of the performance period for the order.

(e) *Nonmanufacturer rule.* (1) To be awarded a contract or order for supplies as a nonmanufacturer under this subpart, a contractor is required—

(i) To provide the end item of a HUBZone small business manufacturer, that has been manufactured or produced in the United States or its outlying areas;

(ii) Not to exceed 500 employees;

(iii) To be primarily engaged in the retail or wholesale trade and normally sell the type of item being supplied; and

(iv) To take ownership or possession of the item(s) with its personnel, equipment, or facilities in a manner consistent with industry practice.

(2) There are no class waivers or waivers to the nonmanufacturer rule for individual solicitations for contracts and orders awarded under the HUBZone Program.

(3) For contracts and orders awarded under the HUBZone Program at or below $25,000 in total value, a HUBZone small business concern may supply the end item of any manufacturer, including a large business, as long as the product acquired is manufactured or produced in the United States.

■ 72. Revise section 19.1309 to read as follows:

19.1309 Contract clauses.

(a)(1) The contracting officer shall insert the clause 52.219–3, Notice of HUBZone Set-Aside or Sole Source Award, in solicitations and contracts for acquisitions that are set aside or awarded on a sole source basis to, HUBZone small business concerns under 19.1305 or 19.1306. This includes multiple-award contracts when orders may be set aside for HUBZone small business concerns as described in 8.405–5 and 16.505(b)(2)(i)(F) or when orders may be issued directly to one HUBZone small business concern in accordance with 19.504(c)(1)(ii).

(2) The contracting officer shall use the clause with its Alternate I to waive the 50 percent requirement if the conditions at 19.1308(c) apply.

(b)(1) The contracting officer shall insert the clause at 52.219–4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns, in solicitations and contracts for acquisitions conducted using full and open competition.

(2) The contracting officer shall use the clause with its Alternate I to waive the 50 percent requirement if the conditions at 19.1308(c) apply.

(c) For use of clause 52.219–33, Nonmanufacturer Rule, see the prescription at 19.507(h)(2).

■ 73. Amend section 19.1403 by revising paragraph (d) to read as follows:

19.1403 Status as a service-disabled veteran-owned small business concern.

* * * * *

(d) Any service-disabled veteran-owned small business concern (nonmanufacturer) is required to meet the requirements in 19.1407(c) to receive a benefit under this program.

19.1407 [Redesignated as 19.1408]

■ 74. Redesignate section 19.1407 as section 19.1408.

■ 75. Add new section 19.1407 to read as follows:

19.1407 Limitations on subcontracting and nonmanufacturer rule.

(a) *Limitations on subcontracting.* To be awarded a contract or order under this subpart, the SDVOSB concern is required to—

(1) For services (except construction), spend at least 50 percent of the cost incurred for personnel on its own employees or the employees of other SDVOSBs;

(2) For supplies or products (other than a procurement from a nonmanufacturer of such supplies or products), spend at least 50 percent of the cost of manufacturing the supplies or products (not including the cost of materials) on itself or by other SDVOSBs;

(3) For general construction, spend at least 15 percent of the cost (not including the cost of materials) incurred for personnel on its own employees or the employees of other SDVOSBs; or

(4) For construction by special trade contractors, spend at least 25 percent of the cost (not including the cost of materials) incurred for personnel on its own employees or the employees of other SDVOSBs.

(b) *Compliance period.* An SDVOSB contractor is required to comply with the limitations on subcontracting—

(1) For a contract that has been set aside or awarded on a sole source basis to an SDVOSB concern, either by the end of the base term and then by the end of each subsequent option period or by the end of the performance period for each order issued under the contract, at the contracting officer's discretion; and

(2) For an order set aside for SDVOSB contractors as described in 8.405–5 and 16.505(b)(2)(i)(F) or for an order issued directly to an SDVOSB contractor in accordance with 19.504(c)(1)(ii), by the end of the performance period for the order.

(c) *Nonmanufacturer rule.* See 19.505(c) for application of the nonmanufacturer rule, inclusive of waivers and exceptions to the nonmanufacturer rule.

■ 76. Revise newly designated section 19.1408 to read as follows:

19.1408 Contract clause.

The contracting officer shall insert the clause 52.219–27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside, in solicitations and contracts for acquisitions that are set aside or awarded on a sole source basis to, service-disabled veteran-owned small business concerns under 19.1405 and 19.1406. This includes multiple-award contracts when orders may be set aside for service-disabled veteran-owned small business concerns as described in 8.405–5 and 16.505(b)(2)(i)(F) or when orders may be issued directly to one service-disabled veteran-owned small business contractor in accordance with 19.504(c)(1)(ii). For contracts that are set aside, the contracting officer shall indicate in paragraph (e) of the clause whether compliance with the limitations on subcontracting is required at the contract level or order level.

19.1503 [Amended]

■ 77. Amend section 19.1503 by removing paragraph (g).

19.1507 [Redesignated as 19.1508]

■ 78. Redesignate section 19.1507 as section 19.1508.

■ 79. Add new section 19.1507 to read as follows:

19.1507 Limitations on subcontracting and nonmanufacturer rule.

(a) *Limitations on subcontracting.* To be awarded a contract or order under the WOSB Program, the contractor is required to perform—

(1) For services (except construction), at least 50 percent of the cost incurred for personnel with its own employees;

(2) For supplies or products (other than a procurement from a nonmanufacturer of such supplies or products), at least 50 percent of the cost of manufacturing the supplies or products (not including the cost of materials);

(3) For general construction, at least 15 percent of the cost with its own employees (not including the cost of materials); or

(4) For construction by special trade contractors, at least 25 percent of the

cost with its own employees (not including the cost of materials).

(b) *Compliance period.* An EDWOSB or WOSB contractor is required to comply with the limitation on subcontracting—

(1) For a contract that has been set aside or awarded on a sole source basis, either by the end of the base term and then by the end of each subsequent option period or by the end of the performance period for each order issued under the contract, at the contracting officer's discretion; and

(2) For an order set aside as described in 8.405–5 and 16.505(b)(2)(i)(F) or for an order issued directly to an EDWOSB or WOSB contractor in accordance with 19.504(c)(1)(ii), by the end of the performance period for the order.

(c) *Nonmanufacturer rule.* See 19.505(c) for application of the nonmanufacturer rule, inclusive of waivers and exceptions to the nonmanufacturer rule.

■ 80. Amend newly designated section 19.1508 by—

■ a. Redesignating paragraph (a) as paragraph (a)(1);

■ b. Removing from the newly designated paragraph (a)(1) ''or reserved'';

■ c. Revising the second sentence of newly designated paragraph (a)(1);

■ d. Adding paragraph (a)(2); and

■ e. Revising paragraph (b).

The revisions and addition read as follows:

19.1508 Contract clauses.

(a)(1) * * * This includes multiple-award contracts when orders may be set aside for EDWOSB concerns as described in 8.405–5 and 16.505(b)(2)(i)(F) or when orders may be issued directly to one EDWOSB contractor in accordance with 19.504(c)(1)(ii).

(2) For contracts that are set aside, the contracting officer shall indicate in paragraph (e) of the clause whether compliance with the limitations on subcontracting is required at the contract level or order level.

(b)(1) The contracting officer shall insert the clause 52.219–30, Notice of Set-Aside for, or Sole Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program, in solicitations and contracts for acquisitions that are set aside for, or awarded on a sole source basis to, WOSB concerns under 19.1505(c) or 19.1506(b). This includes multiple-award contracts when orders may be set aside for WOSB concerns eligible under the WOSB program as described in 8.405–5 and 16.505(b)(2)(i)(F) or when orders may be issued directly to one WOSB contractor in accordance with 19.504(c)(1)(ii).

(2) For contracts that are set aside, the contracting officer shall indicate in paragraph (e) of the clause whether compliance with the limitations on subcontracting is required at the contract level or order level.

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 81. Amend section 42.1503 by revising paragraph (b)(2)(vi) to read as follows:

42.1503 Procedures.

* * * * *

(b) * * *

(2) * * *

(vi) Other (as applicable) (*e.g.,* trafficking violations, tax delinquency, failure to report in accordance with contract terms and conditions, defective cost or pricing data, terminations, suspension and debarments, and failure to comply with limitations on subcontracting).

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 82. Amend section 52.204–8 by—

■ a. Revising the date of the provision;

■ b. Revising paragraph (c)(1)(xii) introductory text;

■ c. Adding paragraph (c)(1)(xii)(C); and

■ d. Adding Alternate I.

The revision and additions read as follows:

52.204–8 Annual Representations and Certifications.

* * * * *

Annual Representations and Certifications (MAR 2020)

* * * * *

(c)(1) * * *

(xii) 52.219–1, Small Business Program Representations (Basic, Alternates I, and II). This provision applies to solicitations when the contract will be performed in the United States or its outlying areas.

* * * * *

(C) The provision with its Alternate II applies to solicitations that will result in a multiple-award contract with more than one NAICS code assigned.

* * * * *

Alternate I (MAR 2020). As prescribed in 4.1202(a), substitute the following paragraph (a) for paragraph (a) of the basic provision:

(a)(1) The North American Industry Classification System (NAICS) codes and corresponding size standards for this acquisition are as follows; the categories or portions these NAICS codes are assigned to are specified elsewhere in the solicitation:

NAICS code	Size standard

[*Contracting Officer to insert NAICS codes and size standards*].

(2) The small business size standard for a concern which submits an offer in its own name, other than on a construction or service contract, but which proposes to furnish a product which it did not itself manufacture (*i.e.,* nonmanufacturer), is 500 employees.

■ 83. Amend section 52.212–1 by revising the date of the provision and paragraph (a) to read as follows:

52.212–1 Instructions to Offerors-Commercial Items.

* * * * *

Instructions to Offerors-Commercial Items (MAR 2020)

(a) *North American Industry Classification System (NAICS) code and small business size standard.* The NAICS code(s) and small business size standard(s) for this acquisition appear elsewhere in the solicitation. However, the small business size standard for a concern which submits an offer in its own name, but which proposes to furnish an item which it did not itself manufacture, is 500 employees.

* * * * *

■ 84. Amend section 52.212–3 by—

■ a. Revising the date of the provision; and

■ b. Removing from paragraph (b)(2) introductory text ''business size standard'' and ''NAICS code'' and adding ''business size standard(s)'' and ''NAICS code(s)'' in their place, respectively.

The revision reads as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (MAR 2020)

* * * * *

■ 85. Amend section 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Revising paragraphs (b)(11), (12), (14), (15), (17) through (19), and (21) through (24);

■ c. Redesignating paragraphs (b)(25) through (60) as paragraphs (b)(27) through (62), respectively; and

■ d. Adding new paragraphs (b)(25) and (26).

The revisions and additions read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (MAR 2020)

* * * * *

(b) * * *

__ (11)(i) 52.219–3, Notice of HUBZone Set-Aside or Sole Source Award (MAR 2020) (15 U.S.C. 657a).

__ (ii) Alternate I (MAR 2020) of 52.219–3.

__ (12)(i) 52.219–4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns (MAR 2020) (if the offeror elects to waive the preference, it shall so indicate in its offer) (15 U.S.C. 657a).

__ (ii) Alternate I (MAR 2020) of 52.219–4.

* * * * *

__ (14)(i) 52.219–6, Notice of Total Small Business Set-Aside (MAR 2020) (15 U.S.C. 644).

__ (ii) Alternate I (MAR 2020).

__ (15)(i) 52.219–7, Notice of Partial Small Business Set-Aside (MAR 2020) (15 U.S.C. 644).

__ (ii) Alternate I (MAR 2020) of 52.219–7.

* * * * *

__ (17)(i) 52.219–9, Small Business Subcontracting Plan (MAR 2020) (15 U.S.C. 637(d)(4)).

__ (ii) * * *

__ (iii) * * *

__ (iv) Alternate III (MAR 2020) of 52.219–9.

__ (v) * * *

__ (18) 52.219–13, Notice of Set-Aside of Orders (MAR 2020) (15 U.S.C. 644(r)).

__ (19) 52.219–14, Limitations on Subcontracting (MAR 2020) (15 U.S.C. 637(a)(14)).

* * * * *

__ (21) 52.219–27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside (MAR 2020) (15 U.S.C. 657f).

__ (22)(i) 52.219–28, Post-Award Small Business Program Rerepresentation (MAR 2020) (15 U.S.C. 632(a)(2)).

__ (ii) Alternate I (MAR 2020) of 52.219–28.

__ (23) 52.219–29, Notice of Set-Aside for, or Sole Source Award to, Economically Disadvantaged Women-Owned Small Business (EDWOSB) Concerns (MAR 2020) (15 U.S.C. 637(m)).

__ (24) 52.219–30, Notice of Set-Aside for, or Sole Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program (MAR 2020) (15 U.S.C. 637(m)).

__ (25) 52.219–32, Orders Issued Directly Under Small Business Reserves (MAR 2020) (15 U.S.C. 644(r)).

__ (26) 52.219–33, Nonmanufacturer Rule (MAR 2020) (15 U.S.C. 637(a)(17)).

* * * * *

■ 86. Amend section 52.219–1 by—

■ a. Revising the date of the clause and paragraph (b)(3);

■ b. Removing paragraph (d)(1);

■ c. Redesignating the paragraph (d)(2) introductory text as paragraph (d) introductory text;

■ d. Redesignating paragraphs (d)(2)(i) through (iii) as paragraphs (d)(1) through (3);

■ e. Adding Alternate II.

The revision and addition read as follows:

52.219–1 Small Business Program Representations.

* * * * *

Small Business Program Representations (MAR 2020)

* * * * *

(b) * * *

(3) The small business size standard for a concern which submits an offer in its own name, other than on a construction or service contract, but which proposes to furnish a product which it did not itself manufacture (*i.e.,* nonmanufacturer), is 500 employees.

* * * * *

Alternate II (MAR 2020). As prescribed in 19.309(a)(3), substitute the following paragraphs (b) and (c)(1) for paragraphs (b) and (c)(1) of the basic provision:

(b)(1) The North American Industry Classification System (NAICS) codes and corresponding size standards for this acquisition are as follows; the categories or portions these NAICS codes are assigned to are specified elsewhere in the solicitation:

NAICS code	Size standard

[Contracting Officer to insert NAICS codes and size standards].

(2) The small business size standard for a concern which submits an offer in its own name, other than on a construction or service contract, but which proposes to furnish a product which it did not itself manufacture (*i.e.,* nonmanufacturer), is 500 employees.

(c) *Representations.* (1) The Offeror shall represent its small business size status for each one of the NAICS codes assigned to this acquisition under which it is submitting an offer.

NAICS code	Small business concern (yes/no)

[Contracting Officer to insert NAICS codes.]

■ 87. Amend section 52.219–3 by—

■ a. Revising the introductory text, the date of the clause, and paragraph (a);

■ b. Removing from paragraph (b)(1) ''or reserved for,'';

■ c. Removing from paragraph (b)(2) ''and'';

■ d. Removing the period from the end of paragraph (b)(3) and adding ''; and'' in its place;

■ e. Adding paragraph (b)(4);

■ f. Revising paragraph (d);

■ g. Removing paragraph (f);

■ h. Redesignating paragraph (e) as paragraph (f);

■ i. Adding new paragraph (e);

■ j. Removing from newly designated paragraph (f) ''will'' and adding ''shall'' in its place; and

■ d. Revising Alternate I.

The revisions and additions read as follows:

52.219–3 Notice of HUBZone Set-Aside or Sole Source Award.

As prescribed in 19.1309(a)(1), insert the following clause:

Notice of HUBZone Set-Aside or Sole Source Award (MAR 2020)

(a) *Definition.* See 13 CFR 125.1 and 126.103 for definitions of terms used in the clause.

(b) * * *

(4) Orders issued directly to HUBZone small business concerns under multiple-award contracts as described in 19.504(c)(1)(ii).

* * * * *

(d) *Limitations on subcontracting.* The Contractor shall spend—

(1) For services (except construction), at least 50 percent of the cost of contract performance incurred for personnel on its own employees or employees of other HUBZone small business concerns;

(2) For supplies (other than acquisition from a nonmanufacturer of the supplies), at least 50 percent of the cost of manufacturing, excluding the cost of materials, on the concern or other HUBZone small business concerns;

(3) *For general construction*—

(i) At least 15 percent of the cost of contract performance incurred for personnel on its own employees;

(ii) At least 50 percent of the cost of the contract performance incurred for personnel on its own employees or on a combination of its own employees and employees of HUBZone small business concern subcontractors; and

(iii) No more than 50 percent of the cost of contract performance incurred for personnel on concerns that are not HUBZone small business concerns; or

(4) *For construction by special trade contractors*—

(i) At least 25 percent of the cost of contract performance incurred for personnel on its own employees;

(ii) At least 50 percent of the cost of the contract performance incurred for personnel on its own employees or on a combination of its own employees and employees of HUBZone small business concern subcontractors;

(iii) No more than 50 percent of the cost of contract performance to be incurred for personnel on concerns that are not HUBZone small business concerns.

(e) A HUBZone small business contractor shall comply with the limitations on subcontracting as follows:

(1) For contracts, in accordance with paragraph (b)(1) or (2) of this clause—

[*Contracting Officer check as appropriate.*]

__ By the end of the base term of the contract and then by the end of each subsequent option period; or

__ By the end of the performance period for each order issued under the contract.

(2) For orders, in accordance with paragraph (b)(3) or (4) of this clause, by the end of the performance period for the order.

* * * * *

Alternate I (MAR 2020). As prescribed in 19.1309(a)(2), substitute the following paragraphs (d)(3) and (d)(4) for paragraphs (d)(3) and (d)(4) of the basic clause:

(3) For general construction, at least 15 percent of the cost of the contract performance to be incurred for personnel shall be spent on the concern's employees; or

(4) For specialty trade construction, at least 25 percent of the cost of the contract performance to be incurred for personnel shall be spent on the concern's employees.

■ 88. Amend section 52.219–4 by—
■ a. Revising the introductory text, clause date, and paragraph (a);
■ b. Revising paragraph (d);
■ c. Removing paragraph (f);
■ d. Redesignating paragraph (g) as paragraph (f); and
■ e. Revising Alternate I.

The revised text reads as follows:

52.219–4 Notice of Price Evaluation Preference for HUBZone Small Business Concerns.

As prescribed in 19.1309(b)(1), insert the following clause:

Notice of Price Evaluation Preference for HUBZone Small Business Concerns (MAR 2020)

(a) *Definition.* See 13 CFR 126.103 for the definition of HUBZone.

* * * * *

(d) *Limitations on subcontracting.* The Contractor shall spend—

(1) For services (except construction), at least 50 percent of the cost of personnel for contract performance on its own employees or employees of other HUBZone small business concerns;

(2) For supplies (other than procurement from a nonmanufacturer of such supplies), at least 50 percent of the cost of manufacturing, excluding the cost of materials, on the concern or other HUBZone small business concerns;

(3) *For general construction*—

(i) At least 15 percent of the cost of contract performance to be incurred for personnel on its own employees;

(ii) At least 50 percent of the cost of the contract performance to be incurred for personnel on its own employees or on a combination of its own employees and employees of HUBZone small business concern subcontractors;

(iii) No more than 50 percent of the cost of contract performance to be incurred for personnel on concerns that are not HUBZone small business concerns; or

(4) *For construction by special trade contractors*—

(i) At least 25 percent of the cost of contract performance to be incurred on its own employees;

(ii) At least 50 percent of the cost of the contract performance to be incurred for personnel on its own employees or on a combination of its own employees and employees of HUBZone small business concern subcontractors;

(iii) No more than 50 percent of the cost of contract performance to be incurred for personnel on concerns that are not HUBZone small business concerns.

* * * * *

Alternate I (MAR 2020). As prescribed in 19.1309(b)(2), substitute the following paragraphs (d)(3) and (d)(4) for paragraphs (d)(3) and (d)(4) of the basic clause:

(3) For general construction, at least 15 percent of the cost of the contract performance to be incurred for personnel on its own employees; or

(4) For construction by special trade contractors, at least 25 percent of the cost of the contract performance to be incurred for personnel on its own employees.

* * * * *

■ 89. Amend section 52.219–6 by—
■ a. Revising the introductory text and the date of the clause;
■ b. Removing from paragraph (b)(1) ''or reserved'';
■ c. Removing paragraph (d) and Alternate I;
■ d. Redesignating Alternate II as Alternate I; and
■ e. Revising the date and the introductory text of the newly designated Alternate I.

The revisions read as follows:

52.219–6 Notice of Total Small Business Set-Aside.

As prescribed in 19.507(c), insert the following clause:

Notice of Total Business Set-Aside (MAR 2020)

* * * * *

Alternate I (MAR 2020). As prescribed in 19.507(c), substitute the following paragraph (c) for paragraph (c) of the basic clause:

* * * * *

■ 90. Amend section 52.219–7 by—
■ a. Revising the introductory text and the date of the clause;
■ b. Revising paragraphs (b) and (c);
■ c. Adding paragraphs (d) and (e);
■ d. Removing Alternate I; and
■ e. Redesignating Alternate II as Alternate I and revising it.

The revisions and additions read as follows:

52.219–7 Notice of Partial Small Business Set-Aside.

As prescribed in 19.507(d), insert the following clause:

Notice of Partial Small Business Set-Aside (MAR 2020)

* * * * *

(b) *Applicability.* This clause applies only to contracts that have been partially set aside for small business concerns.

(c) *General.* (1) A portion of this requirement, identified elsewhere in this solicitation, has been set aside for award to one or more small business concerns identified in 19.000(a)(3). Offers received from concerns that do not qualify as small business concerns shall be considered nonresponsive and shall be rejected on the set-aside portion of the requirement.

(2) Small business concerns may submit offers and compete for the non-set-aside portion and the set-aside portion.

(d) The Offeror shall—

[*Contracting Officer check as appropriate.*]

__ Submit a separate offer for each portion of the solicitation for which it wants to compete (*i.e.* set-aside portion, non-set-aside portion, or both); or

__ Submit one offer to include all portions for which it wants to compete.

(e) *Partial set-asides of multiple-award contracts.* (1) Small business concerns will not compete against other than small business concerns for any order issued under the part or parts of the multiple-award contract that are set aside.

(2) Small business concerns may compete for orders issued under the part or parts of the multiple-award contract that are not set aside, if the small business concern received a contract award for the non-set-aside portion.

(End of Clause)

Alternate I (MAR 2020). As prescribed in 19.507(d), add the following paragraph (f) to the basic clause:

(f) Notwithstanding paragraph (c) of this clause, offers from Federal Prison Industries, Inc., will be solicited and considered for both the set-aside and non-set-aside portion of this requirement.

■ 91. Amend section 52.219–9 by—
■ a. Revising the date of the clause;
■ b. Removing from paragraph (l)(1)(ii)(B) ''19.702(a)(3)'' and adding ''19.702(a)(1)(iii)'' in its place;
■ c. Revising the date of Alternate III; and
■ d. Removing from paragraph (l)(1)(ii)(B) of Alternate III ''19.702(a)(3)'' and adding ''19.702(a)(1)(iii)'' in its place.

The revisions read as follows:

52.219–9 Small Business Subcontracting Plan.

* * * * *

Small Business Subcontracting Plan (MAR 2020)

* * * * *

Alternate III (MAR 2020) * * *

* * * * *

■ 92. Amend section 52.219–13 by—
■ a. Revising the introductory text and the date of the clause;
■ b. Designating the undesignated paragraph as paragraph (b);

■ c. Adding paragraph (a); and
■ d. Adding Alternate I.

The revision and additions read as follows:

52.219–13 Notice of Set-Aside of Orders.

As prescribed in 19.507(f)(1), insert the following clause:

Notice of Set-Aside of Orders (MAR 2020)

(a) The Contracting Officer may set aside orders for the small business concerns identified in 19.000(a)(3).

* * * * *

Alternate I (MAR 2020). As prescribed in 19.507(f)(2), substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a) The Contracting Officer will set aside orders for the small business concerns identified in 19.000(a)(3) when the conditions of FAR 19.502–2 and the specific program eligibility requirements are met, as applicable.

■ 93. Amend section 52.219–14 by—
■ a. Revising the introductory text and the date of the clause;
■ b. Removing from paragraph (b)(1) ''or reserved'';
■ c. Removing from paragraph (b)(2) ''and'';
■ d. Removing from paragraph (b)(3) ''small business'' and adding ''small business concerns'' in its place and removing the period at the end and adding ''; and'' in its place;
■ e. Adding paragraph (b)(4);
■ f. Revising paragraph (c) introductory text; and
■ g. Adding paragraph (d).

The revisions and additions read as follows:

52.219–14 Limitations on Subcontracting.

As prescribed in 19.507(e), insert the following clause:

Limitations on Subcontracting (MAR 2020)

* * * * *

(b) * * *

(4) Orders issued directly to small business concerns or 8(a) participants under multiple-award contracts as described in 19.504(c)(1)(ii).

(c) *Limitations on subcontracting.* By submission of an offer and execution of a contract, the Contractor agrees that in performance of the contract in the case of a contract for—

* * * * *

(d) The Contractor shall comply with the limitations on subcontracting as follows:

(1) For contracts, in accordance with paragraph (b)(1) and (2) of this clause—

[*Contracting Officer check as appropriate.*]

__ By the end of the base term of the contract and then by the end of each subsequent option period; or

__ By the end of the performance period for each order issued under the contract.

(2) For orders, in accordance with paragraphs (b)(3) and (4) of this clause, by the end of the performance period for the order.

* * * * *

■ 94. Amend section 52.219–18 by revising the date of the clause and paragraph (d) and removing Alternate II.

The revision reads as follows:

52.219–18 Notification of Competition Limited to Eligible 8(a) Participants.

* * * * *

Notification of Competition Limited to Eligible 8(a) Participants (MAR 2020)

* * * * *

(d) The _____ [*insert name of SBA's contractor*] shall notify the _____ [*insert name of contracting agency*] Contracting Officer in writing immediately upon entering an agreement (either oral or written) to transfer all or part of its stock.

* * * * *

■ 95. Amend section 52.219–27 by—
■ a. Revising the introductory text and the date of the clause;
■ b. Removing from paragraph (b)(1) ''or reserved'';
■ c. Removing from paragraph (b)(2) ''and'';
■ d. Removing the period from the end of paragraph (b)(3) and adding ''; and'' in its place;
■ e. Adding paragraph (b)(4);
■ f. Revising the paragraph (d) subject heading;
■ g. Removing paragraph (f);
■ h. Redesignating paragraph (e) as paragraph (f); and
■ i. Adding new paragraph (e).

The revisions and additions read as follows:

52.219–27 Notice of Service-Disabled Veteran-Owned Small Business Set-Aside.

As prescribed in 19.1408, insert the following clause:

Notice of Service-Disabled Veteran-Owned Small Business Set-Aside (MAR 2020)

* * * * *

(b) * * *

(4) Orders issued directly to service-disabled veteran-owned small business concerns under multiple-award contracts as described in 19.504(c)(1)(ii).

* * * * *

(d) *Limitations on subcontracting.* * * *

* * * * *

(e) A service-disabled veteran-owned small business concern shall comply with the limitations on subcontracting as follows:

(1) For contracts, in accordance with paragraphs (b)(1) and (2) of this clause—

[*Contracting Officer check as appropriate.*]

__ By the end of the base term of the contract and then by the end of each subsequent option period; or

__ By the end of the performance period for each order issued under the contract.

(2) For orders, in accordance with paragraphs (b)(3) and (4) of this clause, by the end of the performance period for the order.

* * * * *

■ 96. Amend section 52.219–28 by—
■ a. Revising the introductory text and the date of the clause;
■ b. Removing from the definition of ''Small business concern'' in paragraph (a) the phrase ''paragraph (c)'' and adding ''paragraph (d)'' in its place;
■ c. Revising paragraph (b) introductory text;
■ d. Designating paragraphs (c) through (g) as paragraphs (d) through (h);
■ e. Adding new paragraph (c);
■ f. Removing from newly designated paragraph (d) the two occurrences of ''code'' and adding ''code(s)'' in their places;
■ g. Revising newly designated paragraph (f);
■ h. Removing from newly designated paragraph (g) ''paragraphs (e) or (g)'' and adding ''paragraphs (f) or (h)'' in its place;
■ i. Revising newly designated paragraph (h); and
■ j. Adding Alternate I.

The revisions and additions read as follows:

52.219–28 Post-Award Small Business Program Rerepresentation.

As prescribed in 19.309(c)(1), insert the following clause:

Post-Award Small Business Program Rerepresentation (MAR 2020)

* * * * *

(b) If the Contractor represented that it was any of the small business concerns identified in 19.000(a)(3) prior to award of this contract, the Contractor shall rerepresent its size and socioeconomic status according to paragraph (f) of this clause or, if applicable, paragraph (h) of this clause, upon occurrence of any of the following:

* * * * *

(c) If the Contractor represented that it was any of the small business concerns identified in 19.000(a)(3) prior to award of this contract, the Contractor shall rerepresent its size and socioeconomic status according to paragraph (f) of this clause or, if applicable, paragraph (h) of this clause, when the Contracting Officer explicitly requires it for an order issued under a multiple-award contract.

* * * * *

(f) Except as provided in paragraph (h) of this clause, the Contractor shall make the representation(s) required by paragraph (b) and (c) of this clause by validating or updating all its representations in the Representations and Certifications section of the System for Award Management (SAM) and its other data in SAM, as necessary, to ensure that they reflect the Contractor's current status. The Contractor shall notify the contracting office in writing within the timeframes specified in paragraph (b) of this clause, or with its offer for an order (see

paragraph (c) of this clause), that the data have been validated or updated, and provide the date of the validation or update.

* * * * *

(h) If the Contractor does not have representations and certifications in SAM, or does not have a representation in SAM for the NAICS code applicable to this contract, the Contractor is required to complete the following rerepresentation and submit it to the contracting office, along with the contract number and the date on which the rerepresentation was completed:

(1) The Contractor represents that it ☐ is, ☐ is not a small business concern under NAICS Code _____ assigned to contract number _____.

(2) [*Complete only if the Contractor represented itself as a small business concern in paragraph (h)(1) of this clause.*] The Contractor represents that it ☐ is, ☐ is not, a small disadvantaged business concern as defined in 13 CFR 124.1002.

(3) [*Complete only if the Contractor represented itself as a small business concern in paragraph (h)(1) of this clause.*] The Contractor represents that it ☐ is, ☐ is not a women-owned small business concern.

(4) Women-owned small business (WOSB) concern eligible under the WOSB Program. [*Complete only if the Contractor represented itself as a women-owned small business concern in paragraph (h)(3) of this clause.*] The Contractor represents that—

(i) It ☐ is, ☐ is not a WOSB concern eligible under the WOSB Program, has provided all the required documents to the WOSB Repository, and no change in circumstances or adverse decisions have been issued that affects its eligibility; and

(ii) It ☐ is, ☐ is not a joint venture that complies with the requirements of 13 CFR part 127, and the representation in paragraph (h)(4)(i) of this clause is accurate for each WOSB concern eligible under the WOSB Program participating in the joint venture. [*The Contractor shall enter the name or names of the WOSB concern eligible under the WOSB Program and other small businesses that are participating in the joint venture:* _____.] Each WOSB concern eligible under the WOSB Program participating in the joint venture shall submit a separate signed copy of the WOSB representation.

(5) Economically disadvantaged women-owned small business (EDWOSB) concern. [*Complete only if the Contractor represented itself as a women-owned small business concern eligible under the WOSB Program in (h)(4) of this clause.*] The Contractor represents that—

(i) It ☐ is, ☐ is not an EDWOSB concern eligible under the WOSB Program, has provided all the required documents to the WOSB Repository, and no change in circumstances or adverse decisions have been issued that affects its eligibility; and

(ii) It ☐ is, ☐ is not a joint venture that complies with the requirements of 13 CFR part 127, and the representation in paragraph (h)(5)(i) of this clause is accurate for each EDWOSB concern participating in the joint venture. [*The Contractor shall enter the name or names of the EDWOSB concern and other small businesses that are participating in the joint venture:* _____.] Each EDWOSB concern participating in the joint venture shall submit a separate signed copy of the EDWOSB representation.

(6) [*Complete only if the Contractor represented itself as a small business concern in paragraph (h)(1) of this clause.*] The Contractor represents that it ☐ is, ☐ is not a veteran-owned small business concern.

(7) [*Complete only if the Contractor represented itself as a veteran-owned small business concern in paragraph (h)(6) of this clause.*] The Contractor represents that it ☐ is, ☐ is not a service-disabled veteran-owned small business concern.

(8) [*Complete only if the Contractor represented itself as a small business concern in paragraph (h)(1) of this clause.*] The Contractor represents that—

(i) It ☐ is, ☐ is not a HUBZone small business concern listed, on the date of this representation, on the List of Qualified HUBZone Small Business Concerns maintained by the Small Business Administration, and no material changes in ownership and control, principal office, or HUBZone employee percentage have occurred since it was certified in accordance with 13 CFR part 126; and

(ii) It ☐ is, ☐ is not a HUBZone joint venture that complies with the requirements of 13 CFR part 126, and the representation in paragraph (h)(8)(i) of this clause is accurate for each HUBZone small business concern participating in the HUBZone joint venture. [*The Contractor shall enter the names of each of the HUBZone small business concerns participating in the HUBZone joint venture:* _____.] Each HUBZone small business concern participating in the HUBZone joint venture shall submit a separate signed copy of the HUBZone representation.

[*Contractor to sign and date and insert authorized signer's name and title.*]

* * * * *

Alternate I (MAR 2020). As prescribed in 19.309(c)(2), substitute the following paragraph (h)(1) for paragraph (h)(1) of the basic clause:

(h)(1) The Contractor represents its small business size status for each one of the NAICS codes assigned to this contract.

NAICS code	Small business concern (yes/no)

[Contracting Officer to insert NAICS codes.]

■ 97. Amend section 52.219–29 by—

■ a. Revising the introductory text and the date of the clause;

■ b. Removing from paragraph (b)(1) ''or reserved'';

■ c. Removing from paragraph (b)(2) ''and'';

■ d. Removing from paragraph (b)(3) the period at the end and adding ''; and'' in its place;

■ e. Adding paragraph (b)(4);

■ f. Removing from paragraph (c)(1) ''apparent successful offeror'' and adding ''EDWOSB concerns'' in its place;

■ g. Removing from paragraph (c)(3) ''contracting officer'' and adding ''Contracting Officer'' in its place;

■ h. Revising the paragraph (d) subject heading;

■ i. Removing paragraph (f);

■ j. Redesignating paragraph (e) as paragraph (f); and

■ k. Adding new paragraph (e).

The revisions and additions read as follows:

52.219–29 Notice of Set-Aside for, or Sole Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns.

As prescribed in 19.1508(a), insert the following clause:

Notice of Set-Aside for, or Sole Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns (MAR 2020)

* * * * *

(b) * * *

(4) Orders issued directly to EDWOSB concerns under multiple-award contracts as described in 19.504(c)(1)(ii).

* * * * *

(d) *Limitations on subcontracting.* * * *

* * * * *

(e) An EDWOSB concern shall comply with the limitations on subcontracting as follows:

(1) For contracts, in accordance with paragraphs (b)(1) and (2) of this clause—

[*Contracting Officer check as appropriate.*]

__ By the end of the base term of the contract and then by the end of each subsequent option period; or

__ By the end of the performance period for each order issued under the contract.

(2) For orders, in accordance with paragraphs (b)(3) and (4) of this clause, by the end of the performance period for the order.

* * * * *

■ 98. Amend section 52.219–30 by—

■ a. Revising the introductory text and the date of the clause;

■ b. Removing from paragraph (b)(1) ''or reserved'';

■ c. Removing from paragraph (b)(2) ''and'';

■ d. Removing the period from the end of paragraph (b)(3) and adding ''; and'' in its place;

■ e. Adding paragraph (b)(4);

■ f. Revising the paragraph (d) subject heading;

■ g. Removing paragraph (f);

■ h. Redesignating paragraph (e) as paragraph (f); and

■ i. Adding new paragraph (e).

The revisions and additions read as follows:

52.219–30 Notice of Set-Aside for, or Sole Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program.

As prescribed in 19.1508(b), insert the following clause:

Notice of Set-Aside for, or Sole Source Award to, Women-Owned Small Business Concerns Eligible Under The Women-Owned Small Business Program (MAR 2020)

* * * * *

(b) * * *

(4) Orders issued directly to WOSB concerns eligible under the WOSB Program under multiple-award contracts as described in 19.504(c)(1)(ii).

* * * * *

(d) *Limitations on subcontracting.* * * *

* * * * *

(e) A WOSB concern eligible under the WOSB Program shall comply with the limitations on subcontracting as follows:

(1) For contracts, in accordance with paragraphs (b)(1) and (2) of this clause—

[*Contracting Officer check as appropriate.*]

__ By the end of the base term of the contract and then by the end of each subsequent option period; or

__ By the end of the performance period for each order issued under the contract.

(2) For orders, in accordance with paragraphs (b)(3) and (4) of this clause, by the end of the performance period for the order.

* * * * *

■ 99. Add section 52.219–31 to read as follows:

52.219–31 Notice of Small Business Reserve.

As prescribed in 19.507(g)(1), insert the following provision:

Notice of Small Business Reserve (MAR 2020)

(a) This solicitation contains a reserve for one or more small business concerns identified at 19.000(a)(3). The small business program eligibility requirements apply.

(b) The small business concern(s) eligible for participation in the reserve shall submit one offer that addresses each portion of the solicitation for which it wants to compete. Award of the contract will be based on criteria identified elsewhere in the solicitation.

(End of provision)

■ 100. Add section 52.219–32 to read as follows:

52.219–32 Orders Issued Directly Under Small Business Reserves.

As prescribed in 19.507(g)(2), insert the following clause:

Orders Issued Directly Under Small Business Reserves (MAR 2020)

(a) *Applicability.* This clause applies only to contracts that were reserved for any of the small business concerns identified at 19.000(a)(3).

(b) If there is only one contract award to any one type of small business concern identified in 19.000(a)(3) as a result of the reserve, the Contracting Officer may issue an order or orders directly to the concern.

(End of clause)

■ 101. Add section 52.219–33 to read as follows:

52.219–33 Nonmanufacturer Rule.

As prescribed in 19.507(h), insert the following clause:

Nonmanufacturer Rule (MAR 2020)

(a) This clause does not apply to the unrestricted portion of a partial set-aside.

(b) *Applicability.* This clause applies to—

(1) Contracts that have been set aside, in total or in part;

(2) Orders under multiple-award contracts as described in 8.405–5 and 16.505(b)(2)(i)(F) that have been set aside for any of the small business concerns identified in 19.000(a)(3); and

(3) Orders issued directly to any of the small business concerns identified in 19.000(a)(3) under multiple-award contracts as described in 19.504(c)(1)(ii).

(c)(1) The Contractor shall—

(i)(A) Provide the end item of a small business manufacturer, or if set aside or awarded on a sole source basis to a HUBZone small business, provide the end item of a HUBZone small business manufacturer, that has been manufactured or produced in the United States or its outlying areas; or

(B) If this procurement is an order as described in 8.405–5 or 16.505(b)(2)(i)(F) or processed under simplified acquisition procedures (see part 13), and the total amount does not exceed $25,000, provide the end item of any domestic manufacturer;

(ii) Not exceed 500 employees;

(iii) Be primarily engaged in the retail or wholesale trade and normally sell the type of item being supplied; and

(iv) Take ownership or possession of the item(s) with its personnel, equipment, or facilities in a manner consistent with industry practice.

(2) In addition to the requirements set forth in paragraph (c)(1) of this clause, when the end item being acquired is a kit of supplies or other goods, 50 percent of the total value of the components of the kit shall be manufactured in the United States or its outlying areas by small business concerns. Where the Government has specified an item for the kit which is not produced by U.S. small business concerns, such items shall be excluded from the 50 percent calculation. See 13 CFR 121.406(c) for further information regarding nonmanufacturers.

(3) For size determination purposes, there can be only one manufacturer of the end product being acquired. For the purposes of the nonmanufacturer rule, the manufacturer of the end product being acquired is the concern that transforms raw materials and/or miscellaneous parts or components into the end product. Firms which only minimally alter the item being procured do not qualify as manufacturers of the end item, such as firms that add substances, parts, or components to an existing end item to modify its performance, will not be considered the end item manufacturer, where those identical modifications can be performed by and are available from the manufacturer of the existing end item. See 13 CFR 121.406 for further information regarding manufacturers.

(End of clause)

[FR Doc. 2020–02028 Filed 2–26–20; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR–2020–0051, Sequence No. 1]

Federal Acquisition Regulation; Federal Acquisition Circular 2020–05; Small Entity Compliance Guide

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of DOD, GSA, and NASA. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rule appearing in Federal Acquisition Circular (FAC) 2020–05, which amends the Federal Acquisition Regulation (FAR). An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding this rule by referring to FAC 2020–05, which precedes this document. These documents are also available via the internet at *http://www.regulations.gov*.

DATES: February 27, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Mahruba Uddowla, Procurement Analyst, at 703–605–2868 or by email at *mahruba.uddowla@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2020–05, FAR Case 2014–002.

RULE LISTED IN FAC 2020–05

Subject	FAR Case	Analyst
* Set-Asides Under Multiple-Award Contracts.	2014–002	Uddowla.

SUPPLEMENTARY INFORMATION: A summary for the FAR rule follows. For the actual revisions and/or amendments made by this FAR case, refer to the specific subject set forth in the document following this item summary. FAC 2020–05 amends the FAR as follows:

Set-Asides Under Multiple-Award Contracts (FAR Case 2014–002)

This final rule amends the FAR to implement regulatory changes made by the Small Business Administration (SBA) in its final rule at 78 FR 61114 on October 2, 2013. SBA's final rule implements the statutory requirements set forth at section 1331 of the Small Business Jobs Act of 2010 (15 U.S.C. 644(r)). Section 1331 provided authority for three acquisition techniques to facilitate contracting with small businesses on multiple-award contracts:

(1) Setting aside part or parts of the requirement for small businesses.

(2) Reserving one or more contract awards for small business concerns under full and open multiple-award procurements.

(3) Setting aside orders placed against multiple-award contracts, notwithstanding the fair opportunity requirements of 10 U.S.C. 2304c(b) and 41 U.S.C. 4106(c).

This final rule provides contracting officers additional guidance on the use of partial set-asides, reserves, and set-asides of orders under multiple-award contracts. This final rule may have a positive economic impact on any small business entity that wishes to participate in the Federal marketplace. The section 1331 authorities are expected to provide small businesses greater access to multiple-award contracts, including orders issued against such contracts. There is an upward adjustment to the annual burden associated with an existing information collection, to account for size and socioeconomic status rerepresentations for individual task and delivery orders.

This rule also finalizes the interim rule published November 2, 2011, under FAR Case 2011–024.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

[FR Doc. 2020–02029 Filed 2–26–20; 8:45 am]

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FEDERAL REGISTER

Vol. 85 Thursday,

No. 39 February 27, 2020

Part V

Department of the Treasury

Privacy Act of 1974; System of Records; Notice

DEPARTMENT OF THE TREASURY

Privacy Act of 1974; System of Records

AGENCY: Bureau of the Fiscal Service, Department of the Treasury.

ACTION: Notice of Systems of Records.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, the Department of the Treasury, Bureau of the Fiscal Service is publishing its inventory of Privacy Act systems of records.

DATES: Submit comments on or before March 30, 2020. The new routine uses will be applicable on March 30, 2020 unless Treasury receives comments and determines that changes to the system of records notice are necessary.

ADDRESSES: David J. Ambrose, Chief Security Officer/Chief Privacy Officer, Bureau of the Fiscal Service, 3201 Pennsy Drive, Warehouse ''E'', Landover, MD 20785.

FOR FURTHER INFORMATION CONTACT: David J. Ambrose, Chief Security Officer/Chief Privacy Officer, Bureau of the Fiscal Service, 202–874–6488.

SUPPLEMENTARY INFORMATION: In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and the Office of Management and Budget (OMB), Circular No. A–108, the Department of the Treasury, Bureau of the Fiscal Service has completed a review of its Privacy Act systems of records notices to identify changes that will more accurately describe these records and is publishing an inventory of them.

On October 7, 2012, the Secretary of the Treasury issued Treasury Order 136–01, establishing within the Department of the Treasury (''Department'') the Bureau of the Fiscal Service (''Fiscal Service''). The new bureau consolidated the bureaus formerly known as the Financial Management Service (''FMS'') and the Bureau of the Public Debt (''BPD''). Treasury Order 136–01 was published in the **Federal Register** on May 24, 2013 (78 FR 31629). Fiscal Service is consolidating both legacy bureau's systems of records into a new set of SORNs under the Fiscal Service name.[1]

In some instances, FMS and BPD's SORNs have been renumbered. In other cases, parts of the legacy bureaus' SORNs were combined into one or more SORNs. No SORN was rescinded in its entirety.

Fiscal Service's SORNs are derived as follows:

Systems of records notice .001 (Administrative Records) is derived from FMS system of records notice .001 (Administrative Records) and BPD system of records notice .001 (Human Resources and Administrative Records).

System of records notice .002 (Payment Records) is derived from FMS system of records notice .002 (Payment Records—Treasury/FMS).

System of records notice .003 (Claims and Inquiry Records on Treasury Checks, and International Claimants) is derived from FMS system of records notice .003 (Claims and Inquiry Records on Treasury Checks, and International Claimants).

System of records notice .004 (Education and Training Records) is derived from BPD system of records notice .001 (Human Resources and Administrative Records) and FMS system of records notice .004 (Education and Training Records).

System of records notice .005 (Fiscal Service Personnel Records) is derived from BPD system of records notice .001 (Human Resources and Administrative Records) and FMS system of records notice .005 (FMS Personnel Records).

System of records notice .006 (Employee Assistance Records) is derived from BPD system of records notice .005 (Employee Assistance Records).

System of records notice .007 (Direct Deposit Enrollment Records) is derived from FMS system of records notice .006 (Direct Deposit Enrollment Records).

System of records notice .008 (Mailing List Records) is derived from FMS system of records notice .008 (Mailing List Records—Treasury/FMS).

System of records notice .009 (Delegations and Designations of Authority for Disbursing Functions) is derived from FMS system of records notice .010 (Records of Accountable Offices' Authority with Treasury).

System of records notice .010 (Pre-complaint Counseling and Complaint Activities) is derived from FMS system of records notice .012 (Pre-Complaint Counseling and Complaint Activities).

System of records notice .011 (Gifts to the United States) is derived from FMS system of records notice .013 (Gifts to the United States).

System of records notice .012 (Debt Collection Operations System) is derived from FMS system of records notice .014 (Debt Collection Operations System).

System of records notice .013 (Collections Records) is derived from FMS system of records notice .017 (Collections Records).

System of records notice .014 (United States Securities and Access) is derived from BPD systems of records notices .002 (United States Savings-Type Securities), .003 (United States Securities (Other than Savings-Type Securities)), and .008 (Retail Treasury Securities Access Application).

System of records notice .015 (Physical Access Control System) is derived from BPD system of records notice .004 (Controlled Access Security System).

System of records notice .016 (Health Unit Records) is derived from BPD system of records notice .006 (Health Service Program Records).

System of records notice .017 (Do Not Pay Payment Verification Records) is derived from Fiscal Service system of records notice .023 (Do Not Pay Payment Verification Records—Department of the Treasury/Bureau of the Fiscal Service).

System of records notice .018 (OneVoice Customer Relationship Management) is derived from Fiscal Service system of records notice .024 (OneVoice Customer Relationship Management—Department of the Treasury/Bureau of the Fiscal Service).

System of records notice .019 (Gifts to Reduce the Public Debt) is derived from BPD system of records notice .007 (Gifts to Reduce the Public Debt).

System of records notice .020 (U.S. Treasury Securities Fraud Information System) is derived from BPD system of records notice .009 (U.S. Treasury Securities Fraud Information System).

Fiscal Service is adding one routine use to all of the systems of records to share information with other federal agencies or federal entities as required by OMB Memorandum 17–12, ''Preparing for and Responding to a Breach of Personally Identifiable Information,'' dated January 3, 2017, to assist Treasury/Fiscal Service in responding to a suspected or confirmed breach or prevent, minimize, or remedy the risk of harm to the requesters, Treasury/Fiscal Service, the Federal Government, or national security.

Fiscal Service also slightly expanded the scope of SORN .003 (Claims and Inquiry Records on Treasury Checks, and International Claimants) to cover payments that will be made pursuant to the Guam World War II Loyalty Recognition Act, Public Law 114–328, Title XVII. This change is consistent with the purpose of the SORN and many other payments made pursuant to similar statutes and requirements.

[1] BPD last published its systems of records in their entirety on August 17, 2011, at 76 FR 51128. FMS last published its systems of records in their entirety on October 15, 2012, at 77 FR 62602. Since consolidation, Fiscal Service published two additional systems of records: (1) Do Not Pay Payment Verification Records, published on December 9, 2013, at 78 FR 73923; and (2) OneVoice Customer Relationship Management, published on September 19, 2014, at 79 FR 56433.

In addition to the changes noted above, this notice updates some of the system of records notices, changes references in the systems of records notices, and makes other administrative changes to reflect the consolidation into the Fiscal Service, such as updating the procedures for gaining access to, or contesting the contents of, records in these systems of records.

This notice covers all systems of records adopted by the Fiscal Service as of February 27, 2020. The system notices are reprinted in their entirety following the Table of Contents.

Ryan Law,

Deputy Assistant Secretary for Privacy, Transparency, & Records.

Table of Contents

Treasury/Fiscal Service .001

SYSTEM NAME AND NUMBER:

Department of the Treasury, Bureau of the Fiscal Service .001—Administrative Records.

SECURITY CLASSIFICATION:

Information in this system is not classified.

SYSTEM LOCATION:

Bureau of the Fiscal Service, U.S. Department of the Treasury, 3201 Pennsy Drive, Warehouse ''E'', Landover, MD 20785.

SYSTEM MANAGER(S):

(1) For Retiree Mailing Records: Legislative and Public Affairs, Bureau of the Fiscal Service, 3201 Pennsy Drive, Warehouse ''E'', Landover, MD 20785; and

(2) For all other records: Assistant Commissioner, Office of Management, Bureau of the Fiscal Service, 3201 Pennsy Drive, Warehouse ''E'', Landover, MD 20785.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 40 U.S.C. 581.

PURPOSE(S) OF THE SYSTEM:

Information in this system of records is collected and maintained about Fiscal Service employees, their relocating family members, contract vendors, retirees and other individuals if: (1) The Fiscal Service has incurred obligations on their behalf; (2) the individual has requested mailings from Fiscal Service or other Treasury publications; (3) the individual has a parking permit issued by the Fiscal Service; (4) the individual has been involved in a motor vehicle accident that may involve the Fiscal Service; (5) the individual has engaged in certain transactions in connection with their employment with the Fiscal Service or (6) the individual is a vendor to the Fiscal Service.

The information contained in the records assists Fiscal Service in properly tracking its use of appropriated and non-appropriated funding to acquire goods and services received from contractors and other federal agencies, as well as non-payroll related reimbursements to employees. Fiscal Service maintains these records to ensure that financial records pertaining to procurement, financial management and relocation are maintained accurately. For those receiving mailings, information contained in the records assists Fiscal Service in establishing and maintaining a robust relationship with its customers, as well as maintaining its commitment to actively engage employees, even those who have retired from the Civil Service.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Fiscal Service employees (including current and former employees), family members of relocating Fiscal Service employees, contractors, vendors, sellers/purchasers associated with residential transactions involving certain relocating Fiscal Service employees, and individuals requesting various Treasury publications.

CATEGORIES OF RECORDS IN THE SYSTEM:

(1) Motor vehicle accident reports and parking permits;

(2) Procurement records relating to: (a) Contractors/vendors that are individuals; and (b) government purchase cardholders. These records may include, for example, the name, Social Security number and credit card number for employees who hold Government-use cards, as well as procurement integrity certificates;

(3) Financial management records that relate to government travel, vendor accounts, other employee reimbursements, interagency transactions, employee pay records, vendor registration data, purchase card accounts and transactions, and program payment agreements;

(4) Relocation records that relate to employee relocation travel authorizations, reimbursements, and related vendor invoices;

(5) Retiree mailing records that contain the name and address furnished by Fiscal Service retirees that request mailings of newsletters and other special mailings; and

(6) Distribution Lists of Individuals Requesting Various Treasury Publications.

RECORD SOURCE CATEGORIES:

Information in this system of records is provided by Fiscal Service personnel, contractors/vendors or individuals requesting Treasury publications.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under the Privacy Act of 1974, 5 U.S.C. 552a(b), records and/or information or portions thereof maintained as part of this system may be disclosed outside Treasury as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows to:

(1) General Services Administration for driver's permits, parking permits, accident reports, and credentials;

(2) Government Accountability Office or Fiscal Service contractors for servicing the public on Treasury publications and managing subscriptions to the appropriate publications;

(3) Appropriate federal, state, local or foreign agencies responsible for investigating or prosecuting a violation

or for enforcing or implementing a statute, rule, regulation, order, or license, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure;

(4) The Office of Personnel Management, the Merit Systems Protection Board, the Equal Employment Opportunity Commission, and the Federal Labor Relations Authority upon authorized request;

(5) A federal, state, or local agency, maintaining civil, criminal or other relevant enforcement information or other pertinent information, which has requested information relevant to or necessary to the requesting agency's or the bureau's hiring or retention of an individual, or issuance of a security clearance, suitability determination, license, contract, grant, or other benefit;

(6) A court, magistrate, mediator or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations, in response to a subpoena, or in connection with criminal law proceedings;

(7) Foreign governments in accordance with formal or informal international agreements;

(8) A congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(9) Contractors for the purpose of processing personnel and administrative records;

(10) Unions recognized as exclusive bargaining representatives under 5 U.S.C. Chapter 71, arbitrators, and other parties responsible for the administration of the federal labor-management program if needed in the performance of their authorized duties;

(11) Third parties during the course of an investigation to the extent necessary to obtain information pertinent to the investigation;

(12) Federal agencies, state agencies, and local agencies for tax purposes;

(13) Private creditors for the purpose of garnishing wages of an employee if a debt has been reduced to a judgment;

(14) Authorized federal and non-federal entities for use in approved computer matching efforts, limited to those data elements considered necessary in making a determination of eligibility under particular benefit programs administered by those agencies or entities, to improve program integrity, and to collect debts and other monies owed to those agencies or entities or to the Fiscal Service;

(15) Other federal agencies to effect salary or administrative offset for the purpose of collecting a debt, except that addresses obtained from the Internal Revenue Service shall not be disclosed to other agencies;

(16) Next-of-kin, voluntary guardians, and other representative or successor in interest of a deceased or incapacitated employee or former employee;

(17) Representatives of the National Archives and Records Administration (''NARA'') who are conducting records management inspections under authority of 44 U.S.C. 2904 and 2906;

(18) Appropriate agencies, entities, and person when (1) the Department of the Treasury and/or Fiscal Service suspects or has confirmed that there has been a breach of the system of records; (2) the Department of the Treasury and/or Fiscal Service has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Department of the Treasury and/or Fiscal Service (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department of the Treasury's and/or Fiscal Service's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm; and

(19) Another Federal agency or Federal entity, when the Department of the Treasury and/or Fiscal Service determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records may be retrieved by name, Social Security number, other assigned identifier, and Treasury publication.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

All data maintained by this Fiscal Service system of records are retained and destroyed in accordance with the Fiscal Service File Plan. All records schedules and categories within the Fiscal Service File Plan are approved by NARA.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

In accordance with section (b)(12) of the Privacy Act of 1974, as amended (5 U.S.C. 552a(b)(12)), disclosures may be made from this system of records to ''consumer reporting agencies'' [2] in accordance with section 3711(e) of title 31. The purpose of the disclosure is to aid in the collection of outstanding debts owed to the Federal Government. After the prerequisites of 31 U.S.C. 3711 have been followed, the Fiscal Service may disclose information necessary to establish the identity of the individual responsible for the claim, including name, address, and taxpayer identification number; the amount, status, and history of the claim; and the agency or program under which the claim arose.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

These records are maintained in controlled access areas. Identification cards are verified to ensure that only authorized personnel are present. Electronic records are protected by restricted access procedures, including the use of passwords and sign-on protocols, which are periodically changed. Only employees whose official duties require access are allowed to view, administer, and control these records. Copies of records maintained on a computer have the same limited access as paper records.

RECORD ACCESS PROCEDURES:

Individuals requesting information under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest and/or amend records under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

NOTIFICATION PROCEDURES:

Individuals seeking to be notified if this system of record contains a record

[2] ''Consumer reporting agency'' is defined in 31 U.S.C. 3701(a)(3).

pertaining to himself or herself must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

Notice of this system of records was last published in full in the **Federal Register** on August 17, 2011 (76 FR 51128) as the Department of the Treasury, Bureau of the Public Debt .001—Human Resources and Administrative Records and on October 15, 2012 (77 FR 62602) as the Department of the Treasury, Financial Management Service .001—Administrative Records.

Treasury/Fiscal Service .002

SYSTEM NAME AND NUMBER:

Department of the Treasury, Bureau of the Fiscal Service .002—Payment Records

SECURITY CLASSIFICATION:

Information in this system is not classified.

SYSTEM LOCATION:

Kansas City Regional Financial Center, Bureau of the Fiscal Service, U.S. Department of the Treasury, 4241 NE 34th Street, Kansas City, MO 64117; Bureau of the Fiscal Service, 320 Avery Street, Parkersburg, WV 26106–1328. Records are also located throughout the United States at Federal Reserve Banks and financial institutions acting as Treasury's fiscal and financial agents. The addresses of the fiscal and financial agents may be obtained from the system manager below.

SYSTEM MANAGER(S):

Chief Disbursing Officer, Assistant Commissioner, Payment Management, Bureau of the Fiscal Service, 3201 Pennsy Drive, Warehouse ''E'', Landover, MD 20785.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 31 U.S.C. 321, 3301, 3321, 3321 note, 3325, 3327, 3328, 3332, 3334, 3720.

PURPOSE(S) OF THE SYSTEM:

Information in this system of records is collected from federal government entities that are requesting disbursement of domestic and international payments to their recipients and is used to facilitate such payments.

The information will also be used for collateral purposes related to the processing of disbursements, such as collection of statistical information on operations, development of computer systems, investigation of unauthorized or fraudulent activity, and the collection of debts arising out of such activity.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who are the intended or actual recipients of payments disbursed by the United States Government.

CATEGORIES OF RECORDS IN THE SYSTEM:

Payment records showing a payee's name, Social Security number, employer identification number, or other agency identification or account number; date and location of birth, physical and/or electronic mailing address; telephone numbers; payment amount; date of issuance; trace number or other payment identification number, such as Treasury check number and symbol; financial institution information, including the routing number of his or her financial institution and the payee's account number at the financial institution; and vendor contract and/or purchase order number.

RECORD SOURCE CATEGORIES:

Information in this system is provided by: Federal departments and agencies responsible for certifying, disbursing, and collecting federal payments; Treasury or Fiscal Service-designated fiscal and financial agents of the United States that process payments and collections; and commercial database vendors. Each of these record sources may include information obtained from individuals.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under the Privacy Act of 1974, 5 U.S.C. 552a(b), records and/or information or portions thereof maintained as part of this system may be disclosed outside Treasury as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows to:

(1) The banking industry for payment verification;

(2) Federal investigative agencies, Departments and agencies for whom payments are made, and payees;

(3) Appropriate federal, state, local or foreign agencies responsible for investigating or prosecuting a violation or for enforcing or implementing a statute, rule, regulation, order, or license, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure;

(4) A federal, state, or local agency maintaining civil, criminal or other relevant enforcement information or other pertinent information, which has requested information relevant to or necessary to the requesting agency's or the bureau's hiring or retention of an individual, or issuance of a security clearance, suitability determination, license, contract, grant, or other benefit;

(5) A court, magistrate, mediator, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations, in response to a subpoena, or in connection with criminal law proceedings;

(6) Foreign governments in accordance with formal or informal international agreements;

(7) A congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(8) Unions recognized as exclusive bargaining representatives under 5 U.S.C. Chapter 71, arbitrators, and other parties responsible for the administration of the federal labor-management program if needed in the performance of their authorized duties;

(9) Third parties during the course of an investigation to the extent necessary to obtain information pertinent to the investigation;

(10) Federal creditor agencies, their employees, or their agents for the purpose of facilitating or conducting federal administrative offset, federal tax refund offset, federal salary offset, or for any other authorized debt collection purpose;

(11) Any state, territory or commonwealth of the United States, or the District of Columbia to assist in the collection of state, commonwealth, territory or District of Columbia claims pursuant to a reciprocal agreement between Fiscal Service and the state, commonwealth, territory or the District of Columbia, or pursuant to federal law that authorizes the offset of federal payments to collect delinquent obligations owed to the state, commonwealth, territory, or the District of Columbia;

(12) The Defense Manpower Data Center and the United States Postal Service and other federal agencies through authorized computer matching programs for the purpose of identifying and locating individuals who are delinquent in their repayment of debts owed to the Department or other federal agencies in order to collect those debts through salary offset and administrative

offset, or by the use of other debt collection tools;

(13) A contractor of the Fiscal Service for the purpose of performing routine payment processing services, subject to the same limitations applicable to Fiscal Service officers and employees under the Privacy Act;

(14) A fiscal or financial agent of the Fiscal Service, its employees, agents, and contractors, or to a contractor of the Fiscal Service, for the purpose of ensuring the efficient administration of payment processing services, subject to the same or equivalent limitations applicable to Fiscal Service officers and employees under the Privacy Act;

(15) To appropriate agencies, entities, and person when (1) the Department of the Treasury and/or Fiscal Service suspects or has confirmed that there has been a breach of the system of records; (2) the Department of the Treasury and/or Fiscal Service has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Department of the Treasury and/or Fiscal Service (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department of the Treasury's and/or Fiscal Service's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm;

(16) To another Federal agency or Federal entity, when the Department of the Treasury and/or Fiscal Service determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach;

(17) (a) a federal or state agency, its employees, agents (including contractors of its agents) or contractors; (b) a fiscal or financial agent designated by the Fiscal Service or other Department of the Treasury bureau or office, including employees, agents or contractors of such agent; or (c) a contractor of the Fiscal Service, for the purpose of identifying, preventing, or recouping improper payments to an applicant for, or recipient of, federal funds, including funds disbursed by a state in a state-administered, federally-funded program; disclosure may be made to conduct computerized comparisons for this purpose;

(18) Agents or contractors who have been engaged to assist the Fiscal Service in the performance of a service related to this system of records and who need to have access to the records in order to perform the activity; and

(19) Representatives of the National Archives and Records Administration (''NARA'') who are conducting records management inspections under authority of 4 U.S.C. 2904 and 2906.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS IN THE SYSTEM:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records may be retrieved by name, Social Security number, employer identification number, agency-supplied identifier, date of payment, or trace number, or other payment identifying information, such as check number.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

All data maintained by this Fiscal Service system of records are retained and destroyed in accordance with the Fiscal Service File Plan. All records schedules and categories within the Fiscal Service File Plan are approved by NARA.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

These records are maintained in controlled access areas. Identification cards are verified to ensure that only authorized personnel are present. Electronic records are protected by restricted access procedures, including the use of passwords and sign-on protocols, which are periodically changed. Only employees whose official duties require access are allowed to view, administer, and control these records. Copies of records maintained on a computer have the same limited access as paper records.

RECORD ACCESS PROCEDURES:

Individuals requesting information under the Privacy Act must follow procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR, Part 1, Subpart C, Appendix G.

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest and/or amend records under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

NOTIFICATION PROCEDURES:

Individuals seeking to be notified if this system of record contains a record pertaining to himself or herself must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

Notice of this system of records was last published in full in the **Federal Register** on October 15, 2012 (77 FR 62602) as the Department of the Treasury, Financial Management Service .002—Payment Records.

Treasury/Fiscal Service .003

SYSTEM NAME AND NUMBER:

Department of the Treasury, Bureau of the Fiscal Service .003—Claims and Inquiry Records on Treasury Checks, and International Claimants.

SECURITY CLASSIFICATION:

Information in this system is not classified.

SYSTEM LOCATION:

Kansas City Regional Financial Center, Bureau of the Fiscal Service, U.S. Department of the Treasury, 4241 NE 34th Street, Kansas City, MO 64117; Bureau of the Fiscal Service, 320 Avery Street, Parkersburg, WV 26106–1328. Records are also located throughout the United States at Federal Reserve Banks and financial institutions acting as Treasury's fiscal and financial agents. The addresses of the fiscal and financial agents may be obtained from the system manager below.

SYSTEM MANAGER(S):

Chief Disbursing Officer, Assistant Commissioner, Payment Management, Bureau of the Fiscal Service, 3201 Pennsy Drive, Warehouse ''E,'', Landover, MD 20785.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; Treasury check claims—15 U.S.C. 771 with delegation of authority from Comptroller General of the United States; International claims—50 U.S.C. 2012; 22 U.S.C. 1627, 1641, 1642; Public Law 114–328.

PURPOSE(S) OF THE SYSTEM:

To be the system of record for all checks issued by the U.S. Department of the Treasury and claims against these checks, including:

(1) Claims where the payee has verified they were not the endorser of

the check therefore resulting in potential fraud;

(2) Claims of non-entitlement (reclamations) by agencies;

(3) Claims of non-receipt by payees;

(4) Expired checks, *i.e.,* limited pay cancellations; and

(5) Claims for benefits under the War Claims Act, the International Claims Settlement Act of 1949, and the Guam World War II Loyalty Recognition Act.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

(1) Payees and holders of Treasury checks; and

(2) Claimants awarded benefits under the War Claims Act, the International Claims Settlement Act of 1949, and the Guam World War II Loyalty Recognition Act.

CATEGORIES OF RECORDS IN THE SYSTEM:

(1) Treasury check claim files; and

(2) Awards for claims for losses sustained by individuals.

RECORD SOURCE CATEGORIES:

Information in this system of records is provided by:

(1) Individual payees of Treasury checks, endorsers of Treasury checks, investigative agencies, contesting claimants;

(2) Federal program agencies and other federal entities; and

(3) Awards certified to Treasury for payment by Foreign Claims Settlement Commission.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under the Privacy Act of 1974, 5 U.S.C. 552a(b), records and/or information or portions thereof maintained as part of this system may be disclosed outside Treasury as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows to:

(1) Endorsers concerning checks for which there is liability, federal agencies, state and local law enforcement agencies, General Accountability Office, congressional offices and media assistance offices on behalf of payee claimants;

(2) Appropriate federal, state, local or foreign agencies responsible for investigating or prosecuting a violation of or for enforcing or implementing a statute, rule, regulation, order, or license, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure;

(3) A federal, state, or local agency, maintaining civil, criminal or other relevant enforcement information or other pertinent information, which has requested information relevant or necessary to the requesting agency's or the bureau's hiring or retention of an individual, or issuance of a security clearance, suitability determination, license, contract, grant, or other benefit;

(4) A court, magistrate, mediator or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of discovery, litigation, or settlement negotiations, in response to a subpoena, or in connection with criminal law proceedings;

(5) Foreign governments in accordance with formal or informal international agreements;

(6) A congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(7) The news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information, when disclosure is necessary to preserve confidence in the integrity of the Fiscal Service, or when disclosure is necessary to demonstrate the accountability of Fiscal Service's officers, employees, or individuals covered by the system, except to the extent the Chief Privacy Officer determines that release of the specific information in the context of a particular issue would constitute an unwarranted invasion of personal privacy;

(8) Unions recognized as exclusive bargaining representatives under 5 U.S.C. Chapter 71, arbitrators, and other parties responsible for the administration of the federal labor-management program if needed in the performance of their authorized duties;

(9) Third parties during the course of an investigation to the extent necessary to obtain information pertinent to the investigation;

(10) The public when attempts by Fiscal Service to locate the claimant have been unsuccessful. This information is limited to the claimant's name, city, and state of last known address, and the amount owed to the claimant. (This routine use does not apply to the Iran Claims Program or the Holocaust Survivors Claims Program or other claims programs that statutorily prohibit disclosure of claimant information);

(11) Representatives of the National Archives and Records Administration (''NARA'') who are conducting records management inspections under authority of 44 U.S.C. 2904 and 2906;

(12) Appropriate agencies, entities, and person when (1) the Department of the Treasury and/or Fiscal Service suspects or has confirmed that there has been a breach of the system of records; (2) the Department of the Treasury and/or Fiscal Service has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Department of the Treasury and/or Fiscal Service (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department of the Treasury's and/or Fiscal Service's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm;

(13) Another Federal agency or Federal entity, when the Department of the Treasury and/or Fiscal Service determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach; and

(14) Agents or contractors who have been engaged to assist the Fiscal Service in the performance of a service related to this system of records and who need to have access to the records in order to perform the activity.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records may be retrieved by:

(1) Name of payee and check number and symbol;

(2) Social Security number; and

(3) Name of claimant or alphanumeric reference to claim number.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

All data maintained by this Fiscal Service system of records are retained and destroyed in accordance with the Fiscal Service File Plan. All records schedules and categories within the

Fiscal Service File Plan are approved by NARA.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

These records are maintained in controlled access areas. Identification cards are verified to ensure that only authorized personnel are present. Electronic records are protected by restricted access procedures, including the use of passwords and sign-on protocols, which are periodically changed. Only employees whose official duties require access are allowed to view, administer, and control these records. Copies of records maintained on a computer have the same limited access as paper records.

RECORD ACCESS PROCEDURES:

Individuals requesting information under the Privacy Act must follow procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest and/or amend records under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

NOTIFICATION PROCEDURES:

Individuals seeking to be notified if this system of record contains a record pertaining to himself or herself must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

Notice of this system of records was last published in full in the **Federal Register** on Oct. 15, 2012 (77 FR 62602) as the Department of the Treasury, Financial Management Service .003—Claims and Inquiry Records on Treasury Checks, and International Claimants.

Treasury/Fiscal Service .004

SYSTEM NAME AND NUMBER:

Department of the Treasury, Bureau of the Fiscal Service .004—Education and Training Records.

SECURITY CLASSIFICATION:

Information in this system is not classified.

SYSTEM LOCATION:

Bureau of the Fiscal Service, U.S. Department of the Treasury, 320 Avery Street, Parkersburg, WV 26106–1328.

SYSTEM MANAGER(S):

Assistant Commissioner, Office of Management, Bureau of the Fiscal Service, 3201 Pennsy Drive, Warehouse ''E'', Landover, MD 20785.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 31 U.S.C. 321; 31 U.S.C. chapter 33; 31 U.S.C. 3720.

PURPOSE(S) OF THE SYSTEM:

Information in this system of records is collected and maintained about Government employees and other individuals who participate in Fiscal Service's education and training program. The information contained in the records will assist Fiscal Service in properly tracking individual training and accurately account for training revenue and expenditures generated through the Fiscal Service's training programs (for example, Integrated Talent Management (ITM)). For Fiscal Service personnel, the records contained in Fiscal Service's training records will also assist managers' active participation in their employees' learning plans. Fiscal Service maintains the information necessary to ensure that Fiscal Service keeps accurate records related to classes, including a training participant's training and enrollment status, class completion information, and learning history. Fiscal Service also maintains the records to ensure that financial records pertaining to a training participant's payment for training fees are maintained accurately. Fiscal Service's training records will report financial information to the Internal Revenue Service and Office of Personnel Management. Finally, the information contained in the covered records will be used for collateral purposes related to the training processes, such as the collection of statistical information on training programs, development of computer systems, investigation of unauthorized or fraudulent activity related to submission of information to Fiscal Service for training program purposes and the collection of debts arising out of such activity.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Government employees (including separated employees, in certain cases) and other individuals who access and apply for Fiscal Service training services.

CATEGORIES OF RECORDS IN THE SYSTEM:

(1) Personal Profile—Account Record;
(2) Transcript Record;
(3) Enrollment Status Record;
(4) My Plan Record;
(5) Assessment Performance Results Record;
(6) Managerial Approval/Disapproval Status Record;
(7) Class Roster Record;
(8) Class Evaluation Record;
(9) Payment Record; and
(10) Statistical Reports—retrievable by names: (a) Learning History, (b) Class Enrollment Report, (c) Class Payment/Billing Report, (d) Status of Training Report, (e) Ad Hoc Training Report, and (f) Other Similar Files or Registers.

RECORD SOURCE CATEGORIES:

Information in this system is provided by the individual on whom the record is maintained; the individual's employer; and other governmental agency or educational institutions.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under the Privacy Act of 1974, 5 U.S.C. 552a(b), records and/or information or portions thereof maintained as part of this system may be disclosed outside Treasury as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows to:

(1) Appropriate federal, state, local or foreign agencies responsible for investigating or prosecuting a violation or for enforcing or implementing a statute, rule, regulation, order, or license, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure;

(2) A court, magistrate, mediator or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations, in response to a subpoena, or in connection with criminal law proceedings;

(3) A congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(4) Federal agencies, financial institutions, and contractors for the purpose of performing fiscal services, including, but not limited to, processing payments, investigating and rectifying possible erroneous reporting information, testing and enhancing related computer systems, creating and reviewing statistics to improve the quality of services provided, or conducting debt collection services;

(5) Federal agencies, their agents and contractors for the purposes of facilitating the collection of receipts,

determining the acceptable method of collection, the accounting of such receipts, and the implementation of programs related to the receipts being collected as well as status of their personnel training, statistical training information;

(6) Financial institutions, including banks and credit unions, and credit card companies for the purpose of collections and/or investigating the accuracy of information required to complete transactions using electronic methods and for administrative purposes, such as resolving questions about a transaction;

(7) Unions recognized as exclusive bargaining representatives under 5 U.S.C. Chapter 71, arbitrators, and other parties responsible for the administration of the federal labor-management program if needed in the performance of their authorized duties;

(8) Foreign governments in accordance with formal or informal international agreements;

(9) Third parties during the course of an investigation to the extent necessary to obtain information pertinent to the investigation;

(10) Federal agencies, their agents and contractors, credit bureaus, and employers of individuals who owe delinquent debt when the debt arises from the unauthorized use of electronic payment methods. The information will be used for the purpose of collecting such debt through offset, administrative wage garnishment, referral to private collection agencies, litigation, reporting the debt to credit bureaus, or for any other authorized debt collection purpose;

(11) Representatives of the National Archives and Records Administration (''NARA'') who are conducting records management inspections under authority of 44 U.S.C. 2904 and 2906;

(12) To appropriate agencies, entities, and person when (1) the Department of the Treasury and/or Fiscal Service suspects or has confirmed that there has been a breach of the system of records; (2) the Department of the Treasury and/or Fiscal Service has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Department of the Treasury and/or Fiscal Service (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department of the Treasury's and/or Fiscal Service's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm;

(13) To another Federal agency or Federal entity, when the Department of the Treasury and/or Fiscal Service determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach; and

(14) Agents or contractors who have been engaged to assist the Fiscal Service in the performance of a service related to this system of records and who need to have access to the records in order to perform the activity.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Electronic training data can be retrieved by class name and/or organization name and participant name. Electronic financial data can be retrieved by name, organization and payment information (*e.g.,* credit card, Standard Form 182).

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

All data maintained by this Fiscal Service system of records are retained and destroyed in accordance with the Fiscal Service File Plan. All records schedules and categories within the Fiscal Service File Plan are approved by NARA.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

These records are maintained in controlled access areas. Identification cards are verified to ensure that only authorized personnel are present. Electronic records are protected by restricted access procedures, including the use of passwords and sign-on protocols, which are periodically changed. Only employees whose official duties require access are allowed to view, administer, and control these records. Copies of records maintained on a computer have the same limited access as paper records.

RECORD ACCESS PROCEDURES:

Individuals requesting information under the Privacy Act must follow procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest and/or amend records under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

NOTIFICATION PROCEDURES:

Individuals seeking to be notified if this system of record contains a record pertaining to himself or herself must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

Notice of this system of records was last published in full in the **Federal Register** on August 17, 2011 (76 FR 51128) as the Department of the Treasury, Bureau of the Public Debt .001—Human Resources and Administrative Records and on October 15, 2012 (77 FR 62602) as the Department of the Treasury, Financial Management Service .004—Education and Training Records.

Treasury/Fiscal Service .005

SYSTEM NAME AND NUMBER:

Department of the Treasury, Bureau of the Fiscal Service .005—Fiscal Service Personnel Records.

SECURITY CLASSIFICATION:

Information in this system is not classified.

SYSTEM LOCATION:

Bureau of the Fiscal Service, U.S. Department of the Treasury, locations at: 3201 Pennsy Drive, Warehouse ''E'', Landover, MD 20785; 200 Third Street, Parkersburg, WV 26106–1328; 320 Avery Street, Parkersburg, WV 26106–1328; 4241 NE 34th Street, Kansas City, MO 64117–3120; 13000 Townsend Road, Philadelphia, PA 19154; and Fiscal Service offices in Austin, TX 78714 and Birmingham, AL. Copies of some documents have been duplicated for maintenance by supervisors for employees or programs under their supervision. These duplicates are also covered by this system of records.

SYSTEM MANAGER(S):

(1) For personnel records: Assistant Commissioner, Office of Management, Bureau of the Fiscal Service, 3201

Pennsy Drive, Warehouse ''E'', Landover, MD 20785; and

(2) For personnel security records: Assistant Commissioner, Office of Information and Security Services, Bureau of the Fiscal Service, 320 Avery Street, Parkersburg, WV 26106–1328.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; U.S. Office of Personnel Management, Guide to Personnel Recordkeeping (Operating Manual).

PURPOSE(S) OF THE SYSTEM:

The information contained in these records assists Fiscal Service in: (1) Maintaining current and historical personnel records and preparing individual administrative transactions relating to classification; assignment; career development; evaluation; promotion, compensation, separation and retirement; making decisions on the rights, benefits, entitlements and the utilization of individuals; providing a data source for the production of reports, statistical surveys, rosters, documentation, and studies required for the orderly personnel administration within Treasury; (2) maintaining employment history; (3) providing investigatory information for determinations concerning whether an individual is suitable or fit for Government employment; eligible for logical and physical access to Treasury controlled facilities and information systems; eligible to hold sensitive positions (including but not limited to eligibility for access to classified information); fit to perform work for or on behalf of the U.S. Government as a contractor; qualified to perform contractor services for the U.S. Government; or loyal to the United States; (4) ensuring that Fiscal Service is upholding the highest standards of integrity, loyalty, conduct, and security among its employees and contract personnel; (5) to help streamline and make the adjudicative process more efficient; and (6) to otherwise conform with applicable legal, regulatory and policy authorities.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Fiscal Service employees (including current and separated employees), family members of Fiscal Service employees, and applicants for Fiscal Service employment.

CATEGORIES OF RECORDS IN THE SYSTEM:

(1) Human Resources Records: Records covered under the National Archives and Records Administration (''NARA'')'s General Records Schedule, 2.0 Human Resources, which relate to the supervision over and management of federal civilian employees, including the disposition of Official Personnel Folders and other records relating to civilian personnel; and

(2) Personnel Security Records: Records covered under the NARA General Records Schedule 2.1 Employee Acquisition Records, and 5.6 Security Records that relate to initial and recurring background investigations of Fiscal Service employee and contractors, as well as the issuance of PIV-enabled identification cards (*i.e.,* credentials).

RECORD SOURCE CATEGORIES:

Information in this system of records is provided by applicant Notification of Personnel Action Forms (SF–50), job application/resume (completed by applicant), payroll actions references, educational institutions, the subject of the record, authorized representatives, supervisor, employers, medical personnel, other employees, other federal, state, or local agencies, and commercial entities.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under the Privacy Act of 1974, 5 U.S.C. 552a(b), records and/or information or portions thereof maintained as part of this system may be disclosed outside Treasury as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows to:

(1) Appropriate federal, state, local or foreign agencies responsible for investigating or prosecuting a violation or for enforcing or implementing a statute, rule, regulation, order, or license, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure;

(2) The Office of Personnel Management, the Merit Systems Protection Board, the Equal Employment Opportunity Commission, and the Federal Labor Relations Authority upon authorized request;

(3) Other federal, state, or local agencies, such as a state employment compensation board or housing administration agency, so that the agency may adjudicate an individual's eligibility for a benefit, or liability in such matters as child support;

(4) A federal, state, or local agency, maintaining civil, criminal or other relevant enforcement information or other pertinent information, which has requested information relevant to or necessary to the requesting agency's or the bureau's hiring or retention of an individual, or issuance of a security clearance, suitability determination, license, contract, grant, or other benefit;

(5) A court, magistrate, mediator or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations, in response to a subpoena, or in connection with criminal law proceedings;

(6) Foreign governments in accordance with formal or informal international agreements;

(7) A congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(8) Contractors for the purpose of processing personnel and administrative records;

(9) Unions recognized as exclusive bargaining representatives under 5 U.S.C. Chapter 71, arbitrators, and other parties responsible for the administration of the federal labor-management program if needed in the performance of their authorized duties;

(10) Third parties during the course of an investigation to the extent necessary to obtain information pertinent to the investigation;

(11) Consumer reporting agencies, private creditors and debt collection agencies, including mailing addresses obtained from the Internal Revenue Service to obtain credit reports;

(12) Federal agencies and to state and local agencies for tax purposes;

(13) Private creditors for the purpose of garnishing wages of an employee if a debt has been reduced to a judgment;

(14) Authorized federal and non-federal entities for use in approved computer matching efforts, limited to those data elements considered necessary in making a determination of eligibility under particular benefit programs administered by those agencies or entities, to improve program integrity, and to collect debts and other monies owed to those agencies or entities or to the Fiscal Service;

(15) Other federal agencies to effect salary or administrative offset for the purpose of collecting a debt, except that addresses obtained from the Internal Revenue Service shall not be disclosed to other agencies;

(16) Next-of-kin, voluntary guardians, and other representative or successor in interest of a deceased or incapacitated employee or former employee;

(17) Representatives of the National Archives and Records Administration (''NARA'') who are conducting records

management inspections under authority of 44 U.S.C. 2904 and 2906;

(18) A congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(19) Appropriate agencies, entities, and person when (1) the Department of the Treasury and/or Fiscal Service suspects or has confirmed that there has been a breach of the system of records; (2) the Department of the Treasury and/or Fiscal Service has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Department of the Treasury and/or Fiscal Service (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department of the Treasury's and/or Fiscal Service's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm;

(20) Another Federal agency or Federal entity, when the Department of the Treasury and/or Fiscal Service determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach; and

(21) Agents or contractors who have been engaged to assist the Fiscal Service in the performance of a service related to this system of records and who need to have access to the records in order to perform the activity.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

In accordance with section (b)(12) of the Privacy Act of 1974, as amended (5 U.S.C. 552a(b)(12)), disclosures may be made from this system of records to ''consumer reporting agencies'' [3] in accordance with section 3711(e) of title 31.'' The purpose of the disclosure is to aid in the collection of outstanding debts owed to the Federal Government. After the prerequisites of 31 U.S.C. 3711 have been followed, the Fiscal Service may disclose information necessary to establish the identity of the individual responsible for the claim, including name, address, and taxpayer identification number; the amount, status, and history of the claim; and the agency or program under which the claim arose.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

By name, Social Security number or other assigned identifier.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

All data maintained by this Fiscal Service system of records are retained and destroyed in accordance with the Fiscal Service File Plan. All records schedules and categories within the Fiscal Service File Plan are approved by NARA.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

These records are maintained in controlled access areas. Identification cards are verified to ensure that only authorized personnel are present. Electronic records are protected by restricted access procedures, including the use of passwords and sign-on protocols, which are periodically changed. Only employees whose official duties require access are allowed to view, administer, and control these records. Copies of records maintained on a computer have the same limited access as paper records.

RECORD ACCESS PROCEDURES:

Individuals requesting information under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest and/or amend records under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

NOTIFICATION PROCEDURES:

Individuals seeking to be notified if this system of record contains a record pertaining to himself or herself must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

Notice of this system of records was last published in full in the **Federal Register** on August 17, 2011 (76 FR 51128) as the Department of the Treasury, Bureau of the Public Debt .001—Human Resources and Administrative Records and on October 15, 2012 (77 FR 62602) as the Department of the Treasury, Financial Management Service .005—FMS Personnel Records.

Treasury/Fiscal Service .006

SYSTEM NAME AND NUMBER:

Department of the Treasury, Bureau of the Fiscal Service .006—Employee Assistance Records.

SECURITY CLASSIFICATION:

Information in this system is not classified.

SYSTEM LOCATION:

This system covers Fiscal Service employee assistance records that are maintained by another federal, state, local government, or contractor under an agreement with the Fiscal Service directly or through another entity to provide the Employee Assistance Program (EAP) functions. The address of the other agency or contractor may be obtained from the system manager below.

SYSTEM MANAGER(S):

Assistant Commissioner, Office of Management, Bureau of the Fiscal Service, 3201 Pennsy Drive, Warehouse ''E'', Landover, MD 20785.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, 7361, 7362, 7904; 44 U.S.C. 3101.

PURPOSE(S) OF THE SYSTEM:

Information in this system of records is collected and maintained to provide a history and record of the employee's or his/her family member's counseling session.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Fiscal Service employees and former employees who have been counseled, either by self-referral or supervisory-referral, regarding alcohol or drug abuse, emotional health, or other personal problems. Where applicable, this system also covers family members of Fiscal Service employees when the family member uses the services of the EAP.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system contains records of each employee and, in some cases, family

[3] ''Consumer reporting agency'' is defined in 31 U.S.C. 3701(a)(3).

members of the employee who have used the EAP for an alcohol, drug, emotional, or personal problem. Examples of information that may be found in each record are: The individual's name; Social Security number; date of birth; grade; job title; home address; telephone numbers; supervisor's name and telephone number; assessment of problem; and referrals to treatment facilities and outcomes.

RECORD SOURCE CATEGORIES:

Information in this system of records comes from the individual to whom it applies, the supervisor of the individual if the individual was referred by a supervisor, or the contractor's staff member who records the counseling session.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under the Privacy Act of 1974, 5 U.S.C. 552a(b), records and/or information or portions thereof maintained as part of this system may be disclosed outside Treasury as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows to:

(1) An entity under contract with the Fiscal Service for the purpose of providing the EAP function;

(2) Medical personnel to the extent necessary to meet a bona fide medical emergency in accordance with the Confidentiality of Alcohol and Drug Abuse Patient Records regulations (42 CFR part 2);

(3) Contractors and consultants, and their employees, contractors or other personnel for the purpose of conducting scientific research, management audits, financial audits, or program evaluation, provided individual identifiers are not disclosed in any manner, in accordance with the Confidentiality of Alcohol and Drug Abuse Patient Records regulations (42 CFR part 2);

(4) The Department of Justice or other appropriate federal agency in defending claims against the United States when the records are not covered by the Confidentiality of Alcohol and Drug Abuse Patient Records regulations at 42 CFR part 2;

(5) A congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(6) A court, magistrate, mediator or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations, in response to a subpoena, or in connection with criminal law proceedings;

(7) A federal, state, or local agency, maintaining civil, criminal or other relevant enforcement information or other pertinent information, which has requested information relevant to or necessary to the requesting agency's or the bureau's hiring or retention of an individual, or issuance of a security clearance, suitability determination, license, contract, grant, or other benefit;

(8) Appropriate agencies, entities, and person when (1) the Department of the Treasury and/or Fiscal Service suspects or has confirmed that there has been a breach of the system of records; (2) the Department of the Treasury and/or Fiscal Service has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Department of the Treasury and/or Fiscal Service (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department of the Treasury's and/or Fiscal Service's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm;

(9) Another Federal agency or Federal entity, when the Department of the Treasury and/or Fiscal Service determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach; and

(10) Agents or contractors who have been engaged to assist the Fiscal Service in the performance of a service related to this system of records and who need to have access to the records in order to perform the activity.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

These records are retrieved by the name and Social Security number or other assigned identifier of the individual on whom they are maintained.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

All data maintained by this Fiscal Service system of records are retained and destroyed in accordance with the Fiscal Service File Plan. All records schedules and categories within the Fiscal Service File Plan are approved by NARA.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

These records are maintained in controlled access areas. Identification cards are verified to ensure that only authorized personnel are present. Electronic records are protected by restricted access procedures, including the use of passwords and sign-on protocols, which are periodically changed. Only employees whose official duties require access are allowed to view, administer, and control these records. Copies of records maintained on a computer have the same limited access as paper records.

When Fiscal Service contracts with an entity for the purpose of providing the EAP functions, the contractor shall be required to maintain Privacy Act of 1974, as amended, safeguards with respect to such records.

RECORD ACCESS PROCEDURES:

Individuals requesting information under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest and/or amend records under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

NOTIFICATION PROCEDURES:

Individuals seeking to be notified if this system of record contains a record pertaining to himself or herself must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

Notice of this system of records was last published in full in the **Federal Register** on August 17, 2011 (76 FR 51128) as the Department of the Treasury, Bureau of the Public Debt .005—Employee Assistance Records.

Treasury/Fiscal Service .007

SYSTEM NAME AND NUMBER:

Department of the Treasury, Bureau of the Fiscal Service .007—Direct Deposit Enrollment Records.

SECURITY CLASSIFICATION:

Information in this system is not classified.

SYSTEM LOCATION:

Federal Reserve Bank of Dallas, acting in its capacity as Treasury's fiscal agent, 2200 North Pearl Street, Dallas, TX 75201.

SYSTEM MANAGER(S):

Chief Disbursing Officer, Assistant Commissioner, Payment Management, Bureau of the Fiscal Service, 3201 Pennsy Drive, Warehouse ''E'', Landover, MD 20785.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 31 U.S.C. 321; 31 U.S.C. chapter 33; 31 U.S.C. 3332.

PURPOSE(S) OF THE SYSTEM:

Information in this system of records is collected and maintained about individuals who wish to enroll in the Direct Deposit program in order to receive federal payments directly to a bank account or other similar type of account via electronic funds transfer, rather than by paper check.

The records are used to process Direct Deposit enrollment applications that may be received directly by Fiscal Service, its fiscal agents, and/or contractors. The records are collected and maintained to guarantee that Direct Deposit enrollment applications are processed properly to ensure that a recipient's federal payment will be disbursed to the correct account. Without the appropriate information, Fiscal Service, its fiscal agents and contractors, would not be able to process the Direct Deposit enrollment application as requested by the individual authorizing the Direct Deposit.

The information will also be used for collateral purposes related to the processing of Direct Deposit enrollments, such as collection of statistical information on operations, development of computer systems, investigation of unauthorized or fraudulent activity, and the collection of debts arising out of such activity.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who enroll with the Fiscal Service to receive federal payments from the Federal Government via an electronic funds transfer program known as ''Direct Deposit.''

CATEGORIES OF RECORDS IN THE SYSTEM:

The records may contain identifying information, such as: An individual's name(s), Social Security number, home address, home and work telephone number, and personal email address (home and work); date of birth; bank account(s) and other types of accounts to which payments are made, such as the individual's bank account number and the financial institution routing and transit number; information about an individual's payments received from the United States, including the type of payment received and the federal agency responsible for authorizing the payment; information related to the cancellation or suspension of an individual's Direct Express® debit card [4] by Fiscal Service's financial agent; and information provided by an individual regarding a hardship due to a remote geographic location or about his or her inability to manage a bank account or prepaid debit card due to mental impairment.

RECORD SOURCE CATEGORIES:

Information in this system is provided by the individual on whom the record is maintained (or by his or her authorized representative), other persons who electronically authorize payments from the Federal Government, federal agencies responsible for authorizing payments, federal agencies responsible for disbursing payments, Treasury financial agents, Treasury fiscal agents that process Direct Deposit enrollment applications, and contractors.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under the Privacy Act of 1974, 5 U.S.C. 552a(b), records and/or information or portions thereof maintained as part of this system may be disclosed outside Treasury as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows to:

(1) Appropriate federal, state, local or foreign agencies responsible for investigating or prosecuting a violation or for enforcing or implementing a statute, rule, regulation, order, or license, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure;

(2) A federal, state, or local agency, maintaining civil, criminal, or other relevant enforcement information or other pertinent information, which has requested information relevant to or necessary to the requesting agency's or the bureau's hiring or retention of an individual, or issuance of a security clearance, suitability determination, license, contract, grant, or other benefit;

(3) Foreign governments in accordance with formal or informal international agreements;

(4) Authorized federal and non-federal entities for use in approved computer matching efforts, limited to those data elements considered necessary in making a determination of eligibility under particular benefit programs administered by those agencies or entities, to improve program integrity, and to collect debts and other monies owed to those agencies or entities or to the Fiscal Service;

(5) A court, magistrate, mediator or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations, in response to a subpoena, or in connection with criminal law proceedings;

(6) A congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(7) Fiscal agents, financial agents, financial institutions, and contractors for the purposes of: (a) Processing Direct Deposit enrollment applications, including, but not limited to, processing Direct Deposit enrollment forms and implementing programs related to Direct Deposit; investigating and rectifying possible erroneous information; creating and reviewing statistics to improve the quality of services provided; conducting debt collection services for debts arising from Direct Deposit activities; or developing, testing and enhancing computer systems; and (b) processing waivers from the requirement to receive payments electronically, including, but not limited to, processing automatic waivers and applications for waivers, as well as implementing the waivers; investigating and rectifying possible erroneous information or fraud; creating and reviewing statistics to improve the quality of services provided; or developing, testing and enhancing computer systems;

(8) Federal agencies, their agents, and contractors for the purposes of facilitating the processing of Direct Deposit enrollment applications and the implementation of programs related to Direct Deposit;

[4] Direct Express® is a registered service mark of the Bureau of the Fiscal Service, U.S. Department of the Treasury.

(9) Federal agencies, their agents and contractors, credit bureaus, and employers of individuals who owe delinquent debt for the purpose of garnishing wages, only when the debt arises from the unauthorized or improper use of the Direct Deposit program. The information will be used for the purpose of collecting such debt through offset, administrative wage garnishment, referral to private collection agencies, litigation, reporting the debt to credit bureaus, or for any other authorized debt collection purpose;

(10) Financial institutions, including banks and credit unions, for the purpose of disbursing payments and/or investigating the accuracy of information required to complete transactions using Direct Deposit and for administrative purposes, such as resolving questions about a transaction;

(11) Representatives of the National Archives and Records Administration (''NARA'') who are conducting records management inspections under authority of 44 U.S.C. 2904 and 2906;

(12) Third parties during the course of an investigation to the extent necessary to obtain information pertinent to the investigation;

(13) Federal agencies, state agencies, and local agencies for tax purposes;

(14) Appropriate agencies, entities, and person when (1) the Department of the Treasury and/or Fiscal Service suspects or has confirmed that there has been a breach of the system of records; (2) the Department of the Treasury and/or Fiscal Service has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Department of the Treasury and/or Fiscal Service (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department of the Treasury's and/or Fiscal Service's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm;

(15) Another Federal agency or Federal entity, when the Department of the Treasury and/or Fiscal Service determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach;

(16) Consumer reporting agencies, as defined by the Fair Credit Reporting Act, 5 U.S.C. 1681(f), to encourage repayment of a delinquent debt; and

(17) Agents or contractors who have been engaged to assist the Fiscal Service in the performance of a service related to this system of records and who need to have access to the records in order to perform the activity.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrieved by name, Social Security number, telephone number, transaction identification number, or other alpha/numeric identifying information.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

All data maintained by this Fiscal Service system of records are retained and destroyed in accordance with the Fiscal Service File Plan. All records schedules and categories within the Fiscal Service File Plan are approved by NARA.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

These records are maintained in controlled access areas. Identification cards are verified to ensure that only authorized personnel are present. Electronic records are protected by restricted access procedures, including the use of passwords and sign-on protocols, which are periodically changed. Only employees whose official duties require access are allowed to view, administer, and control these records. Copies of records maintained on a computer have the same limited access as paper records.

RECORD ACCESS PROCEDURES:

Individuals requesting information under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest and/or amend records under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

NOTIFICATION PROCEDURES:

Individuals seeking to be notified if this system of record contains a record pertaining to himself or herself must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

Notice of this system of records was last published in full in the **Federal Register** on October 15, 2012 (77 FR 62602) as the Department of the Treasury, Financial Management Service .006—Direct Deposit Enrollment Records.

Treasury/Fiscal Service .008

SYSTEM NAME AND NUMBER:

Department of the Treasury, Bureau of the Fiscal Service .008—Mailing List Records.

SECURITY CLASSIFICATION:

Information in this system is not classified.

SYSTEM LOCATION:

Bureau of the Fiscal Service, U.S. Department of the Treasury, 3201 Pennsy Drive, Warehouse ''E'', Landover, MD 20785, or its fiscal or financial agents at various locations. The addresses of the fiscal or financial agents may be obtained by contacting the System Manager below.

SYSTEM MANAGER(S):

Chief Disbursing Officer, Assistant Commissioner, Payment Management, Bureau of the Fiscal Service, 3201 Pennsy Drive, Warehouse ''E'', Landover, MD 20785.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 31 U.S.C. 321; 31 U.S.C. chapter 33; 31 U.S.C. 3332; Title XII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, Jul. 21, 2010).

PURPOSE(S) OF THE SYSTEM:

Information in this system of records is collected and maintained about low to moderate income individuals, who are more likely to be unbanked or under-banked, and who could potentially receive federal tax refund payments. The records are used to send letters to individuals informing them of the benefits of electronic payments and Treasury-recommended account options for receiving payments electronically. Without the information, Fiscal Service and its fiscal or financial agents and contractors would not be able to directly

notify prospective payment recipients about the benefits of electronic payments and the Treasury-recommended account options for the receipt of federal payments electronically.

The information will also be used to study the effectiveness of offering account options to individuals for the purpose of receiving federal payments. To study program efficacy, Fiscal Service may use its mailing list records to collect aggregate statistical information on the success and benefits of direct mail and the use of commercial database providers.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Low- to moderate-income individuals, who are more likely to be unbanked or underbanked, who could potentially receive federal tax refund payments, and whose names and addresses are included on mailing lists purchased from commercial providers.

CATEGORIES OF RECORDS IN THE SYSTEM:

The records may contain identifying information, such as an individual's name(s) and address.

RECORD SOURCE CATEGORIES:

Information in this system is provided by commercial database providers based on publicly available information.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under the Privacy Act of 1974, 5 U.S.C. 552a(b), records and/or information or portions thereof maintained as part of this system may be disclosed outside Treasury as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows to:

(1) The U.S. Department of Justice (''DOJ'') for its use in providing legal advice to the Department or in representing the Department in a proceeding before a court, adjudicative body, or other administrative body before which the Department is authorized to appear, where the use of such information by the DOJ is deemed by the Department to be relevant and necessary to the litigation, and such proceeding names as a party or interests: (a) The Department or any component thereof; (b) any employee of the Department in his or her official capacity; (c) any employee of the Department in his or her individual capacity where DOJ has agreed to represent the employee; or (d) the United States, where the Department determines that litigation is likely to affect the Department or any of its components;

(2) A congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(3) Fiscal agents, financial agents, and contractors for the purpose of mailing information to individuals about the benefits of electronic federal payments and Treasury-recommended account options for receipt of federal payments electronically, including, but not limited to, processing direct mail or performing other marketing functions; and creating and reviewing statistics to improve the quality of services provided;

(4) Federal agencies, their agents and contractors for the purposes of implementing and studying options for encouraging current and prospective federal payment recipients to receive their federal payments electronically;

(5) Representatives of the National Archives and Records Administration (''NARA'') who are conducting records management inspections under authority of 44 U.S.C. 2904 and 2906;

(6) A federal, state, or local agency, maintaining civil, criminal or other relevant enforcement information or other pertinent information, which has requested information relevant to or necessary to the requesting agency's or the bureau's hiring or retention of an individual, or issuance of a security clearance, suitability determination, license, contract, grant, or other benefit;

(7) Appropriate federal, state, local or foreign agencies responsible for investigating or prosecuting a violations or enforcing or implementing a statute, rule, regulation, order, or license, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure;

(8) A court, magistrate, mediator or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations, in response to a subpoena, or in connection with criminal law proceedings;

(9) Third parties during the course of an investigation to the extent necessary to obtain information pertinent to the investigation;

(10) Appropriate agencies, entities, and person when (1) the Department of the Treasury and/or Fiscal Service suspects or has confirmed that there has been a breach of the system of records; (2) the Department of the Treasury and/or Fiscal Service has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Department of the Treasury and/or Fiscal Service (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department of the Treasury's and/or Fiscal Service's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm;

(11) Another Federal agency or Federal entity, when the Department of the Treasury and/or Fiscal Service determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach; and

(12) Agents or contractors who have been engaged to assist the Fiscal Service in the performance of a service related to this system of records and who need to have access to the records in order to perform the activity.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrieved by name, address, or other alpha/numeric identifying information.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

All data maintained by this Fiscal Service system of records are retained and destroyed in accordance with the Fiscal Service File Plan. All records schedules and categories within the Fiscal Service File Plan are approved by NARA.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

These records are maintained in controlled access areas. Identification cards are verified to ensure that only authorized personnel are present. Electronic records are protected by restricted access procedures, including

the use of passwords and sign-on protocols, which are periodically changed. Only employees whose official duties require access are allowed to view, administer, and control these records. Copies of records maintained on computer have the same limited access as paper records.

RECORD ACCESS PROCEDURES:

Individuals requesting information under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest and/or amend records under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

NOTIFICATION PROCEDURES:

Individuals seeking to be notified if this system of record contains a record pertaining to himself or herself must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

Notice of this system of records was last published in full in the **Federal Register** on October 15, 2012 (77 FR 62602) as the Department of the Treasury, Financial Management Service .008—Mailing List Records.

Treasury/Fiscal Service .009

SYSTEM NAME AND NUMBER:

Department of the Treasury, Bureau of the Fiscal Service .009—Delegations and Designations of Authority for Disbursing Functions

SECURITY CLASSIFICATION:

Information in this system is not classified.

SYSTEM LOCATION:

Kansas City Regional Financial Center, Bureau of the Fiscal Service, U.S. Department of the Treasury, 4241 NE 34th Street, Kansas City, MO 64117.

SYSTEM MANAGER(S):

Chief Disbursing Officer, Assistant Commissioner, Payment Management, Bureau of the Fiscal Service, 3201 Pennsy Drive, Warehouse ''E'', Landover, MD 20785.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 31 U.S.C. 3321, 3325.

PURPOSE(S) OF THE SYSTEM:

Information in this system of records is collected and maintained from federal agencies that are requesting disbursement of domestic and international payments to its recipients. The information is collected and maintained to ensure that only properly authorized Federal Government personnel are able to engage in the process of disbursing a payment.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Heads of Agencies, Certifying Officers, designated agents, and other federal employees designated to perform specific disbursement-related functions.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records are maintained on the designation or removal of individuals to act in a specified capacity pursuant to a proper authorization.

RECORD SOURCE CATEGORIES:

Information in this system of records is provided by government departments and agencies requiring services of the Department for issuance and payment of Treasury checks.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under the Privacy Act of 1974, 5 U.S.C. 552a(b), records and/or information or portions thereof maintained as part of this system may be disclosed outside Treasury as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows to:

(1) Banking institutions, Federal Reserve Banks, and government agencies for verification of information on authority of individuals to determine propriety of actions taken by such individuals;

(2) Appropriate federal, state, local or foreign agencies responsible for investigating or prosecuting a violation or for enforcing or implementing a statute, rule, regulation, order, or license, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure;

(3) A federal, state, or local agency, maintaining civil, criminal or other relevant enforcement information or other pertinent information, which has requested information relevant to or necessary to the requesting agency's or the bureau's hiring or retention of an individual, or issuance of a security clearance, suitability determination, license, contract, grant, or other benefit;

(4) A court, magistrate, mediator or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations, in response to a subpoena, or in connection with criminal law proceedings;

(5) Foreign governments in accordance with formal or informal international agreements;

(6) A congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(7) Unions recognized as exclusive bargaining representatives under 5 U.S.C. Chapter 71, arbitrators, and other parties responsible for the administration of the federal labor-management program if needed in the performance of their authorized duties;

(8) Third parties during the course of an investigation to the extent necessary to obtain information pertinent to the investigation;

(9) Contractors for the purpose of processing personnel and administrative records;

(10) Appropriate agencies, entities, and person when (1) the Department of the Treasury and/or Fiscal Service suspects or has confirmed that there has been a breach of the system of records; (2) the Department of the Treasury and/or Fiscal Service has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Department of the Treasury and/or Fiscal Service (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department of the Treasury's and/or Fiscal Service's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm;

(11) Another Federal agency or Federal entity, when the Department of the Treasury and/or Fiscal Service determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach;

(12) Representatives of the National Archives and Records Administration (''NARA'') who are conducting records management inspections under authority of 44 U.S.C. 2904 and 2906; and

(13) Agents or contractors who have been engaged to assist the Fiscal Service in the performance of a service related to this system of records and who need to have access to the records in order to perform the activity.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records may be retrieved by name.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

All data maintained by this Fiscal Service system of records are retained and destroyed in accordance with the Fiscal Service File Plan. All records schedules and categories within the Fiscal Service File Plan are approved by NARA.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

These records are maintained in controlled access areas. Identification cards are verified to ensure that only authorized personnel are present. Electronic records are protected by restricted access procedures, including the use of passwords and sign-on protocols, which are periodically changed. Only employees whose official duties require access are allowed to view, administer, and control these records. Copies of records maintained on a computer have the same limited access as paper records.

RECORD ACCESS PROCEDURES:

Individuals requesting information under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest and/or amend records under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

NOTIFICATION PROCEDURES:

Individuals seeking to be notified if this system of record contains a record pertaining to himself or herself must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

Notice of this system of records was last published in full in the **Federal Register** on October 15, 2012 (77 FR 62602) as the Department of the Treasury, Financial Management Service .010—Records of Accountable Officers' Authority With Treasury.

Treasury/Fiscal Service .010

SYSTEM NAME AND NUMBER:

Department of the Treasury, Bureau of the Fiscal Service .010—Pre-complaint Counseling and Complaint Activities.

SECURITY CLASSIFICATION:

Information in this system is not classified.

SYSTEM LOCATION:

Bureau of the Fiscal Service, U.S. Department of the Treasury, 200 Third Street, Parkersburg, WV 26106–1328.

SYSTEM MANAGER(S):

Director, Equal Employment Opportunity & Diversity, Bureau of the Fiscal Service, 200 Third Street, Parkersburg, WV 26106–1328.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 7154; 42 U.S.C. 200e–16; Executive Order 11478; and 5 CFR part 713.

PURPOSE(S) OF THE SYSTEM:

The system is used for the investigation of complaints of discrimination on the basis of race, color, national origin, sex, age, retaliation/reprisal and disability. In addition, the system contains case files developed in investigating complaints and in reviewing actions within Fiscal Service to determine if it conducted programs and activities in compliance with the federal laws. The system also contains annual and bi-annual statistical data submitted to and used by the Fiscal Service.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Employees seeking services of EEO Counselors.

CATEGORIES OF RECORDS IN THE SYSTEM:

Monthly pre-complaint activity reports from all Fiscal Service facilities.

RECORD SOURCE CATEGORIES:

Information in this system of records is provided by monthly submissions by financial centers and headquarters.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under the Privacy Act of 1974, 5 U.S.C. 552a(b), records and/or information or portions thereof maintained as part of this system may be disclosed outside Treasury as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows to:

(1) A court, magistrate, mediator or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations, in response to a subpoena, or in connection with criminal law proceedings;

(2) A congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(3) Unions recognized as exclusive bargaining representatives under 5 U.S.C. Chapter 71, arbitrators, and other parties responsible for the administration of the federal labor-management program if needed in the performance of their authorized duties;

(4) Third parties during the course of an investigation to the extent necessary to obtain information pertinent to the investigation;

(5) Appropriate federal, state, local, or foreign agencies responsible for investigating or prosecuting a violation or for enforcing or implementing a statute, rule, regulation, order or license, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure;

(6) A federal, state, or local agency, maintaining civil, criminal or other relevant enforcement information or other pertinent information, which has requested information relevant to or necessary to the requesting agency's or the bureau's hiring or retention of an individual, or issuance of a security clearance, suitability determination, license, contract, grant, or other benefit;

(7) Appropriate agencies, entities, and person when (1) the Department of the Treasury and/or Fiscal Service suspects or has confirmed that there has been a breach of the system of records; (2) the Department of the Treasury and/or Fiscal Service has determined that as a

result of the suspected or confirmed breach there is a risk of harm to individuals, the Department of the Treasury and/or Fiscal Service (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department of the Treasury's and/or Fiscal Service's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm;

(8) Another Federal agency or Federal entity, when the Department of the Treasury and/or Fiscal Service determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach;

(9) Contractors for the purpose of processing personnel and administrative records; and

(10) Agents or contractors who have been engaged to assist the Fiscal Service in the performance of a service related to this system of records and who need to have access to the records in order to perform the activity.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records may be retrieved by employee name and date of receipt.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

All data maintained by this Fiscal Service system of records are retained and destroyed in accordance with the Fiscal Service File Plan. All records schedules and categories within the Fiscal Service File Plan are approved by NARA.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

These records are maintained in controlled access areas. Identification cards are verified to ensure that only authorized personnel are present. Electronic records are protected by restricted access procedures, including the use of passwords and sign-on protocols, which are periodically changed. Only employees whose official duties require access are allowed to view, administer, and control these records. Copies of records maintained on a computer have the same limited access as paper records.

RECORD ACCESS PROCEDURES:

Individuals requesting information under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest and/or amend records under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

NOTIFICATION PROCEDURES:

Individuals seeking to be notified if this system of record contains a record pertaining to himself or herself must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

Notice of this system of records was last published in full in the **Federal Register** on October 15, 2012 (77 FR 62602) as the Department of the Treasury, Financial Management Service .012—Pre-complaint Counseling and Complaint Activities.

Treasury/Fiscal Service .011

SYSTEM NAME AND NUMBER:

Department of the Treasury, Bureau of the Fiscal Service .011—Gifts to the United States

SECURITY CLASSIFICATION:

Information in this system is not classified.

SYSTEM LOCATION:

Bureau of the Fiscal Service, U.S. Department of the Treasury, 200 Third Street, Parkersburg, WV 26106–1328.

SYSTEM MANAGER(S):

Director, Reporting and Analysis Division, Reporting and Analysis Branch 2, Bureau of the Fiscal Service, 200 Third Street, Parkersburg, WV 26106–1328.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

31 U.S.C. 3113.

PURPOSE(S) OF THE SYSTEM:

Information in this system of records is collected and maintained to document donors' gifts to the United States Government.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Donors of inter vivos and testamentary gifts to the United States.

CATEGORIES OF RECORDS IN THE SYSTEM:

Correspondence, copies of wills and court proceedings, and other material related to gifts to the United States.

RECORD SOURCE CATEGORIES:

Information in this system of records is provided by individuals, executors, administrators and other involved persons.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under the Privacy Act of 1974, 5 U.S.C. 552a(b), records and/or information or portions thereof maintained as part of this system may be disclosed outside Treasury as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows to:

(1) Fiscal agents, financial agents, financial institutions, and contractors for the purpose of performing fiscal or financial services, including, but not limited to, processing payments, investigating and rectifying possible erroneous reporting information, creating and reviewing statistics to improve the quality of services provided, or developing, testing and enhancing computer systems;

(2) Appropriate agencies, entities, and person when (1) the Department of the Treasury and/or Fiscal Service suspects or has confirmed that there has been a breach of the system of records; (2) the Department of the Treasury and/or Fiscal Service has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Department of the Treasury and/or Fiscal Service (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department of the Treasury's and/or Fiscal Service's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm;

(3) Another Federal agency or Federal entity, when the Department of the Treasury and/or Fiscal Service determines that information from this

system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach;

(4) Third parties during the course of an investigation to the extent necessary to obtain information pertinent to the investigation;

(5) Representatives of the National Archives and Records Administration (''NARA'') who are conducting records management inspections under authority of 44 U.S.C. 2904 and 2906;

(6) The news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information, when disclosure is necessary to preserve confidence in the integrity of the Fiscal Service, or when disclosure is necessary to demonstrate the accountability of the Fiscal Service's officers, employees, or individuals covered by the system, except to the extent the Chief Privacy Officer determines that release of the specific information in the context of a particular issue would constitute an unwarranted invasion of personal privacy;

(7) A federal, state, or local agency, maintaining civil, criminal or other relevant enforcement information or other pertinent information, which has requested information relevant to or necessary to the requesting agency's or the bureau's hiring or retention of an individual, or issuance of a security clearance, suitability determination, license, contract, grant, or other benefit;

(8) Appropriate federal, state, local or foreign agencies responsible for investigating or prosecuting a violation or for enforcing or implementing a statute, rule, regulation, order, or license, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure;

(9) A court, magistrate, mediator or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations, in response to a subpoena, or in connection with criminal law proceedings;

(10) A congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(11) Authorized federal and non-federal entities for use in approved computer matching efforts, limited to those data elements considered necessary in making a determination of eligibility under particular benefit programs administered by those agencies or entities, to improve program integrity, and to collect debts and other monies owed to those agencies or entities or to the Fiscal Service; and

(12) Agents or contractors who have been engaged to assist the Fiscal Service in the performance of a service related to this system of records and who need to have access to the records in order to perform the activity.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records may be retrieved by name of donor.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

All data maintained by this Fiscal Service system of records are retained and destroyed in accordance with the Fiscal Service File Plan. All records schedules and categories within the Fiscal Service File Plan are approved by NARA.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

These records are maintained in controlled access areas. Identification cards are verified to ensure that only authorized personnel are present. Electronic records are protected by restricted access procedures, including the use of passwords and sign-on protocols, which are periodically changed. Only employees whose official duties require access are allowed to view, administer, and control these records. Copies of records maintained on a computer have the same limited access as paper records.

RECORD ACCESS PROCEDURES:

Individuals requesting information under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest and/or amend records under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

NOTIFICATION PROCEDURES:

Individuals seeking to be notified if this system of record contains a record pertaining to himself or herself must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

Notice of this system of records was last published in full in the **Federal Register** on October 15, 2012 (77 FR 62602) as the Department of the Treasury, Financial Management Service .013—Gifts to the United States.

Treasury/Fiscal Service .012

SYSTEM NAME AND NUMBER:

Department of the Treasury, Bureau of the Fiscal Service .012—Debt Collection Operations System.

SECURITY CLASSIFICATION:

Information in this system is not classified.

SYSTEM LOCATION:

Records are located throughout the United States at Bureau of the Fiscal Service operations centers, Federal Records Centers, Federal Reserve Banks acting as Treasury's fiscal agents, and financial institutions acting as Treasury's financial agents. Addresses may be obtained from system managers.

SYSTEM MANAGER(S):

System Manager, Debt Management Services, Bureau of the Fiscal Service, 3201 Pennsy Drive, Warehouse ''E'', Landover, MD 20785.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Federal Claims Collection Act of 1966 (Pub. L. 89–508), as amended by the Debt Collection Act of 1982 (Pub. L. 97–365, as amended); Deficit Reduction Act of 1984 (Pub. L. 98–369, as amended); Debt Collection Improvement Act of 1996 (Pub. L. 104–134, sec. 31001); Taxpayer Relief Act of 1997 (Pub. L. 105–34); Internal Revenue Service Restructuring and Reform Act of 1998 (Pub. L. 105–206); Improper Payments Information Act of 2002 (Pub. L. 107–300); Recovery Audit Act of 2002 (Pub. L. 107–107; Section 831; 115 Stat. 1186); Improper Payments Elimination and

Recovery Act of 2010 (Pub. L. 111–204); Improper Payments Elimination and Recovery Improvement Act of 2012 (Pub. L. 112–248); 26 U.S.C. 6402; 26 U.S.C. 6331; 31 U.S.C. chapter 37 (Claims), subchapter I (General) and subchapter II (Claims of the U.S. Government); 31 U.S.C. 3321 note.

PURPOSE(S) OF THE SYSTEM:

The purpose of this system is to maintain records about individuals who owe current receivable(s) or delinquent debt(s) to the United States or to any person for whom the United States is authorized by statute to collect for the benefit of such person, through one or more of its departments or agencies, or to states, including past due support enforced by states. The information contained in the records is maintained for the purpose of taking action to facilitate the collection or resolution of the debt(s) using various methods, including, but not limited to, requesting repayment of the debt orally or in writing; offset or levy of federal or state payments; administrative wage garnishment; referral to collection agencies or for litigation; or other collection or resolution methods authorized or required by law. The information is also maintained for the purpose of providing collection information about the debt to the agency collecting the debt, so that debtors can access information to resolve their debt, and to provide statistical information on debt collection operations. The information is also maintained for the purpose of testing and developing enhancements to: The computer systems which contain the records; and operations or business processes used to collect or resolve debts. The information is also maintained for the purpose of data analysis related to improving government-wide efforts to resolve and/or collect current receivables and delinquent debts owed to federal and/or state agencies. The information is also maintained for the purpose of resolving delinquent debts owed by debtors who are ineligible for federally funded programs until the delinquency is resolved, or for identifying, preventing, or recouping improper payments to individuals who owe obligations to federal and/or state agencies.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who may owe current receivables or delinquent debts (collectively ''debts'') to: (a) The United States, through one or more of its departments and agencies; or (b) states, territories or commonwealths of the United States, or the District of Columbia (hereinafter collectively referred to as ''States'').

CATEGORIES OF RECORDS IN THE SYSTEM:

Debt records containing information about the debtor(s), the type of debt, the governmental entity to which the debt is owed, and the debt collection tools utilized to collect the debt. The records may contain identifying information, such as: (a) Debtor name(s) and taxpayer identifying number(s) (*i.e.,* Social Security number or employer identification number); (b) debtor contact information, such as work and home address, email address, or work, home or cellular telephone numbers; (c) contact information for the debtor's authorized third party representative(s); (d) information concerning the financial status of the debtor and his/her household, including income, assets, liabilities or other financial burdens, and any other resources from which the debt may be recovered; and (e) name of employer or employer contact information. Debts may include taxes, loans, assessments, fines, fees, penalties, overpayments, advances, extensions of credit from sales of goods or services, or other amounts of money or property owed to, or collected by, the Federal Government or a State, including past due support which is being enforced by a State.

The records also may contain information about: (a) The debt, such as the original amount of the debt, the debt account number, the date the debt originated, the amount of the delinquency or default, the date of delinquency or default, basis for the debt, amounts accrued for interest, penalties, and administrative costs, proof of debt documentation, or payments on the account; (b) actions taken to collect or resolve the debt, such as copies of demand letters or invoices, information prepared for the purpose of referring the debt to private collection agencies or the United States Department of Justice, recordings of telephone calls and computer activity related to the collection and resolution of debt, collectors' notes regarding telephone or other communications related to the collection or resolution of the debt, copies of administrative wage garnishment orders, due process notices, hearing requests, and hearing decisions, payment or compromise agreements; (c) other relevant information, including orders for military service, prison records, bankruptcy notices, medical records, or other correspondence with the debtor; and (d) the referring or governmental agency that is collecting or owed the debt, such as name, telephone number, and address of the agency contact.

RECORD SOURCE CATEGORIES:

Information in this system is provided by: The individual on whom the record is maintained; Federal and state agencies to which the debt is owed; Federal agencies and other entities that employ the individual or have information concerning the individual's employment or financial resources; Federal and State agencies issuing payments; collection agencies; locator and asset search companies, credit bureaus, and other database vendors; Federal, State or local agencies furnishing identifying information and/or debtor address information; and/or public documents.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under the Privacy Act of 1974, 5 U.S.C. 552a(b), records and/or information or portions thereof maintained as part of this system may be disclosed outside Treasury as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows to:

(1) Appropriate federal, state, local or foreign agencies responsible for investigating or prosecuting a violation or for enforcing or implementing a statute, rule, regulation, order, or license, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure;

(2) A court, magistrate, mediator or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations, in response to a subpoena, or in connection with criminal law proceedings;

(3) A congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(4) Any federal agency, State or local agency, or their agents or contractors, including private collection agencies:

(a) To facilitate the collection of debts through the use of any combination of various debt collection methods required or authorized by law, including, but not limited to:

(i) Request for repayment by telephone or in writing;

(ii) Negotiation of voluntary repayment or compromise agreements;

(iii) Offset or levy of Federal or State payments, which may include the disclosure of information contained in the records for the purpose of providing the debtor with appropriate notice or to otherwise comply with prerequisites, to facilitate voluntary repayment in lieu of offset or levy, to provide information to the debtor to understand what happened to the payment, or to otherwise effectuate the offset or levy process;

(iv) Referral of debts to private collection agencies, to Treasury-designated debt collection centers, or for litigation;

(v) Administrative and court-ordered wage garnishment;

(vi) Debt sales;

(vii) Publication of names and identities of delinquent debtors in the media or other appropriate places; or

(viii) Any other debt collection method authorized by law;

(b) To conduct computerized comparisons to locate Federal or State payments to be made to debtors;

(c) To conduct computerized comparisons to locate employers of, or obtain taxpayer identifying numbers or other information about, an individual for debt collection purposes;

(d) To collect a debt owed to the United States through the offset of payments made by States;

(e) To account or report on the status of debts for which such entity has a legitimate use for the information in the performance of official duties;

(f) For the purpose of denying Federal financial assistance in the form of a loan or loan insurance or guaranty to an individual who owes delinquent debt to the United States or who owes delinquent child support that has been referred to Fiscal Service for collection by administrative offset;

(g) To develop, enhance and/or test database, matching, communications, or other computerized systems which facilitate debt collection processes;

(h) To conduct data analysis which facilitates processes related to the collection or resolution of debts owed to Federal and/or State agencies; or

(i) For any other appropriate debt collection purpose.

(5) The Department of Defense, the U.S. Postal Service, or other Federal agency for the purpose of conducting an authorized computer matching program in compliance with the Privacy Act of 1974, as amended, to identify and locate individuals receiving Federal payments including, but not limited to, salaries, wages, or benefits, which may include the disclosure of information contained in the record(s) for the purpose of requesting voluntary repayment or implementing Federal employee salary offset or other offset procedures;

(6) Unions recognized as exclusive bargaining representatives under 5 U.S.C. Chapter 71, arbitrators, and other parties responsible for the administration of the federal labor-management program if needed in the performance of their authorized duties;

(7) The Department of Justice or other federal agency:

(a) When requested in connection with a legal proceeding, including a pending or threatened legal proceeding; or

(b) To obtain concurrence in a decision to compromise, suspend, or terminate collection action on a debt;

(8) The Internal Revenue Service in connection with reporting income from the cancellation of a debt;

(9) A federal, state, or local agency, maintaining civil, criminal or other relevant enforcement information or other pertinent information, which has requested information relevant to or necessary to the requesting agency's or the bureau's hiring or retention of an individual, or issuance of a security clearance, suitability determination, license, contract, grant, or other benefit;

(10) Any individual or other entity who receives federal or state payments as a joint payee with a debtor for the purpose of providing notice of, and information about, offsets from such federal payments;

(11) Any individual or entity:

(a) To facilitate the collection and/or resolution of debts using any combination of various debt collection methods required or authorized by law, including, but not limited to:

(i) Performing administrative and court-ordered wage garnishment;

(ii) Reporting information to commercial or consumer credit bureaus;

(iii) Conducting asset searches or locating debtors;

(iv) Publishing names and identities of delinquent debtors in the media or other appropriate places; or

(v) Selling debts;

(b) For the purpose of denying federal financial assistance in the form of a loan or loan insurance or guaranty to an individual who owes delinquent debt to the United States or who owes delinquent child support that has been referred to the Fiscal Service for collection by administrative offset; or

(c) For any other appropriate debt collection purpose;

(12) Appropriate agencies, entities, and person when (1) the Department of the Treasury and/or Fiscal Service suspects or has confirmed that there has been a breach of the system of records; (2) the Department of the Treasury and/or Fiscal Service has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Department of the Treasury and/or Fiscal Service (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department of the Treasury's and/or Fiscal Service's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm;

(13) Another Federal agency or Federal entity, when the Department of the Treasury and/or Fiscal Service determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach;

(14)(a) A Federal or State agency, its employees, agents (including contractors of its agents) or contractors; (b) fiscal or financial agent designated by the Fiscal Service or other Department of the Treasury bureau or office, including employees, agents or contractors of such agent; or (c) contractor of the Fiscal Service, for the purpose of identifying, preventing, or recouping improper payments to an applicant for, or recipient of, Federal funds, including funds disbursed by a state in a state-administered, Federally funded program; disclosure may be made to conduct computerized comparisons for this purpose;

(15) Consumer reporting agencies (as defined by the Fair Credit Reporting Act, 5 U.S.C. 1681(f)) in accordance with 5 U.S.C. 552a(b)(12) and 31 U.S.C. 3711(e), to encourage repayment of a delinquent debt; and

(16) Representatives of the National Archives and Records Administration (''NARA'') who are conducting records management inspections under authority of 44 U.S.C. 2904 and 2906.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in this system are stored electronically, or on paper in secure facilities in a locked drawer behind a locked door.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records may be retrieved by various combinations of identifiers, including but not limited to name, taxpayer identifying number (*i.e.,* Social Security number or employer identification number), debt account number, offset trace number, payment trace number, telephone number or address.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

All data maintained by this Fiscal Service system of records are retained and destroyed in accordance with the Fiscal Service File Plan. All records schedules and categories within the Fiscal Service File Plan are approved by NARA.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

These records are maintained in controlled access areas. Identification cards are verified to ensure that only authorized personnel are present. Electronic records are protected by restricted access procedures, including the use of passwords and sign-on protocols, which are periodically changed. Only employees whose official duties require access are allowed to view, administer, and control these records. Copies of records maintained on a computer have the same limited access as paper records.

RECORD ACCESS PROCEDURES:

Individuals requesting information under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest and/or amend records under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

NOTIFICATION PROCEDURES:

Individuals seeking to be notified if this system of record contains a record pertaining to himself or herself must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

Notice of this system of records was last published in full in the **Federal Register** on October 15, 2012 (77 FR 62602) as the Department of the Treasury, Financial Management Service .014—Debt Collection Operations System.

Treasury/Fiscal Service .013

SYSTEM NAME AND NUMBER:

Department of the Treasury, Bureau of the Fiscal Service .013—Collections Records.

SECURITY CLASSIFICATION:

Information in this system is not classified.

SYSTEM LOCATION:

Bureau of the Fiscal Service, U.S. Department of the Treasury, 3201 Pennsy Drive, Warehouse ''E'', Landover, MD 20785. Records are also located throughout the United States at Federal Reserve Banks and financial institutions acting as Treasury's fiscal and financial agents. The addresses of the fiscal and financial agents may be obtained from the system manager below.

SYSTEM MANAGER(S):

Assistant Commissioner, Revenue Collections Management, Bureau of the Fiscal Service, 3201 Pennsy Drive, Warehouse ''E'', Landover, MD 20785.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 31 U.S.C. 321; 31 U.S.C. chapter 33; 31 U.S.C. 3720.

PURPOSE(S) OF THE SYSTEM:

Information in this system of records is collected and maintained about individuals who electronically authorize payments to the Federal Government. The information contained in the records is maintained for the purpose of facilitating the collection and reporting of receipts from the public to the Federal Government and to minimize the financial risk to the Government and the public of unauthorized use of electronic payment methods. Examples of payment mechanisms authorized electronically include Automated Clearing House (ACH), check conversion, wire transfers, credit and debit cards, or stored value cards. Individuals may authorize payments using paper check conversion or internet-based systems through programs such as ''Pay.gov'' and ''Electronic Federal Taxpayer Payment System'' or directly through their financial institution. The information also is maintained to:

(a) Provide collections information to the federal agency collecting the public receipts;

(b) Authenticate the identity of individuals who electronically authorize payments to the Federal Government;

(c) Verify the payment history and eligibility of individuals to electronically authorize payments to the Federal Government;

(d) Provide statistical information on collections operations;

(e) Test and develop enhancements to the computer systems that contain the records; and

(f) Collect debts owed to the Federal Government from individuals when the debt arises from the unauthorized use of electronic payment methods.

Fiscal Service's use of the information contained in the records is necessary to process financial transactions while protecting the government and the public from financial risks that could be associated with electronic transactions. The records are collected and maintained to authenticate payers and their ability to pay, process payments through banking networks, and resolve after-the-fact accounting and reconciliation questions.

In addition, the information contained in the covered records will be used for other purposes related to the processing of financial transactions, such as collection of statistical information on operations, development of computer systems, investigation of unauthorized or fraudulent activity related to electronic transactions, and the collection of debts arising out of such activity.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who electronically authorize payments to the Federal Government through the use of communication networks, such as the internet, via means such as ACH, check conversion, wire transfer, credit/debit cards, and/or stored value card.

CATEGORIES OF RECORDS IN THE SYSTEM:

Collections records containing information about individuals who electronically authorize payments to the Federal Government to the extent such records are covered by the Privacy Act of 1974, as amended. The records may contain identifying information, such as: An individual's name(s), taxpayer identifying number (*i.e.,* Social Security number or employer identification number), home address, home telephone number, and email addresses (personal and work); an individual's employer's name, address, telephone number, and email address; an individual's date of birth and driver's license number; information about an individual's bank account(s) and other types of accounts from which payments

are made, such as financial institution routing and account number; credit and debit card numbers; information about an individual's payments made to or from the United States (or to other entities such as private contractors for the Federal Government), including the amount, date, status of payments, payment settlement history, and tracking numbers used to locate payment information; user name and password assigned to an individual; other information used to identify and/or authenticate the user of an electronic system to authorize and make payments, such as a unique question and answer chosen by an individual; and information concerning the authority of an individual to use an electronic system (access status) and the individual's historical use of the electronic system. The records also may contain information about the governmental agency to which payment is made and information required by such agency as authorized or required by law.

The information contained in the records covered by Fiscal Service's system of records is necessary to process financial transactions while protecting the government and the public from financial risks that could be associated with electronic transactions. It is noted that the system covers records obtained in connection with various mechanisms that either are used currently or may be used in the future for electronic financial transactions. Not every transaction will require the maintenance of all of the information listed in this section. The categories of records cover the broad spectrum of information that might be connected to various types of transactions.

RECORD SOURCE CATEGORIES:

Information in this system is provided by the individual on whom the record is maintained (or by his or her authorized representative), other persons who electronically authorize payments to the Federal Government, federal agencies responsible for collecting receipts, federal agencies responsible for disbursing and issuing federal payments, Treasury fiscal and financial agents that process collections, and commercial database vendors.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under the Privacy Act of 1974, 5 U.S.C. 552a(b), records and/or information or portions thereof maintained as part of this system may be disclosed outside Treasury as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows to:

(1) Appropriate federal, state, local or foreign agencies responsible for investigating or prosecuting a violation or for enforcing or implementing a statute, rule, regulation, order, or license, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure;

(2) Commercial database vendors for the purposes of authenticating the identity of individuals who electronically authorize payments to the Federal Government, to obtain information on such individuals' payment or check writing history, and for administrative purposes, such as resolving a question about a transaction. For purposes of this notice, the term ''commercial database vendors'' means vendors who maintain and disclose information from consumer credit, check verification, and address databases;

(3) A court, magistrate, mediator or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations, in response to a subpoena, or in connection with criminal law proceedings;

(4) A congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(5) Fiscal agents, financial agents, financial institutions, and contractors for the purpose of performing fiscal or financial services, including, but not limited to, processing payments, investigating and rectifying possible erroneous reporting information, creating and reviewing statistics to improve the quality of services provided, conducting debt collection services, or developing, testing and enhancing computer systems;

(6) Federal agencies, state agencies, and local agencies for tax purposes;

(7) Federal agencies, their agents and contractors, credit bureaus, and employers of individuals who owe delinquent debt for the purpose of garnishing wages only when the debt arises from the unauthorized use of electronic payment methods. The information will be used for the purpose of collecting such debt through offset, administrative wage garnishment, referral to private collection agencies, litigation, reporting the debt to credit bureaus, or for any other authorized debt collection purpose;

(8) Financial institutions, including banks and credit unions, and credit card companies for the purpose of collections and/or investigating the accuracy of information required to complete transactions using electronic methods and for administrative purposes, such as resolving questions about a transaction;

(9) Third parties during the course of an investigation to the extent necessary to obtain information pertinent to the investigation;

(10) Authorized federal and non-federal entities for use in approved computer matching efforts, limited to those data elements considered necessary in making a determination of eligibility under particular benefit programs administered by those agencies or entities, to improve program integrity, and to collect debts and other monies owed to those agencies or entities or to the Fiscal Service;

(11) Unions recognized as exclusive bargaining representatives under 5 U.S.C. Chapter 71, arbitrators, and other parties responsible for the administration of the federal labor-management program if needed in the performance of their authorized duties;

(12) A federal, State, or local agency, maintaining civil, criminal or other relevant enforcement information or other pertinent information, which has requested information relevant to or necessary to the requesting agency's or the bureau's hiring or retention of an individual, or issuance of a security clearance, suitability determination, license, contract, grant, or other benefit;

(13) Foreign governments in accordance with formal or informal international agreements;

(14) Appropriate agencies, entities, and person when (1) the Department of the Treasury and/or Fiscal Service suspects or has confirmed that there has been a breach of the system of records; (2) the Department of the Treasury and/or Fiscal Service has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Department of the Treasury and/or Fiscal Service (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department of the Treasury's and/or Fiscal Service's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm;

(15) Another Federal agency or Federal entity, when the Department of

the Treasury and/or Fiscal Service determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach;

(16) Representatives of the National Archives and Records Administration (''NARA'') who are conducting records management inspections under authority of 44 U.S.C. 2904 and 2906; and

(17) Agents or contractors who have been engaged to assist the Fiscal Service in the performance of a service related to this system of records and who need to have access to the records in order to perform the activity.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

Debt information concerning a government claim against a debtor when the debt arises from the unauthorized use of electronic payment methods is also furnished, in accordance with 5 U.S.C. 552a(b)(12) and 31 U.S.C. 3711(e), to consumer reporting agencies, as defined by the Fair Credit Reporting Act, 5 U.S.C. 1681(f), to encourage repayment of a delinquent debt.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records may be retrieved by account number (such as financial institution account number or credit card account number), name (including an authentication credential, *e.g.,* a user name), Social Security number, transaction identification number, or other alpha/numeric identifying information.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

All data maintained by this Fiscal Service system of records are retained and destroyed in accordance with the Fiscal Service File Plan. All records schedules and categories within the Fiscal Service File Plan are approved by NARA.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

These records are maintained in controlled access areas. Identification cards are verified to ensure that only authorized personnel are present. Electronic records are protected by restricted access procedures, including the use of passwords and sign-on protocols, which are periodically changed. Only employees whose official duties require access are allowed to view, administer, and control these records. Copies of records maintained on a computer have the same limited access as paper records.

RECORD ACCESS PROCEDURES:

Individuals requesting information under the Privacy Act must comply with the rules of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest and/or amend records under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

NOTIFICATION PROCEDURES:

Individuals seeking to be notified if this system of record contains a record pertaining to himself or herself must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

Notice of this system of records was last published in full in the **Federal Register** on October 15, 2012 (77 FR 62602) as the Department of the Treasury, Financial Management Service .017—Collections Records.

Treasury/Fiscal Service .014

SYSTEM NAME AND NUMBER:

Department of the Treasury, Bureau of the Fiscal Service .014—United States Securities and Access.

SECURITY CLASSIFICATION:

Information in this system is not classified.

SYSTEM LOCATION:

Bureau of the Fiscal Service, U.S. Department of the Treasury, 200 Third Street, Parkersburg, WV 26106–1328; Bureau of the Fiscal Service, U.S. Department of the Treasury, 3201 Pennsy Drive, Warehouse ''E'', Landover, MD 20785; the Federal Reserve Bank of Minneapolis, 90 Hennepin Avenue, Minneapolis, MN 55401; and the Federal Reserve Bank of New York, East Rutherford Operations Center, 100 Orchard Street, East Rutherford, NJ 07073.

SYSTEM MANAGER(S):

Assistant Commissioner, Retail Securities Services, Bureau of the Fiscal Service, 200 Third Street, Parkersburg, WV 26106–1328. For Federal Housing Administration (FHA) Debentures: Assistant Commissioner, Office of Fiscal Accounting Operations, 200 Third Street, Parkersburg, WV 26106–1328.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 31 U.S.C. 3101, *et seq.*

PURPOSE(S) OF THE SYSTEM:

Information in this system of records is collected and used to identify and maintain all account and ownership data, both paper and electronic (internet based), on past and current purchases of Treasury securities. This includes, for example, U.S. Treasury bonds, notes, and bills; adjusted service bonds; armed forces leave bonds; and Federal Housing Administration debentures as well as savings-type securities including savings bonds, savings notes, definitive accrual, current income, and retirement-type savings securities. Information on transactions related to the inquiry and servicing of these Treasury securities is also collected and maintained. The collection of information allows Fiscal Service and its agents to issue and process Treasury securities, make payments, identify owners and their accounts, and other customer service related transactions.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Present and former owners of, subscribers to, claimants to, persons entitled to, and inquirers concerning United States savings-type securities and interest on securities, for example, United States savings bonds, savings notes, retirement plan bonds, and individual retirement bonds.

Present and former owners of, subscribers to, claimants to, persons entitled to, and inquirers concerning United States Treasury securities (except savings-type securities) and interest on securities and such securities for which the Treasury acts as agents, for example, Treasury bonds, notes, and bills; adjusted service bonds; armed forces leave bonds; and Federal Housing Administration debentures.

Individuals who provide information to create an account for the purchase of United States Treasury securities and

savings-type securities through the internet.

CATEGORIES OF RECORDS IN THE SYSTEM:

(1) Issuance: Records relating to registration, issuance, and correspondence in connection with issuance of United States Treasury securities and savings-type securities;

(2) Holdings: Records of accounts for the purchase of United States securities. These records may include ownership and interest activity on registered or recorded United States Treasury securities and savings-type securities;

(3) Transactions (redemptions, payments, reissues, transfers, and exchanges): Records which include securities transaction requests;

(4) Claims: Records including correspondence concerning lost, stolen, destroyed, or mutilated United States Treasury securities and savings-type securities; and

(5) Inquiries: Records of correspondence with individuals who have requested information concerning United States Treasury securities and savings-type securities.

All of the above categories of records include records of FHA debentures in the Fiscal Accounting securities accounting system.

All of the above categories of records include or may include the following types of personal information:

(1) Personal identifiers (name, including previous name used; Social Security number; date of birth; physical and electronic addresses; telephone, fax, and pager numbers); and

(2) Authentication aids (personal identification number, password, account number, shared-secret identifier, digitized signature, or other unique identifier).

RECORD SOURCE CATEGORIES:

Information on records in this system is furnished by the individuals or their authorized representatives as listed in ''Categories of Individuals'' and issuing agents for securities, is generated within the system itself, or, with their authorization, is derived from other systems of records.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under the Privacy Act of 1974, 5 U.S.C. 552a(b), records and/or information or portions thereof maintained as part of this system may be disclosed outside Treasury as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows to:

(1) Agents or contractors of the Department for the purpose of administering the public debt of the United States;

(2) Next-of-kin, voluntary guardian, legal representative or successor in interest of a deceased or incapacitated owner of securities and others entitled to the reissue, distribution, or payment for the purpose of assuring equitable and lawful disposition of securities and interest;

(3) Any owner of United States Treasury securities or savings-type securities registered to two or more owners; or to the beneficiary of such securities registered in beneficiary form if acceptable proof of death of the owner is submitted;

(4) Federal agencies, state agencies, and local agencies for tax purposes;

(5) A federal, state, or local agency, maintaining civil, criminal or other relevant enforcement information or other pertinent information, which has requested information relevant to or necessary to the requesting agency's or the bureau's hiring or retention of an individual, or issuance of a security clearance, suitability determination, license, contract, grant, or other benefit;

(6) Foreign governments in accordance with formal or informal international agreements;

(7) The Department of Veterans Affairs and selected veterans' publications for the purpose of locating owners or other persons entitled to undeliverable bonds held in safekeeping by the Department;

(8) The Department of Veterans Affairs when it relates to the holdings of Armed Forces Leave Bonds, to facilitate the redemption or disposition of these securities;

(9) Other federal agencies to effect salary or administrative offset for the purpose of collecting debts;

(10) A consumer-reporting agency, including mailing addresses obtained from the Internal Revenue Service, to obtain credit reports;

(11) A debt collection agency, including mailing addresses obtained from the Internal Revenue Service, for debt collection services;

(12) Contractors conducting Treasury-sponsored surveys, polls, or statistical analyses relating to the marketing or administration of the public debt of the United States;

(13) Appropriate federal, state, local, or foreign agencies responsible for investigating or prosecuting a violation or for enforcing or implementing a statute, rule, regulation, order, or license, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure;

(14) A court, magistrate, mediator or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations, in response to a subpoena, or in connection with criminal law proceedings;

(15) A congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(16) Other federal agencies, through computer matching, information on individuals owing debts to the Fiscal Service for the purpose of determining whether the debtor is a federal employee or retiree receiving payments that may be used to collect the debt through administrative or salary offset;

(17) Requesting federal agencies, through computer matching under approved agreements limiting the information to that which is relevant in making a determination of eligibility for federal benefits administered by those agencies, information on holdings of United States Treasury securities and savings-type securities;

(18) Other federal agencies through computer matching, information on individuals with whom the Fiscal Service has lost contact, for the purpose of utilizing letter forwarding services to advise these individuals that they should contact the Fiscal Service about returned payments and/or matured, unredeemed securities;

(19) Appropriate agencies, entities, and person when (1) the Department of the Treasury and/or Fiscal Service suspects or has confirmed that there has been a breach of the system of records; (2) the Department of the Treasury and/or Fiscal Service has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Department of the Treasury and/or Fiscal Service (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department of the Treasury's and/or Fiscal Service's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm;

(20) Another Federal agency or Federal entity, when the Department of the Treasury and/or Fiscal Service determines that information from this system of records is reasonably

necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach;

(21) Agents or contractors who have been engaged to assist the Fiscal Service in the performance of a service related to this system of records and who need to have access to the records in order to perform the activity;

(22) ''Consumer reporting agencies'' [5] to aid in the collection of outstanding debts owed to the Federal Government. After the prerequisites of 31 U.S.C. 3711 have been followed, the Fiscal Service may disclose information necessary to establish the identity of the individual responsible for the claim, including name, address, and taxpayer identification number; the amount, status, and history of the claim; and the agency or program under which the claim arose; and

(23) Representatives of the National Archives and Records Administration (''NARA'') who are conducting records management inspections under authority of 44 U.S.C. 2904 and 2906.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Information can be retrieved alphabetically by name, address, and period of time the security was issued, by bond serial numbers, other assigned identifier, or, in some cases, numerically by taxpayer identification number. In the case of securities, except Series G savings bonds registered in more than one name, information relating to those securities can be retrieved only by the names, or, in some cases, by the taxpayer identification number of the registrants, primarily the registered owners or first-named co-owners. In the case of gift bonds inscribed with the taxpayer identification number of the purchaser, bonds are retrieved under that number or by bond serial number.

[5] ''Consumer reporting agency'' is defined in 31 U.S.C. 3701(a)(3).

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

All data maintained by this Fiscal Service system of records are retained and destroyed in accordance with the Fiscal Service File Plan. All records schedules and categories within the Fiscal Service File Plan are approved by NARA.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

These records are maintained in controlled access areas. Identification cards are verified to ensure that only authorized personnel are present. Electronic records are protected by restricted access procedures, including the use of passwords and sign-on protocols, which are periodically changed. Only employees whose official duties require access are allowed to view, administer, and control these records. Copies of records maintained on a computer have the same limited access as paper records.

RECORD ACCESS PROCEDURES:

Individuals requesting information under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest and/or amend records under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

NOTIFICATION PROCEDURES:

Individuals seeking to be notified if this system of record contains a record pertaining to himself or herself must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

APPENDIX OF TREASURY RETAIL SECURITIES SITES:

This appendix lists the mailing addresses and telephone number of the places that individuals may contact to inquire about their securities accounts maintained in Treasury Direct or the Legacy Holding System. The toll-free telephone number 1–844–284–2676 is used to reach all the locations. Customers may also view information on the TreasuryDirect website at *www.TreasuryDirect.gov.*

For Series EE and Series I Bonds:

Treasury Retail Securities Services Site, P.O. Box 214, Minneapolis, MN 55480–0214.

For Series HH and Series H Bonds:

Treasury Retail Securities Services Site, P.O. Box 2186, Minneapolis, MN 55480–2816.

For all other Series:

Treasury Retail Securities Services Site, P.O. Box 9150, Minneapolis, MN 55480–9150.

For TreasuryDirect:

Treasury Retail Securities Site, P.O. Box 7015, Minneapolis, MN 55480–9150.

For Legacy Holding System:

Retail Securities Services, Bureau of the Fiscal Service, 200 Third Street, Parkersburg, WV 26106–1328.

For FHA Debentures:

Fiscal Accounting Office, Special Investments Branch, Bureau of the Fiscal Service, P.O. Box 396, 200 Third Street, Parkersburg, WV 26106–1328.

HISTORY:

Notice of this system of records was last published in full in the **Federal Register** on August 17, 2011 (76 FR 51128) as the Department of the Treasury, Bureau of the Public Debt .002—United States Savings-Type Securities, Department of the Treasury, Bureau of the Public Debt .003—United States Securities (Other than Savings-Type Securities) and Department of the Treasury, Bureau of the Public Debt .008—Retail Treasury Securities Access Application.

Treasury/Fiscal Service .015

SYSTEM NAME AND NUMBER:

Department of the Treasury, Bureau of the Fiscal Service .015—Physical Access Control System.

SECURITY CLASSIFICATION:

Information in this system is not classified.

SYSTEM LOCATION:

All Bureau of the Fiscal Service, U.S. Department of the Treasury, locations.

SYSTEM MANAGER(S):

Assistant Commissioner, Information and Security Services, Bureau of the Fiscal Service, 320 Avery Street, Parkersburg, WV 26106–1328.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

31 U.S.C. 321; 41 CFR 101–20.103.

PURPOSE(S) OF THE SYSTEM:

Information in this system of records is collected and maintained to allow the Fiscal Service to control and verify access to all Fiscal Service facilities.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All Fiscal Service employees, employees of contractors or service companies, and visitors.

CATEGORIES OF RECORDS IN THE SYSTEM:

Every individual with access to Fiscal Service facilities controlled by the Physical Access Control System (''PACS'') has a personal record stored in the PACS database. This record contains the individual's full legal name, date of birth, height, weight, eye/hair color, digital color photograph, federal agency smart credential number, and their door access profile. When an access card is presented at a reader, a record of the access is created on the PACS database. This record contains the individual's name, date/time, door/location scanned, and whether the access was granted or denied.

RECORD SOURCE CATEGORIES:

Information in this system of records is provided by the individual concerned, his/her supervisor, or an official of the individual's firm or agency.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under the Privacy Act of 1974, 5 U.S.C. 552a(b), records and/or information or portions thereof maintained as part of this system may be disclosed outside Treasury as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows to:

(1) Appropriate federal, state, local, or foreign agencies responsible for investigating or prosecuting a violation or for enforcing or implementing a statute, rule, regulation, order, or license, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure;

(2) A federal, state, or local agency maintaining civil, criminal or other relevant enforcement information or other pertinent information, which has requested information relevant to or necessary to the requesting agency's or the bureau's hiring or retention of an individual, or issuance of a security clearance, suitability determination, license, contract, grant, or other benefit;

(3) A court, magistrate, mediator or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations, in response to a subpoena, or in connection with criminal law proceedings;

(4) A congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(5) Unions recognized as exclusive bargaining representatives under 5 U.S.C. Chapter 71, arbitrators, and other parties responsible for the administration of the federal labor-management program if needed in the performance of their authorized duties;

(6) Contractors for the purpose of processing personnel and administrative records;

(7) Third parties during the course of an investigation to the extent necessary to obtain information pertinent to the investigation;

(8) The Office of Personnel Management, the Merit System Protection Board, the Equal Employment Opportunity Commission, and the Federal Labor Relations Authority upon authorized request;

(9) Appropriate agencies, entities, and person when (1) the Department of the Treasury and/or Fiscal Service suspects or has confirmed that there has been a breach of the system of records; (2) the Department of the Treasury and/or Fiscal Service has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Department of the Treasury and/or Fiscal Service (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department of the Treasury's and/or Fiscal Service's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm;

(10) Another Federal agency or Federal entity, when the Department of the Treasury and/or Fiscal Service determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach;

(11) Representatives of the National Archives and Records Administration (''NARA'') who are conducting records management inspections under authority of 44 U.S.C. 2904 and 2906; and

(12) Agents or contractors who have been engaged to assist the Fiscal Service in the performance of a service related to this system of records and who need to have access to the records in order to perform the activity.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Information on individuals can be retrieved by name or card number or other assigned identifier such as biometric or biographic information.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

All data maintained by this Fiscal Service system of records are retained and destroyed in accordance with the Fiscal Service File Plan. All records schedules and categories within the Fiscal Service File Plan are approved by NARA.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

These records are maintained in controlled access areas. Identification cards are verified to ensure that only authorized personnel are present. Electronic records are protected by restricted access procedures, including the use of passwords and sign-on protocols, which are periodically changed. Only employees whose official duties require access are allowed to view, administer, and control these records. Copies of records maintained on a computer have the same limited access as paper records.

RECORD ACCESS PROCEDURES:

Individuals requesting information under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest and/or amend records under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

NOTIFICATION PROCEDURES:

Individuals seeking to be notified if this system of record contains a record pertaining to himself or herself must

follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

Notice of this system of records was last published in full in the **Federal Register** on August 17, 2011 (76 FR 51128) as the Department of the Treasury, Bureau of the Public Debt .004—Controlled Access Security System.

Treasury/Fiscal Service .016

SYSTEM NAME AND NUMBER:

Department of the Treasury, Bureau of the Fiscal Service .016—Health Unit Records

SECURITY CLASSIFICATION:

Information in this system is not classified.

SYSTEM LOCATION:

Bureau of the Fiscal Service, U.S. Department of the Treasury, 200 Third Street, Parkersburg, WV 26106–1328; Bureau of the Fiscal Service, U.S. Department of the Treasury, 320 Avery Street, Parkersburg, WV 26106–1328; and Bureau of the Fiscal Service, U.S. Department of the Treasury, 3201 Pennsy Drive, Warehouse ''E'', Landover, MD 20785.

SYSTEM MANAGER(S):

Assistant Commissioner, Office of Management, Bureau of the Fiscal Service, 3201 Pennsy Drive, Warehouse ''E'', Landover, MD 20785.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 7901; 29 U.S.C. 2613.

PURPOSE(S) OF THE SYSTEM:

Information in this system of records is collected and maintained to document an individual's utilization on a voluntary basis of health services provided under the Federal Employee Health Services Program at the health unit at the Fiscal Service and to document employees' requests for Family Medical Leave Act (''FMLA'') leave in Parkersburg, West Virginia or Hyattsville, Maryland. Data is necessary to ensure: Proper evaluation, diagnosis, treatment, and referral to maintain continuity of care; a medical history of care received by the individual; planning for further care of the individual; a means of communication among health care members who contribute to the individual's care; a legal document of health care rendered; and is a tool for evaluating the quality of health care rendered; and for assessing employees' requests for FMLA leave.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

(1) Fiscal Service employees who receive services under the Federal Employee Health Services Program from the Fiscal Service health units in Parkersburg, West Virginia or Hyattsville, MD, or who submit medical documentation in support of their requests for sick leave or leave under the FMLA;

(2) Federal employees of other organizations who receive services under the Federal Employee Health Services Program from the Fiscal Service health units in Parkersburg, West Virginia or Hyattsville, Maryland; and

(3) Non-federal individuals working in or visiting the buildings, who may receive emergency treatment from the Fiscal Service health unit in Parkersburg, West Virginia or Hyattsville, Maryland.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system is comprised of records developed as a result of an individual's utilization of services provided under the Federal Employee Health Services Program or provided in support of employees' requests for FMLA leave. These records contain information such as: Examination, diagnostic, assessment and treatment data; laboratory findings; nutrition and dietetic files; nursing notes; immunization records; CPR training; first aider: Names, Social Security number, date of birth, addresses, and telephone numbers of individual; name, address, and telephone number of individual's physician; name, address, and telephone number of hospital; name, address, and telephone number of emergency contact; and information obtained from the individual's physician(s); medical documents related to employees' requests for FMLA leave, and record of requested accesses by any Fiscal Service employee (other than health unit personnel) who has an official need for the information.

Note: This system does not cover records related to counseling for drug, alcohol, or other problems covered by the system of records notice Treasury/Fiscal Service .006—Employee Assistance Records. Medical records relating to a condition of employment or an on-the-job occurrence are covered by the Office of Personnel Management's system of records notice OPM/GOVT–10—Employee Medical File System Records.

RECORD SOURCE CATEGORIES:

Information in this system of records comes from the individual to whom it applies; laboratory reports and test results; health unit physicians, nurses, and other medical technicians who have examined, tested, or treated the individual; the individual's personal physician; other federal employee health units; and other federal agencies.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under the Privacy Act of 1974, 5 U.S.C. 552a(b), records and/or information or portions thereof maintained as part of this system may be disclosed outside Treasury as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows to:

(1) Medical personnel under a contract agreement with the Fiscal Service;

(2) A federal, state, or local public health service agency as required by applicable law, concerning individuals who have contracted certain communicable diseases or conditions. Such information is used to prevent further outbreak of the disease or condition;

(3) Appropriate federal, state, or local agencies responsible for investigation of an accident, disease, medical condition, or injury as required by pertinent legal authority;

(4) A federal agency responsible for administering benefits programs in connection with a claim for benefits filed by an employee;

(5) A congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(6) A court, magistrate, mediator or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations, in response to a subpoena, or in connection with criminal law proceedings;

(7) Appropriate agencies, entities, and person when (1) the Department of the Treasury and/or Fiscal Service suspects or has confirmed that there has been a breach of the system of records; (2) the Department of the Treasury and/or Fiscal Service has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Department of the Treasury and/or Fiscal Service (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such

agencies, entities, and persons is reasonably necessary to assist in connection with the Department of the Treasury's and/or Fiscal Service's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm;

(8) Another Federal agency or Federal entity, when the Department of the Treasury and/or Fiscal Service determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach;

(9) Fiscal Service employees who have a need to know the information in order to assess employees' requests for FMLA leave;

(10) Representatives of the National Archives and Records Administration (''NARA'') who are conducting records management inspections under authority of 44 U.S.C. 2904 and 2906;

(11) Contractors for the purpose of processing personnel and administrative records; and

(12) Agents or contractors who have been engaged to assist the Fiscal Service in the performance of a service related to this system of records and who need to have access to the records in order to perform the activity.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

These records are retrieved by the name or other assigned identifier of the individual to whom they pertain.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

All data maintained by this Fiscal Service system of records are retained and destroyed in accordance with the Fiscal Service File Plan. All records schedules and categories within the Fiscal Service File Plan are approved by NARA.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

These records are maintained in a secured database. Medical personnel under a contract agreement who have access to these records are required to maintain adequate safeguards with respect to such records.

RECORD ACCESS PROCEDURES:

Individuals requesting information under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest and/or amend records under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

NOTIFICATION PROCEDURES:

Individuals seeking to be notified if this system of record contains a record pertaining to himself or herself must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

EXEMPTIONS PROMULGATED FOR THE SYSTEM

None.

HISTORY:

Notice of this system of records was last published in full in the **Federal Register** on August 17, 2011 (76 FR 51128) as the Department of the Treasury, Bureau of the Public Debt .006—Health Service Program Records.

Treasury/Fiscal Service .017

SYSTEM NAME AND NUMBER:

Department of the Treasury, Bureau of the Fiscal Service .017—Do Not Pay Payment Verification Records.

SECURITY CLASSIFICATION:

Information in this system is not classified.

SYSTEM LOCATION:

Bureau of the Fiscal Service, U.S. Department of the Treasury, 3201 Pennsy Drive, Warehouse ''E'', Landover, MD 20785. Records are also located throughout the United States at Fiscal Service operations centers, Federal Records Centers, Federal Reserve Banks acting as Treasury's fiscal agents, and financial institutions acting as Treasury's financial agents. The specific address for each of the aforementioned locations may be obtained upon request.

SYSTEM MANAGER(S):

Director, Do Not Pay Business Center, Bureau of the Fiscal Service, 3201 Pennsy Drive, Warehouse ''E'', Landover, MD 20785.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Improper Payments Elimination and Recovery Improvement Act of 2012, 31 U.S.C. 3321 note, Public Law 112–248; the Improper Payments Elimination and Recovery Act of 2010, Public Law 111–204; E.O. 13520 (Reducing Improper Payments and Eliminating Waste in Federal Programs), 74 FR 62201; OMB Memorandum M–12–11 (Reducing Improper Payment through the ''Do Not Pay List'', April 12, 2012; OMB Memorandum M–13–20 (Protecting Privacy while Reducing Improper Payments with the Do Not Pay Initiative); Presidential Memorandum on Enhancing Payment Accuracy through a ''Do Not Pay List'' (June 18, 2010).

PURPOSE(S) OF THE SYSTEM:

Information in this system of records is collected and maintained to assist federal agencies in verifying that individuals are eligible to receive federal payments by allowing the Department of the Treasury/Fiscal Service to collect, maintain, analyze, and disclose records that will assist federal agencies in identifying, preventing, and recovering payment error, waste, fraud, and abuse within federal spending, as required by the Improper Payments Elimination and Recovery Improvement Act.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

(1) Individuals who have applied for or are receiving payments (including contract, grant, benefit or loan payments) disbursed by any federal agency, its agents or contractors;

(2) Individuals declared ineligible to participate in federal procurement programs or to receive certain federal loans, assistance, and/or benefits as a result of an exclusion or disqualification action;

(3) Individuals declared ineligible to participate in federal health care programs or to receive federal assistance and/or benefits as a result of an exclusion action;

(4) Individuals who are barred from entering the United States;

(5) Individuals in bankruptcy proceedings or individuals who have declared bankruptcy;

(6) Individuals who are, or have been, incarcerated and/or imprisoned;

(7) Individuals who are in default or delinquent status on loans, judgment debt, or rural development and farm services programs provided through federal agencies responsible for administering federally-funded programs;

(8) Individuals who owe non-tax debts to the United States;

(9) Individuals who owe debts to states, where the state has submitted the debt to the Fiscal Service for offset; and

(10) Individuals conducting, or attempting to conduct, transactions at or through a financial institution where the financial institution has identified, knows, suspects, or has reason to suspect that: (a) The transaction involves funds originating from illegal activities; (b) the purpose of the transaction is to hide or disguise funds or assets, or attempt to hide or disguise funds or assets, originating from illegal activities as part of a plan to violate or evade any law or regulation or to avoid any transaction reporting requirement under federal law; or (c) the transaction is illegal in nature or is not the type of transaction in which the particular individual would normally be expected to engage, and the financial institution knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction.

CATEGORIES OF RECORDS IN THE SYSTEM:

The records in this system contain information that will assist federal agencies to identify and prevent payment error, waste, fraud, and abuse within federal spending. The records contain information about intended or actual payees or recipients of federal payments, including information about financial assets, including income, wages, and bank accounts into which payments are made, and other information to assist federal agencies in making eligibility determinations regarding applicants for and recipients of payments from the Federal Government.

The records may contain the following information:

(1) Name(s), including aliases and surnames;

(2) State and federal taxpayer identification number (TIN), Social Security number (SSN), employer identification number (EIN), individual taxpayer identification number (ITIN), taxpayer identification number for pending U.S. adoptions (ATIN), and preparer taxpayer identification number (PTIN));

(3) Date of birth;

(4) Home and work address;

(5) Driver's license information and other information about licenses issued to an individual by a governmental entity;

(6) Home, work, and mobile telephone numbers;

(7) Personal and work email addresses;

(8) Income;

(9) Employer information;

(10) Assets and bank account information, including account number and financial institution routing and transit number;

(11) Other types of accounts to which payments are made, including account numbers and identifiers (*e.g.,* financial institution routing number, account number, credit card number, and information related to pre-paid debit cards);

(12) Tracking numbers used to locate payment information;

(13) Loan information, such as borrower identification (''ID'') number and ID type, case number, agency code, and type code;

(14) Incarceration information, such as inmate status code, date of conviction, date of confinement, and release date;

(15) Information about legal judgments;

(16) Data Universal Numbering System (''DUNS'') numbers;

(17) Information about non-tax debts owed to the United States; and

(18) Information about debts owed to state agencies.

RECORD SOURCE CATEGORIES:

Information in this system is provided by the individual (or an authorized representative) to whom the record pertains, federal agencies that authorize payments or issue payments with federal funds, Treasury fiscal and financial agents who work with data in this system, and commercial database vendors. The system may contain information about an individual from more than one source, and this information may vary, depending on the source that provided it.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under the Privacy Act of 1974, 5 U.S.C. 552a(b), records and/or information or portions thereof maintained as part of this system may be disclosed outside Treasury as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows: [6]

(1) (a) A federal agency, its employees, agents (including contractors of its agents) or contractors; (b) a fiscal or financial agent designated by the Fiscal Service, its predecessors, or other Department bureau or office, including employees, agents or contractors of such agent; or (c) a Fiscal Service contractor, for the purpose of identifying, preventing, or recouping improper payments to an applicant for, or recipient of, federal funds;

(2) A congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(3) (a) a federal agency, its employees, agents (including contractors of its agents) or contractors; (b) a fiscal or financial agent designated by the Fiscal Service, its predecessors, or other Department bureau or office, including employees, agents or contractors of such agent; or (c) a Fiscal Service contractor, to initiate an investigation, or during the course of an investigation, and to the extent necessary, obtain information supporting an investigation pertinent to the elimination of systemic fraud, waste, and abuse within federal programs;

(4) (a) a federal agency, its employees, agents (including contractors of its agents) or contractors; (b) a fiscal or financial agent designated by the Fiscal Service, its predecessors, or other Department bureau or office, including employees, agents or contractors of such agent; or (c) a Fiscal Service contractor for the purpose of validating eligibility for an award through a federal program;

(5) (a) a federal agency, its employees, agents (including contractors of its agents) or contractors; (b) a fiscal or financial agent designated by the Fiscal Service, its predecessors, or other Department bureau or office, including employees, agents or contractors of such agent; or (c) a Fiscal Service contractor to check or improve the quality and accuracy of system records;

(6) Financial institutions and their servicers in order to: (a) verify the proper routing and delivery of any federal payment; (b) verify the identity of any recipient or intended recipient of a federal payment; or (c) investigate or pursue recovery of any improper payment;

(7) Foreign governments in accordance with formal or informal international agreements;

(8) Appropriate federal, state, local or foreign agencies responsible for investigating or prosecuting a violation or for enforcing or implementing a statute, rule, regulation, order, or license, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper

[6] This system contains records that are collected by the Fiscal Service and other federal agencies. Notwithstanding the routine uses listed in this system of records, Federal law may further limit how records may be used, and the Fiscal Service may agree to additional limits on disclosure for some data through a written agreement with the entity that supplied the information. As such, the routine uses listed in this system of records may not apply to every data set in the system. To identify which routine uses apply to specific data sets, visit *https://fiscal.treasury.gov/dnp/privacy-program.html.*

and consistent with the official duties of the person making the disclosure;

(9) A federal, state, or local agency, maintaining civil, criminal or other relevant enforcement information or other pertinent information, which has requested information relevant to or necessary to the requesting agency's or the bureau's hiring or retention of an individual, or issuance of a security clearance, suitability determination, license, contract, grant, or other benefit;

(10) A court, magistrate, mediator or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations, in response to a subpoena, or in connection with criminal law proceedings;

(11) Appropriate agencies, entities, and person when (1) the Department of the Treasury and/or Fiscal Service suspects or has confirmed that there has been a breach of the system of records; (2) the Department of the Treasury and/or Fiscal Service has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Department of the Treasury and/or Fiscal Service (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department of the Treasury's and/or Fiscal Service's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm;

(12) Another Federal agency or Federal entity, when the Department of the Treasury and/or Fiscal Service determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach;

(13) Representatives of the National Archives and Records Administration (''NARA'') who are conducting records management inspections under authority of 44 U.S.C. 2904 and 2906; and

(14) Agents or contractors who have been engaged to assist the Fiscal Service in the performance of a service related to this system of records and who need to have access to the records in order to perform the activity.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records may be retrieved by identifiers, including, but not limited to, exact name, partial name, SSN, TIN, EIN, DUNS numbers, or a combination of these elements.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

All data maintained by this Fiscal Service system of records are retained and destroyed in accordance with the Fiscal Service File Plan. All records schedules and categories within the Fiscal Service File Plan are approved by NARA.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

These records are maintained in controlled access areas. Identification cards are verified to ensure that only authorized personnel are present. Electronic records are protected by restricted access procedures, including the use of passwords and sign-on protocols, which are periodically changed. Only employees whose official duties require access are allowed to view, administer, and control these records. Copies of records maintained on a computer have the same limited access as paper records.

The Fiscal Service may agree to additional safeguards for some data through a written agreement with the entity supplying the data. Information on additional safeguards can be found at *https://donotpay.treas.gov.*

RECORD ACCESS PROCEDURES:

Individuals requesting information under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest and/or amend records under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

NOTIFICATION PROCEDURES:

Individuals seeking to be notified if this system of record contains a record pertaining to himself or herself must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

Notice of this system of records was last published in full in the **Federal Register** on December 9, 2013 (78 FR 73923) as the Department of the Treasury, Bureau of the Fiscal Service .023—Do Not Pay Payment Verification Records.

Treasury/Fiscal Service .018

SYSTEM NAME AND NUMBER:

Department of the Treasury, Bureau of the Fiscal Service .018—OneVoice Customer Relationship Management.

SECURITY CLASSIFICATION:

Information in this system is not classified.

SYSTEM LOCATION:

Bureau of the Fiscal Service, U.S. Department of the Treasury, 3201 Pennsy Drive, Warehouse ''E'', Landover, MD 20785. Records are also located throughout the United States at data centers operated by Fiscal Service service providers.

SYSTEM MANAGER(S):

Director, Office of Agency Outreach, Bureau of the Fiscal Service, 3201 Pennsy Drive, Warehouse ''E'', Landover, MD 20785.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301.

PURPOSES(S) OF THE SYSTEM:

The purpose of this system of records is to establish a customer relationship management (''CRM'') tool within the Fiscal Service. An enterprise-wide CRM tool is necessary to strategically promote, share, and guide the organization in developing processes for marketing, messaging, outreach, engagement and consistent product and service implementations. In addition, this system will increase transparency; improve outreach, communications, and collaboration efforts with our customers and vendors; and employ sound, repeatable methodologies.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Sole proprietors and other entities, which provide goods and/or services to the Fiscal Service (''Vendors''); and individuals representing agencies that purchase goods and/or services through the Fiscal Service (''Clients'').

CATEGORIES OF RECORDS IN THE SYSTEM:

(1) Client's or Vendor's name;
(2) Agency or organization identifier (if applicable);
(3) Position information (title and expertise area);
(4) Phone and fax numbers;
(5) Email addresses; and
(6) Physical work address.

RECORD SOURCE CATEGORIES:

Records are obtained directly from clients and vendors and added to the system by authorized Fiscal Service employees, contractors, and fiscal or financial agents.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under the Privacy Act of 1974, 5 U.S.C. 552a(b), records and/or information or portions thereof maintained as part of this system may be disclosed outside Treasury as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows to:

(1) A federal, state, or local agency, maintaining civil, criminal, or other relevant enforcement information or other pertinent information, which has requested information relevant to or necessary to the requesting agency's or the bureau's hiring or retention of an individual, or issuance of a security clearance, suitability determination, license, contract, grant, or other benefit;

(2) A congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(3) A court, magistrate, mediator or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations, in response to a subpoena, or in connection with criminal law proceedings;

(4) Appropriate agencies, entities, and person when (1) the Department of the Treasury and/or Fiscal Service suspects or has confirmed that there has been a breach of the system of records; (2) the Department of the Treasury and/or Fiscal Service has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Department of the Treasury and/or Fiscal Service (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department of the Treasury's and/or Fiscal Service's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm;

(5) Another Federal agency or Federal entity, when the Department of the Treasury and/or Fiscal Service determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach;

(6) Representatives of the National Archives and Records Administration (''NARA'') who are conducting records management inspections under the authority of 44 U.S.C. 2904 and 2906;

(7) Appropriate federal, state, local or foreign agencies responsible for investigating or prosecuting a violation or for enforcing or implementing a statute, rule, regulation, order, or license, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure;

(8) Foreign governments in accordance with formal or informal international agreements; and

(9) Agents or contractors who have been engaged to assist the Fiscal Service in the performance of a service related to this system of records and who need to have access to the records in order to perform the activity.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records may be retrieved by name, address, or other alpha/numeric identifying information.

POLICIES AND PROCEDURES FOR RETENTION AND DISPOSAL OF RECORDS:

All data maintained by this Fiscal Service system of records are retained and destroyed in accordance with the Fiscal Service File Plan. All records schedules and categories within the Fiscal Service File Plan are approved by NARA.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

These records are maintained in controlled access areas. Identification cards are verified to ensure that only authorized personnel are present. Electronic records are protected by restricted access procedures, including the use of passwords and sign-on protocols, which are periodically changed. Only employees whose official duties require access are allowed to view, administer, and control these records. Copies of records maintained on a computer have the same limited access as paper records.

RECORD ACCESS PROCEDURES:

Individuals requesting information under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest and/or amend records under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

NOTIFICATION PROCEDURES:

Individuals seeking to be notified if this system of record contains a record pertaining to himself or herself must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

Notice of this system of records was last published in full in the **Federal Register** on September 19, 2014 (79 FR 56433) as the Department of the Treasury, Bureau of the Fiscal Service .024—OneVoice Customer Relationship Management.

Treasury/Fiscal Service .019

SYSTEM NAME AND NUMBER:

Department of the Treasury, Bureau of the Fiscal Service .019—Gifts to Reduce the Public Debt.

SECURITY CLASSIFICATION:

Information in this system is not classified.

SYSTEM LOCATION:

Bureau of the Fiscal Service, U.S. Department of the Treasury, 200 Third Street, Parkersburg, WV 26106–1328.

SYSTEM MANAGER(S):

Assistant Commissioner, Office of Retail Securities Services, Division of Securities Accounting, Bureau of the Fiscal Service, 200 Third Street, Parkersburg, WV 26106–1328.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

31 U.S.C. 3113.

PURPOSE(S) OF THE SYSTEM:

Information in this system of records is collected and maintained to document donors' gifts to reduce the public debt. They provide a record of correspondence between Fiscal Service and the donor, information concerning any legal matters, and a record of depositing the gift and accounting for it.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Donors of gifts to reduce the public debt.

CATEGORIES OF RECORDS IN THE SYSTEM:

Correspondence; copies of checks, money orders, or other payments; copies of wills and other legal documents; and other material related to gifts to reduce the public debt by the Bureau of the Fiscal Service.

Note: This system of records does not cover gifts sent to other agencies, such as gifts sent with one's federal income tax return to the Internal Revenue Service. It also does not include records pertaining to gifts of tangible property, nor does it include any other gifts to the United States.

RECORD SOURCE CATEGORIES:

Information in this system of records comes from the individual to whom it applies, executors, administrators, and other involved persons.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under the Privacy Act of 1974, 5 U.S.C. 552a(b), records and/or information or portions thereof maintained as part of this system may be disclosed outside Treasury as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows to:

(1) Appropriate federal, state, local, or foreign agencies responsible for investigating or prosecuting a violation or for enforcing or implementing a statute, rule, regulation, order, or license, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure;

(2) A court, magistrate, mediator or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations, in response to a subpoena, or in connection with criminal law proceedings;

(3) A congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(4) Agents or contractors of the Department for the purpose of administering the public debt of the United States;

(5) A federal, state, or local agency, maintaining civil, criminal or other relevant enforcement information or other pertinent information, which has requested information relevant to or necessary to the requesting agency's or the bureau's hiring or retention of an individual, or issuance of a security clearance, suitability determination, license, contract, grant, or other benefit;

(6) The Internal Revenue Service for the purpose of confirming whether a tax-deductible event has occurred;

(7) Appropriate agencies, entities, and person when (1) the Department of the Treasury and/or Fiscal Service suspects or has confirmed that there has been a breach of the system of records; (2) the Department of the Treasury and/or Fiscal Service has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Department of the Treasury and/or Fiscal Service (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department of the Treasury's and/or Fiscal Service's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm;

(8) Another Federal agency or Federal entity, when the Department of the Treasury and/or Fiscal Service determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach;

(9) Third parties during the course of an investigation to the extent necessary to obtain information pertinent to the investigation;

(10) Representatives of the National Archives and Records Administration (''NARA'') who are conducting records management inspections under authority of 44 U.S.C. 2904 and 2906; and

(11) Agents or contractors who have been engaged to assist the Fiscal Service in the performance of a service related to this system of records and who need to have access to the records in order to perform the activity.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

These records are retrieved by the name of the donor, amount of gift, type of gift, date of gift, Social Security number of donor, if provided, control number, check number, state code, or other assigned identifier.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

All data maintained by this Fiscal Service system of records are retained and destroyed in accordance with the Fiscal Service File Plan. All records schedules and categories within the Fiscal Service File Plan are approved by NARA.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

These records are maintained in controlled access areas. Identification cards are verified to ensure that only authorized personnel are present. Electronic records are protected by restricted access procedures, including the use of passwords and sign-on protocols, that are periodically changed. Only employees whose official duties require access are allowed to view, administer, and control these records. Copies of records maintained on a computer have the same limited access as paper records.

RECORD ACCESS PROCEDURES:

Individuals requesting information under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest and/or amend records under the Privacy Act must follow the procedures set forth in

the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

NOTIFICATION PROCEDURES:

Individuals seeking to be notified if this system of record contains a record pertaining to himself or herself must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

Notice of this system of records was last published in full in the **Federal Register** on August 17, 2011 (76 FR 51128) as the Department of the Treasury, Bureau of the Public Debt .007—Gifts to Reduce the Public Debt.

Treasury/Fiscal Service .020

SYSTEM NAME AND NUMBER:

Department of the Treasury, Bureau of the Fiscal Service .020—U.S. Treasury Securities Fraud Information System.

SECURITY CLASSIFICATION:

Information in this system is not classified.

SYSTEM LOCATION:

Bureau of the Fiscal Service, U.S. Department of the Treasury, 200 Third Street, Parkersburg, WV 26106–1328; Bureau of the Fiscal Service, U.S. Department of the Treasury, 3201 Pennsy Drive, Warehouse ''E'', Landover, MD 20785. This system also covers the Fiscal Service records that are maintained by contractor(s) under agreement. The system manager maintains the system location of these records. The addresses of the contractor(s) may be obtained from the system manager below.

SYSTEM MANAGER(S):

(1) Assistant Commissioner, Office of Information Technology, Bureau of the Fiscal Service, 200 Third Street, Parkersburg, WV 26106–1328;

(2) Assistant Commissioner, Retail Securities Services, Bureau of the Fiscal Service, 200 Third Street, Parkersburg, WV 26106–1328; and

(3) Office of the Chief Counsel, Bureau of the Fiscal Service, 200 Third Street, Parkersburg, WV 26106–1328.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM

31 U.S.C. 321(a)(5), 31 U.S.C. 333, 31 U.S.C. 3101, *et seq.* 31 U.S.C. 5318, and 5 U.S.C. 301.

PURPOSE(S) OF THE SYSTEM:

Information in this system of records is collected and maintained to: (1) Identify and monitor fraudulent and suspicious activity related to Treasury securities, other U.S. obligations, and fictitious instruments; (2) ensure that the Fiscal Service provides a timely and appropriate notification of a possible violation of law to law enforcement and regulatory agencies; (3) protect the Government and individuals from fraud and loss; (4) prevent the misuse of Treasury names and symbols on fraudulent instruments; and (5) compile summary reports that conform with the spirit of the USA Patriot Act's anti-terrorism financing provisions and the Bank Secrecy Act's anti-money laundering provisions, and submit the reports to the Financial Crimes Enforcement Network.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals under investigation or who make inquiries or report fraudulent or suspicious activities related to Treasury securities and other U.S. obligations.

CATEGORIES OF RECORDS IN THE SYSTEM:

The types of personal information collected/used by this system are necessary to ensure the accurate identification of individuals who report or make fraudulent transactions involving Treasury securities, other U.S. obligations, and fictitious instruments. The types of personal information potentially could include the following:

(1) Personal identifiers (name, including previous name used, and aliases; Social Security number; tax identification number; physical and electronic addresses; telephone, fax, and pager numbers); and

(2) Authentication aids (personal identification number, password, account number, credit card number, shared-secret identifier, digitized signature, or other unique identifier).

Supporting records may contain correspondence between the Fiscal Service and the entity or individual suspected of fraud or individual submitting a complaint or inquiry, correspondence between the Fiscal Service and the Department, or correspondence between the Fiscal Service and law enforcement, regulatory bodies, or other third parties.

RECORD SOURCE CATEGORIES:

Information in this system of records is exempt from the Privacy Act provision that requires that record source categories be reported. (See ''Exemptions Promulgated for the System,'' below.)

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under the Privacy Act of 1974, 5 U.S.C. 552a(b), records and/or information or portions thereof maintained as part of this system may be disclosed outside Treasury as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows to:

(1) A congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(2) Appropriate federal, state, local or foreign agencies responsible for investigating or prosecuting a violation or for enforcing or implementing a statute, rule, regulation, order, or license, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure;

(3) A federal, state, or local agency, maintaining civil, criminal or other relevant enforcement information or other pertinent information, which has requested information relevant to or necessary to the requesting agency's or the bureau's hiring or retention of an individual, or issuance of a security clearance, suitability determination, license, contract, grant, or other benefit;

(4) A court, magistrate, mediator or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations, in response to a subpoena, or in connection with criminal law proceedings;

(5) Third parties during the course of an investigation to the extent necessary to obtain information pertinent to the investigation;

(6) Agents or contractors who have been engaged to assist the Fiscal Service in the performance of a service related to this system of records and who need to have access to the records in order to perform the activity;

(7) Appropriate agencies, entities, and person when (1) the Department of the Treasury and/or Fiscal Service suspects or has confirmed that there has been a breach of the system of records; (2) the Department of the Treasury and/or Fiscal Service has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Department of the Treasury and/or Fiscal Service (including its information systems, programs, and operations), the Federal

Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department of the Treasury's and/or Fiscal Service's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm;

(8) Another Federal agency or Federal entity, when the Department of the Treasury and/or Fiscal Service determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach; and

(9) Representatives of the National Archives and Records Administration (''NARA'') who are conducting records management inspections under authority of 44 U.S.C. 2904 and 2906.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records may be retrieved by (name, alias name, Social Security number, tax identification number, account number, or other unique identifier).

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

All data maintained by this Fiscal Service system of records are retained and destroyed in accordance with the Fiscal Service File Plan. All records schedules and categories within the Fiscal Service File Plan are approved by NARA.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

These records are maintained in controlled access areas. Identification cards are verified to ensure that only authorized personnel are present. Electronic records are protected by restricted access procedures, including the use of passwords and sign-on protocols, that are periodically changed. Only employees whose official duties require access are allowed to view, administer, and control these records. Copies of records maintained on a computer have the same limited access as paper records.

RECORD ACCESS PROCEDURES:

Individuals requesting information under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest and/or amend records under the Privacy Act must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

NOTIFICATION PROCEDURES:

Individuals seeking to be notified if this system of record contains a record pertaining to himself or herself must follow the procedures set forth in the regulations of the U.S. Department of the Treasury published in 31 CFR part 1, subpart C, Appendix G.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

Records maintained in this system have been designated as exempt from 5 U.S.C. 552a(c)(3), (d)(1), (2), (3), and (4), (e)(1), (e)(4)(G), (H), and (I), and (f) pursuant to 5 U.S.C. 552a(k)(2). See 31 CFR 1.36.[7]

HISTORY:

Notice of this system of records was last published in full in the **Federal Register** on August 17, 2011 (76 FR 51128) as the Department of the Treasury, Bureau of the Public Debt .009—U.S. Treasury Securities Fraud Information System.

[FR Doc. 2020–03969 Filed 2–26–20; 8:45 am]

BILLING CODE 4810–35–P

[7] As noted in the Supplementary Information section, this SORN is the successor to BPD SORN .009 (U.S. Treasuries Securities Fraud Information System). Therefore, references to BPD .009 in 31 CFR part 1 should be construed as a reference to this SORN.

FEDERAL REGISTER

Vol. 85 Thursday,
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Part VI

Environmental Protection Agency

40 CFR Part 52
Air Quality State Implementation Plans; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2019–0439; FRL–10005–31–Region 9]

Air Plan Approval; California; Mojave Desert Air Quality Management District; California; Ventura County; 8-Hour Ozone Nonattainment Area Requirements; Clean Air Plans; 2008 8-Hour Ozone Nonattainment Area Requirements; Determination of Attainment by the Attainment Date; Imperial County, CA

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve revisions to the Mojave Desert Air Quality Management District (MDAQMD) portion of the California State Implementation Plan (SIP). These revisions concern emissions of volatile organic compounds (VOC) from Metal Parts and Products Coating Operations, and Polyester Resin Operations. We are approving two local rules that regulate these emission sources under the Clean Air Act (CAA or the Act) as well as approving negative declarations for three subcategories of control techniques guidelines (CTG) sources in the MDAQMD. In addition, we are converting the partial conditional approval of the District's reasonably available control technology (RACT) SIPs for the 1997 and 2008 ozone standards, as it applies to these two rules, to a full approval.

DATES: These rules and negative declarations will be effective on March 30, 2020.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R09–OAR–2019–0439. 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 (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Arnold Lazarus, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 972–3024 or by email at *Lazarus.Arnold@epa.gov.*

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

Table of Contents

I. Proposed Action

On December 4, 2019 (84 FR 66345), the EPA proposed to approve the following rules and negative declarations into the California SIP.

Local agency	Document title	Amended/ adopted	Submitted
MDAQMD	Rule 1115 Metal Parts and Products Coating Operations	01/22/2018	05/23/2018
MDAQMD	Rule 1162 Polyester Resin Operations	04/23/2018	07/16/2018
MDAQMD	Federal Negative Declarations for Two Control Techniques Guidelines Source Categories	04/23/2018	07/16/2018
MDAQMD	Federal Negative Declaration for One Control Techniques Guidelines Source Category (Motor Vehicle Materials).	10/22/2018	12/07/2018

We proposed to approve these rules and negative declarations because we determined that they comply with the relevant CAA requirements. Our proposed action contains more information on the rules, negative declarations and our evaluation.

II. Public Comments and EPA Responses

The EPA's proposed action provided a 30-day public comment period. During this period, we received no comments.[1]

III. EPA Action

No comments were submitted. Therefore, as authorized in section 110(k)(3) of the Act, the EPA is fully approving these rules and negative declarations into the California SIP. The EPA is also removing from 40 CFR 52.248(d)(1) the conditional approval of the District's RACT SIPs for the 1997 and 2008 ozone standards, with respect to these two rules.

[1] The EPA received one submission on this docket through *www.regulations.gov* but that submission was blank.

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 MDAQMD rules described in the amendments to 40 CFR part 52 set forth below. 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

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, as described

in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; 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).

In addition, 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 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 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 in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Particulate matter, Reporting and recordkeeping requirements, VOC.

Dated: January 29, 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 F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(239)(i)(A)(*3*), (c)(354)(i)(B)(*2*), and (c)(518)(i)(A)(*2*), revising paragraph (c)(519) introductory text, and adding paragraphs (c)(519)(i)(A)(*2*), (c)(519)(ii), and (c)(531) to read as follows:

§ 52.220 Identification of plan-in part.

* * * * *

(c) * * *

(239) * * *

(i) * * *

(A) * * *

(*3*) Previously approved on December 23, 1997 in paragraph (c)(239)(i)(A)(*2*) of this section and now deleted with replacement in paragraph (c)(518)(i)(A)(*2*) of this section, Rule 1115, adopted on March 2, 1992 and amended on April 22, 1996.

* * * * *

(354) * * *

(i) * * *

(B) * * *

(*2*) Previously approved on November 24, 2008 in paragraph (c)(354)(i)(B)(*1*) of this section and now deleted with replacement paragraph (c)(519)(i)(A)(*2*) of this section, Rule 1162, ''Polyester Resin Operations,'' adopted on August 27, 2007.

* * * * *

(518) * * *

(i) * * *

(A) * * *

(*2*) Rule 1115, ''Metal Parts and Products Coating Operations,'' amended on January 22, 2018.

* * * * *

(519) New and amended regulations and additional materials for the following APCDs were submitted on July 16, 2018 by the Governor's designee.

(i) * * *

(A) * * *

(*2*) Rule 1162, ''Polyester Resin Operations,'' amended on April 23, 2018.

* * * * *

(ii) *Additional materials.* (A) Mojave Desert Air Quality Management District.

(*1*) Federal Negative Declaration (8 hr Ozone Standard) for Two Control Technologies Guidelines Source Categories, approved on April 23, 2018.

(*2*) [Reserved]

(B) [Reserved]

* * * * *

(531) The following additional material was submitted on December 7, 2018 by the Governor's designee.

(i) [Reserved]

(ii) *Additional materials.* (A) Mojave Desert Air Quality Management District.

(*1*) Federal Negative Declaration (8 hr Ozone Standard) for One Control Technologies Guidelines Source Category, approved on October 22, 2018.

(*2*) [Reserved]

* * * * *

■ 3. Section 52.222 is amended by adding paragraphs (a)(1)(viii) and (ix) to read as follows:

§ 52.222 Negative declarations.

(a) * * *

(1) * * *

(viii) The following negative declarations for the 2008 ozone standard were adopted by the District on April 23, 2018 and submitted to EPA on July 16, 2018: Miscellaneous Metal and Plastic Parts Coatings (EPA–453/R–08–003), Table 3—Plastic Parts and Products, and Table 4—Automotive/ Transportation and Business Machine Plastic Parts.

(ix) The following negative declaration for the 2008 ozone standard was adopted by the District on October 22, 2018, and submitted to EPA on December 7, 2018: Miscellaneous Metal and Plastic Parts Coatings (EPA–453/R–08–003), Table 6—Motor Vehicle Materials.

* * * * *

§ 52.248 [Amended]

■ 4. Section 52.248 is amended by removing and reserving paragraphs (d)(1)(vi) and (x).

[FR Doc. 2020–03251 Filed 2–26–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2018–0146; FRL–10005–67–Region 9]

Approval of Air Quality Implementation Plans; California; Ventura County; 8-Hour Ozone Nonattainment Area Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve portions of two state implementation plan (SIP) revisions submitted by the State of California to meet Clean Air Act (CAA or ''the Act'') requirements for the 2008 8-hour ozone national ambient air quality standards (NAAQS or ''standards'') in the Ventura County, California (''Ventura County'') ozone nonattainment area. The two SIP revisions include the ''Final 2016 Ventura County Air Quality Management Plan,'' and the Ventura County portion of the ''2018 Updates to the California State Implementation Plan.'' In this action, the EPA refers to these submittals collectively as the ''2016 Ventura County Ozone SIP.'' The 2016 Ventura County Ozone SIP addresses the nonattainment area requirements for the 2008 ozone NAAQS, including the requirements for an emissions inventory, attainment demonstration, reasonable further progress, reasonably available control measures, contingency measures, among others; and establishes motor vehicle emissions budgets. The EPA is taking final action to approve the 2016 Ventura County Ozone SIP as meeting all the applicable ozone nonattainment area requirements except for the contingency measure requirement, for which the EPA will be taking final action in a separate document.

DATES: This rule will be effective on March 30, 2020.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R09–OAR–2018–0146. 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 (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: John Kelly, Air Planning Office (AIR–2), EPA Region IX, 75 Hawthorne Street, San Francisco, CA 94105, (415) 947–4151, or by email at *kelly.johnj@epa.gov.*

SUPPLEMENTARY INFORMATION:

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I. Summary of the Proposed Action

On December 20, 2019 (84 FR 70109), the EPA proposed to approve, under CAA section 110(k)(3), and to approve conditionally, under CAA section 110(k)(4), all or portions of submittals from the California Air Resources Board (CARB) of revisions to the California SIP for the Ventura County ozone nonattainment area for the 2008 ozone NAAQS.[1] The relevant SIP revisions include Ventura County Air Pollution Control District's (VCAPCD's or ''District's'') Final 2016 Ventura County Air Quality Management Plan (''2016 Ventura County AQMP''), and the Ventura County portion of CARB's 2018 Updates to the California State Implementation Plan (''2018 SIP Update''). Collectively, we refer to the 2016 Ventura County AQMP and the relevant portion of the 2018 SIP Update as the ''2016 Ventura County Ozone SIP,'' and we refer to our December 20, 2019 proposed rule as the ''proposed rule.''

Our proposed conditional approval of the contingency measure element of the 2016 Ventura County AQMP relied on specific commitments: (1) From the District to modify an existing rule or rules that would provide for additional emissions reductions in the event that Ventura County fails to meet a reasonable further progress (RFP) milestone or fails to attain the 2008 ozone NAAQS by the applicable attainment date, and (2) from CARB to submit the revised District rule(s) to the EPA as a SIP revision within 12 months of our final action.[2] For more information on the SIP revision submittals and related commitments, please see our proposed rule.

In our proposed rule, we provided background information on the ozone standards,[3] area designations, and related SIP revision requirements under the CAA, and the EPA's implementing regulations for the 2008 ozone standards, referred to as the 2008 Ozone SIP Requirements Rule (''2008 Ozone SRR''). To summarize, the Ventura County ozone nonattainment area is classified as Serious for the 2008 ozone standards, and the 2016 Ventura County Ozone SIP was developed to address the requirements for this Serious nonattainment area for the 2008 ozone NAAQS.

For our proposed rule, we reviewed the various SIP elements contained in the 2016 Ventura County Ozone SIP, evaluated them for compliance with statutory and regulatory requirements, and concluded that they meet all applicable requirements with the exception of the contingency measure element. More specifically, in our proposal rule, we based our proposed actions on the following determinations:

- CARB and the District have met all applicable procedural requirements for public notice and hearing prior to the adoption and submittal of the 2016 Ventura County AQMP and 2018 SIP Update (see 84 FR 70109, 70112–70113 from the proposed rule);
- The 2012 base year emissions inventory from the 2016 Ventura County AQMP is comprehensive, accurate, and current and thereby meets the requirements of CAA sections 172(c)(3) and 182(a)(1) and 40 CFR 51.1115 for the 2008 ozone NAAQS, and future year baseline projections reflect appropriate calculation methods and the latest planning assumptions and are properly

[1] Ventura County lies within California's South Central Coast Air Basin, which includes the counties of Santa Barbara and San Luis Obispo in addition to Ventura County. The Ventura County ozone nonattainment area for the 2008 ozone NAAQS includes the entire county except for the Channel Islands of Anacapa and San Nicolas Islands. See 40 CFR 81.305.

[2] Letter dated August 16, 2019 from Michael Villegas, Air Pollution Control Officer, VCAPCD, to Richard Corey, Executive Officer, CARB; and letter dated August 30, 2019 from Richard W. Corey, Executive Officer, CARB to Mike Stoker, Regional Administrator, Region IX.

[3] Ground-level ozone pollution is formed from the reaction of volatile organic compounds (VOC) and oxides of nitrogen (NO_X) in the presence of sunlight. The 2008 ozone NAAQS is 0.075 parts per million (ppm) (eight-hour average). CARB refers to reactive organic gases (ROG) in some of its ozone-related submittals. The CAA and the EPA's regulations refer to VOC, rather than ROG, but both terms cover essentially the same set of gases. In this final rule, we use the Federal term (VOC) to refer to this set of gases.

supported by SIP-approved stationary and mobile source measures (see 84 FR 70109, 70113–70115 from the proposed rule);

- The emissions statement element of the 2016 Ventura County AQMP meets the requirements for emissions statements under CAA section 182(a)(3)(B) and 40 CFR 51.1102 for the 2008 ozone NAAQS (see 84 FR 70109, 70115–70116 from the proposed rule);
- The process followed by the District to identify reasonably available control measures (RACM) is generally consistent with the EPA's recommendations; the District's rules provide for the implementation of RACM for stationary and area sources of oxides of nitrogen (NO_X) and volatile organic compounds (VOC); CARB and the Southern California Association of Governments (SCAG) provide for the implementation of RACM for mobile sources of NO_X and VOC; there are no additional RACM that would advance attainment of the 2008 ozone NAAQS in Ventura County by at least one year; and therefore, the 2016 Ventura County AQMP provide for the implementation of all RACM as required by CAA section 172(c)(1) and 40 CFR 51.1112(c) for the 2008 ozone NAAQS (see 84 FR 70109, 70116–70118 from the proposed rule);
- The photochemical modeling in the 2016 Ventura County AQMP shows that existing CARB and District control measures are sufficient to attain the 2008 ozone NAAQS by the applicable attainment date in Ventura County; given the documentation in the 2016 Ventura County AQMP of modeling procedures and good model performance, the modeling is adequate to support the attainment demonstration for the 2008 ozone NAAQS; and therefore, the 2016 Ventura County AQMP meets the attainment demonstration requirements of CAA section 182(c)(2)(A) and 40 CFR 51.1108 (see 84 FR 70109, 70118–70121 from the proposed rule);
- As provided in our SRR, the previously-approved 15 percent rate-of-progress (ROP) demonstration for the 1-hour ozone NAAQS for Ventura County meets the ROP requirements of CAA section 182(b)(1) for Ventura County for the 2008 ozone NAAQS given that the boundaries of the Ventura County nonattainment area for the 1-hour ozone NAAQS and the 2008 ozone NAAQS are the same (see 84 FR 70109, 70121–70123 from the proposed rule);
- The RFP demonstration in the 2018 SIP Update provides for emissions reductions of VOC or NO_X of at least 3 percent per year on average for each three-year period from a 2011 baseline year through the attainment year and thereby meets the requirements of CAA sections 172(c)(2), 182(b)(1), and 182(c)(2)(B), and 40 CFR 51.1110(a)(2)(ii) for the 2008 ozone NAAQS (see 84 FR 70109, 70121–70123 from the proposed rule);
- The motor vehicle emissions budgets for the RFP milestone/attainment year of 2020 from the 2016 Ventura County AQMP are consistent with the RFP and attainment demonstrations, are clearly identified and precisely quantified, and meet all other applicable statutory and regulatory requirements in 40 CFR 93.118(e), including the adequacy criteria in 40 CFR 93.118(e)(4) and (5) (see 84 FR 70109, 70125–70127 from the proposed rule); [4]
- The general conformity budgets in the 2016 AQMP are established for a set time period, cover both precursors of ozone, are precisely quantified, and are consistent with the RFP and attainment demonstrations for the 2008 ozone NAAQS in Ventura County (see 84 FR 70109, 70127–70128 from the proposed rule); and
- Through previous EPA approvals of the State's inspection and maintenance (I/M) program, the 1994 ''Opt-Out Program'' SIP revision, the 1993 Photochemical Assessment Monitoring Station (PAMS) SIP revision, and the 2018 annual monitoring network plan, we find that Ventura County meets the following requirements for the 2008 ozone NAAQS: The enhanced vehicle I/M requirements in CAA section 182(c)(3) and 40 CFR 51.1102; the clean fuels fleet program in CAA sections 182(c)(4) and 246 and 40 CFR 51.1102; and the enhanced ambient air monitoring requirements in CAA section 182(c)(1) and 40 CFR 51.1102 (see 84 FR 70109, 70128–70129 from the proposed rule).

With respect to the contingency measure element of the 2016 Ventura County Ozone SIP, we proposed to approve conditionally the element as meeting the requirements of CAA sections 172(c)(9) and 182(c)(9) for the 2008 ozone NAAQS, based on commitments by CARB and the District to supplement the element through submission of a SIP revision within one year of final conditional approval action that will include a revised District rule or rules. See 84 FR 70109, 70123–70125 from the proposed rule.[5]

Please see our proposed rule for more information concerning the background for this action and for a more detailed discussion of the rationale for approval or conditional approval of the above-listed elements of the 2016 Ventura County Ozone SIP.

II. Public Comments and EPA Responses

The public comment period on the proposed rule opened on December 20, 2019, the date of its publication in the **Federal Register**, and closed on January 21, 2020. During this period, the EPA received five anonymous comments and one comment letter submitted by Air Law for All on behalf of the Center for Biological Diversity, the Center for Environmental Health and Citizens for Responsible Oil and Gas (collectively referred to herein as ''CBD'').

Four of the anonymous commenters express overall support for the proposed action. The fifth anonymous commenter expresses opposition to the approach taken under the current Administration to environmental regulation in general and opposes our proposed action, without providing any specific comments on it, based on the assumption that it represents a rollback of environmental standards. The EPA is not responding to these five commenters, either because their comments are not adverse to, or because they are not pertinent to, the proposed action. The comment letter from CBD relates solely to our proposed conditional approval of the contingency measure element of the 2016 Ventura County Ozone SIP. We are not taking final action on the contingency measure element in this document, but will take final action on it in a separate final rule and will address CBD's comments at that time.

III. Final Action

For the reasons discussed in detail in the proposed rule and summarized herein, under CAA section 110(k)(3), the EPA is taking final action to approve as a revision to the California SIP the following portions of the 2016 Ventura County Ozone SIP submitted by CARB on April 11, 2017 and December 5, 2018:

- Base year emissions inventory element in the 2016 Ventura County AQMP as meeting the requirements of CAA sections 172(c)(3) and 182(a)(1)

[4] In light of CARB's request to limit the duration of the approval of the budgets in the 2018 SIP Update and in anticipation of the EPA's approval, in the near term, of an updated version of CARB's EMFAC (short for EMission FACtor) model for use in SIP development and transportation conformity in California to include updated vehicle mix and emissions data, we proposed to limit the duration of our approval of the budgets until replacement budgets have been found adequate. See 84 FR 70109, 70126–70127 from the proposed rule.

[5] We are not taking final action on the contingency measure element of the 2016 Ventura County Ozone SIP at this time but will do so in a separate final rule.

and 40 CFR 51.1115 for the 2008 ozone NAAQS;

- Emissions statement element in the 2016 Ventura County AQMP as meeting the requirements of CAA section 182(a)(3)(B) and 40 CFR 51.1102 for the 2008 ozone NAAQS;
- RACM demonstration element in the 2016 Ventura County AQMP as meeting the requirements of CAA section 172(c)(1) and 40 CFR 51.1112(c) for the 2008 ozone NAAQS;
- Attainment demonstration element for the 2008 ozone NAAQS in the 2016 Ventura County AQMP as meeting the requirements of CAA section 182(c)(2)(A) and 40 CFR 51.1108;
- ROP demonstration element in the 2016 Ventura County AQMP as meeting the requirements of CAA 182(b)(1) and 40 CFR 51.1110(a)(2) for the 2008 ozone NAAQS;
- RFP demonstration element in the 2018 SIP Update, as clarified in August 2019,[6] as meeting the requirements of CAA sections 172(c)(2) and 182(c)(2)(B), and 40 CFR 51.1110(a)(2)(ii) for the 2008 ozone NAAQS;
- Motor vehicle emissions budgets in the 2016 Ventura County AQMP for the RFP milestone/attainment year of 2020 (as shown below) because they are consistent with the RFP and attainment demonstrations for the 2008 ozone NAAQS proposed for approval herein and meet the other criteria in 40 CFR 93.118(e); and

TRANSPORTATION CONFORMITY BUDGETS FOR THE 2008 OZONE NAAQS IN VENTURA COUNTY

[Summer planning inventory, tpd]

Budget year	VOC	NO_X
2020	5	7

Source: 2016 Ventura County AQMP, Table 3–7, 52.

- General conformity budgets of VOC and NO_X (as shown below) for Naval Base Ventura County (NBVC), as meeting the requirements of CAA section 176(c) and 40 CFR 93.161.

NBVC GENERAL CONFORMITY BUDGETS FOR THE 2008 OZONE NAAQS IN VENTURA COUNTY

[Summer planning inventory, tpy]

Budget year	VOC	NO_X
2017	178.6	434.2
2018	184.8	447.6
2019	191.3	461.5
2020	198.0	475.9

Source: 2016 Ventura County Ozone AQMP, Table 4–9.

We are also taking final action to find that the:

- Enhanced vehicle inspection and maintenance program in Ventura County meets the requirements of CAA section 182(c)(3) and 40 CFR 51.1102 for the 2008 ozone NAAQS;
- California SIP revision to opt-out of the Federal Clean Fuels Fleet Program meets the requirements of CAA sections 182(c)(4)(A) and 246 and 40 CFR 51.1102 for the 2008 ozone NAAQS with respect to Ventura County; and
- Enhanced monitoring in Ventura County meets the requirements of CAA section 182(c)(1) and 40 CFR 51.1102 for the 2008 ozone NAAQS.[7]

With respect to the motor vehicle emissions budgets, we are limiting the duration of the approval of the budgets to last only until the effective date of the EPA's adequacy finding for any subsequently submitted budgets. We are doing so at CARB's request and in light of the benefits of using EMFAC2017-derived budgets prior to our taking final action on the future SIP revision that includes the updated budgets. Furthermore, we are determining that the submitted 2020 budgets included in the 2016 Ventura County AQMP are adequate for transportation conformity purposes.[8]

We are not taking final action on the contingency measure element of the 2016 Ventura County Ozone SIP at this time but will do so in a separate final rule.

IV. Statutory and Executive Order Reviews

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

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

[6] Letter dated August 29, 2019, from Dr. Michael T. Benjamin, Chief, Air Quality Planning and Science Division, CARB, to Amy Zimpfer, Assistant Director, Air Division, EPA Region IX.

[7] Regarding other applicable requirements for the 2008 ozone NAAQS in Ventura County, the EPA has previously approved SIP revisions that address the nonattainment area requirements for implementation of RACT and Nonattainment New Source Review (NSR) for Ventura County for the 2008 ozone NAAQS. See 80 FR 2016 (January 15, 2015) (approval of Ventura County RACT SIP) and 84 FR 66074 (December 3, 2019) (approval of Ventura County Nonattainment NSR SIP).

[8] Pursuant to 40 CFR 93.118(f)(2)(iii), the EPA's adequacy determination is effective upon publication of this final rule in the **Federal Register**. Upon the effective date of the adequacy determination, the 2020 budgets from the 2016 Ventura County AQMP will replace the budgets that were previously found adequate for use in transportation conformity determinations (*i.e.,* the 2009 budgets from the Ventura County Early Progress Plan (February 2008)).

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 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 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 in 40 CFR Part 52

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

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

Dated: January 29, 2020.

Deborah Jordan,

Acting Regional Administrator, Region IX.

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 F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(514)(ii)(A)(*4*) and (c)(532) to read as follows:

§ 52.220 Identification of plan—in part.

* * * * *

(c) * * *

(514) * * *

(ii) * * *

(A) * * *

(*4*) 2018 Updates to the California State Implementation Plan, adopted on October 25, 2018, chapter III (''SIP Elements for Ventura County''), excluding section III.C (''Contingency Measures''); and pages A–7 through A–10 of appendix A (''Nonattainment Area Inventories''), only.

* * * * *

(532) The following plan was submitted on April 11, 2017, by the Governor's designee.

(i) [Reserved]

(ii) *Additional materials.* (A) Ventura County Air Pollution Control District.

(*1*) Final 2016 Ventura County Air Quality Management Plan, adopted February 14, 2017, excluding chapter 7 (''Contingency Measures'').

(*2*) [Reserved]

(B) [Reserved]

■ 3. Section 52.244 is amended by adding paragraph (a)(9) to read as follows:

§ 52.244 Motor vehicle emissions budgets.

(a) * * *

(9) Ventura County, approved March 30, 2020.

* * * * *

[FR Doc. 2020–03246 Filed 2–26–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2018–0562; FRL–10005–51–Region 9]

Clean Air Plans; 2008 8-Hour Ozone Nonattainment Area Requirements; Determination of Attainment by the Attainment Date; Imperial County, California

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving two state implementation plan (SIP) revisions submitted by the State of California to meet Clean Air Act (CAA or ''Act'') requirements for the 2008 ozone national ambient air quality standards (NAAQS) in the Imperial County nonattainment area, as follows. The EPA is approving the ''Imperial County 2017 State Implementation Plan for the 2008 8-Hour Ozone Standard'' (''Imperial Ozone Plan'' or ''Plan'') and the portions of the ''2018 Updates to the California State Implementation Plan'' (''2018 SIP Update'') that address the requirement for a reasonable further progress (RFP) demonstration for Imperial County for the 2008 ozone standards. In addition, the EPA is determining, based on the ''Imperial County Clean Air Act Section 179B(b) Retrospective Analysis for the 75 ppb 8-hour Ozone Standard'' (''Imperial Ozone Retrospective Demonstration''), that the Imperial County nonattainment area would have attained the 2008 ozone NAAQS by the ''Moderate'' area attainment date of July 20, 2018, but for emissions emanating from Mexico, and therefore is not subject to the CAA requirements pertaining to reclassification upon failure to attain. As a result of these final actions, the Imperial County nonattainment area will remain classified as a Moderate nonattainment area for the 2008 ozone NAAQS.

DATES: This rule will be effective on March 30, 2020.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R09–OAR–2018–0562. 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 (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Ginger Vagenas, Air Planning Office (AIR–2), EPA Region IX, 75 Hawthorne Street, San Francisco, CA 94105, (415) 972–3964, or by email at *vagenas.ginger@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us,'' and ''our'' refer to the EPA. The EPA is approving portions of the Imperial Ozone Plan that address the requirements for emissions statements, a base year emissions inventory, a reasonably available control measures

(RACM) demonstration, a demonstration of attainment of the standards by the applicable attainment date but for emissions emanating from Mexico, and motor vehicle emissions budgets. We are finalizing our proposed determination that Imperial County met its RFP requirements and therefore determining the requirement for contingency measures for failing to meet RFP is moot. We are also finalizing our proposed approval of the State's determination of attainment by the attainment date but for international emissions, and therefore determining that contingency measures for failing to attain the standard are not required. The EPA is also approving the portions of the 2018 SIP Update that address the requirement for a reasonable further progress demonstration for Imperial County for the 2008 ozone standards.

Table of Contents

I. Summary of the Proposed Action

On November 1, 2019 (84 FR 58641), the EPA proposed to approve, under CAA section 110(k)(3), two submittals from the California Air Resources Board (CARB or ''State'') and the Imperial County Air Pollution Control District (''District'') as revisions to the California SIP for the Imperial County ozone nonattainment area.[1] The relevant SIP revisions include the Imperial Ozone Plan and the portions of the 2018 SIP Update that address the requirement for an RFP demonstration for Imperial County for the 2008 ozone standards. We also proposed to determine, based on a separate demonstration submitted by the State of California, that the Imperial County nonattainment area would have attained the 2008 ozone NAAQS by the ''Moderate'' area attainment date of July 20, 2018, but for emissions emanating from outside of the United States (specifically, from Mexico), and therefore is not subject to the CAA requirements pertaining to reclassification upon failure to attain. For more information on these submittals, please see our proposed rule.

In our proposed rule, we provided background information on the ozone standards,[2] area designations and related SIP revision requirements under the CAA, and the EPA's implementing regulations for the 2008 ozone standards, referred to as the 2008 Ozone SIP Requirements Rule (''2008 Ozone SRR''), including information on the provisions of CAA section 179B, entitled ''International Border Areas.'' [3] To summarize, the Imperial County ozone nonattainment area is classified as Moderate for the 2008 ozone standards, and the Imperial Ozone Plan that is the subject of this final action was developed to address the requirements for this Moderate nonattainment area for the 2008 ozone NAAQS.

In our proposed rule, we also discussed a decision issued by the D.C. Circuit Court of Appeals in *South Coast Air Quality Management Dist.* v. *EPA* (''South Coast II'') [4] that vacated certain portions of the EPA's 2008 Ozone SRR. The only aspect of the *South Coast II* decision that affects this action is the vacatur of the provision in the 2008 Ozone SRR that allowed states to use an alternative baseline year for demonstrating RFP. To address this issue, CARB submitted an updated RFP demonstration in the 2018 SIP Update that relied on a 2011 baseline year, along with updated motor vehicle emissions budgets (MVEBs) associated with the new RFP milestone years.

For our proposed rule, we reviewed the various SIP elements contained in the Imperial Ozone Plan and the portions of the 2018 SIP Update that address the requirement for an RFP demonstration for Imperial County for the 2008 ozone standards, evaluated them for compliance with statutory and regulatory requirements, and concluded that they meet all applicable requirements. More specifically, in our proposed rule, we proposed to approve the following:

- Emissions statement certification as meeting the requirements of CAA section 182(A)(3)(B);
- Base year emissions inventory as meeting the requirements of CAA sections 172(c)(3) and 182(a)(1) and 40 CFR 51.1115 with respect to attainment planning;
- RACM demonstration as meeting the requirements of CAA section 172(c)(1) and 40 CFR 51.1112(c);
- RFP demonstration as meeting the requirements of CAA sections 182(b)(1), and 40 CFR 51.1110(a)(4)(i); and
- Motor vehicle emissions budgets for the 2017 RFP milestone year because they are consistent with the RFP demonstration and the demonstration of attainment but for international emissions that are approved herein and meet the other criteria of 40 CFR 93.118(e); [5]

We also proposed that finalization of this action regarding the 179B demonstration would render the RFP contingency measure requirement of CAA section 172(c)(9) moot and that attainment contingency measures would no longer be required.

We also note that since signature of our proposed action on the Imperial Ozone Plan, we have finalized a separate action approving in part and conditionally approving in part certain portions of the Imperial Ozone Plan (Chapter 7, ''Reasonably Available Control Technology Assessment'' and App. B, ''Reasonably Available Control Technology Analysis for the 2017 Imperial County State Implementation Plan for the 2008 8-Hour Ozone Standard'').[6]

Given our proposal that the Imperial Ozone Plan meets all requirements for the Imperial County Moderate ozone nonattainment area, other than the requirement to demonstrate attainment, and our evaluation of the State's lines of evidence that together support the conclusion that Imperial County's SIP submission demonstrated the area would have attained the 2008 ozone

[1] The Imperial County ozone nonattainment area for the 2008 ozone standards includes the entire county. Both the Quechan Tribe of the Fort Yuma Indian Reservation and the Torres Martinez Desert Cahuilla Indians have lands within Imperial County. A precise description of the Imperial County ozone nonattainment area is contained in 40 CFR 81.305.

[2] Ground-level ozone pollution is formed from the reaction of volatile organic compounds (VOC) and oxides of nitrogen (NO_X) in the presence of sunlight. The 1-hour ozone NAAQS is 0.12 parts per million (ppm) (one-hour average), the 1997 ozone NAAQS is 0.08 ppm (eight-hour average), and the 2008 ozone standard is 0.075 ppm (eight-hour average). CARB refers to reactive organic gases (ROG) in some of its ozone-related submittals. The CAA and the EPA's regulations refer to VOC, rather than ROG, but both terms cover essentially the same set of gases. In this final rule, we use the federal term (VOC) to refer to this set of gases.

[3] 80 FR 12264 (March 6, 2015).

[4] *South Coast Air Quality Management Dist.* v. *EPA,* 882 F.3d 1138 (D.C. Cir. 2018). The term ''South Coast II'' is used in reference to the 2018 court decision to distinguish it from a decision published in 2006 also referred to as ''South Coast.'' The earlier decision involved a challenge to the EPA's Phase 1 implementation rule for the 1997 ozone standard. *South Coast Air Quality Management Dist.* v. *EPA,* 472 F.3d 882 (D.C. Cir. 2006).

[5] In light of CARB's request to limit the duration of the approval of the budgets in the Imperial Ozone Plan and in anticipation of the EPA's approval, in the near term, of an updated version of CARB's EMFAC (short for EMission FACtor) model for use in SIP development and transportation conformity in California to include updated vehicle mix and emissions data, we proposed to limit the duration of our approval of the budgets until replacement budgets have been found adequate. 84 FR 58641, 58658–58659.

[6] The final action on the Imperial RACT SIP for the 2008 ozone standard has been signed but has not yet published in the **Federal Register**; therefore, we have included a copy of the signed final action in the docket for this action. See also, 84 FR 58647, note 54.

NAAQS by the July 20, 2018 attainment date but for emissions emanating from Mexico, under CAA section 179B(a), the EPA proposed to approve the Imperial Ozone Plan's section 179B attainment demonstration as meeting the requirements of CAA sections 172(c)(1), 182(b)(1)(A), and 179B(a) and 40 CFR 51.1108.

Concurrently, we proposed to determine, consistent with our evaluation of the Imperial Ozone Plan, the 2018 Update, and the Imperial Ozone Retrospective Demonstration, that the Imperial County nonattainment area would have attained the 2008 ozone NAAQS by the Moderate area attainment date of July 20, 2018, but for emissions emanating from Mexico, under CAA section 179B(b). We also stated that, if our proposed determination were finalized, the EPA's obligation under CAA section 181(b)(2)(A) to determine whether the area attained by its attainment date would not apply and the area would not be reclassified.

Please see our proposed rule for more information concerning the background for this action and for a more detailed discussion of the rationale for approval of the above-listed elements of the Imperial Ozone Plan and our determination that Imperial County would have attained the 2008 ozone NAAQS by the Moderate area attainment date of July 20, 2018, but for emissions emanating from Mexico.

II. Public Comment and EPA Responses

The public comment period on the proposed rule opened on November 1, 2019, the date of its publication in the **Federal Register**, and closed on December 2, 2019. During this period, the EPA received one set of comments from the Center for Biological Diversity, Comite Civico del Valle, Inc., and Air Law for All, Ltd., and one anonymous comment.

The anonymous commenter describes ozone generators and safety sensors, issues that are outside the scope of this rulemaking. With respect to the other commenter, we provide summaries of the comments and our responses thereto in the following paragraphs. All the comments received are included in the docket for this action.

Comment 1: The commenter argues that any ''but for'' determination should be conditioned on California following through on its commitment to enhance and fund border pollution activities, including the creation and funding of a CARB assistant executive officer position for border pollution. The commenter asserts that CARB has acknowledged the need to create and fund such a position with staff to focus on border pollution issues, referencing, among other things, statements made at a CARB public meeting on December 13, 2018 to consider a particulate matter plan for Imperial County. The commenter contends that the State's failure to fund and staff the assistant executive officer position for border pollution indicates that Imperial County does not have adequate personnel and funding to carry out the plan, as required by CAA section 110(a)(2)(E)(i).

Response: The commenter correctly asserts that CAA section 110(a)(2)(E)(i) requires the State and District to have adequate personnel and funding to meet their obligations under the SIP, and with respect to the specific obligations of the SIP submission at issue in this action. The EPA has previously determined that California met the CAA section 110(a)(2)(E)(i) requirements for the 2008 ozone standard.[7] The commenter expresses concern that the State and District have not yet created, filled, or funded a specific position for an individual who will focus on international transport issues, as the State and District have previously had under consideration. The EPA agrees with the State, District, and commenters that the creation of an official position to focus on international transport issues might be a helpful approach to making progress on such problems. However, at this time neither the State nor the District included the creation of an assistant executive officer position for border pollution as an element or a commitment of the pre-exiting SIP or in the submitted Imperial Ozone Plan at issue in this action.[8] Thus, the creation, filling, or funding of such a position is not part of the SIP or the Imperial Ozone Plan, and thus is not relevant for purposes of section 110(a)(2)(E)(i), or an appropriate basis for the EPA to not finalize its proposed action to approve the Plan.

The commenters also suggest that the EPA should require the creation and funding of such a position as a part of the ''but for'' determination of CAA section 179B. Neither section 179B(a) nor the relevant statutory provisions applicable to nonattainment plan requirements impose a specific obligation on states to create, fill, or fund a position for personnel focusing on interstate transport. Similarly, sections 179B(b)–(d) do not explicitly require states to meet a requirement that they have such personnel. Again, the EPA agrees that having such personnel could be useful, but does not agree that it is a requirement for purposes of section 179B. Because the creation and funding of the position is neither a requirement of the existing SIP or an element of the Imperial Ozone Plan, nor an explicit requirement of CAA section 179B, the EPA does not in this case consider it to be a relevant consideration for the ''but for'' analysis.

Comment 2: The commenter states that CAA sections 179B(a)(1) and (2) provide that the EPA shall approve a plan or plan revision if (1) it meets all requirements applicable to it under the Act, other than the requirement to demonstrate attainment and maintenance of the relevant air quality standard, and (2) the submitting state establishes to the EPA's satisfaction that the plan would be adequate to attain and maintain the standard by the relevant attainment date, but for emissions emanating from outside the United States. The commenter states that the EPA's proposed action did not discuss or explain the statutory terms ''maintenance'' and ''maintain'' in CAA section 179B(a) and argues that the EPA's failure to give any meaning to these terms constitutes a failure of notice and is contrary to law.

The commenter suggests that the term ''maintenance'' addresses a gap in the statutory structure of the Act. The commenter states that after an applicable attainment date, areas not affected by international emissions have additional planning obligations. Specifically, the commenter states that areas not affected by international emissions and that do not attain the applicable standard have additional attainment-related requirements, and areas not affected by international emissions that do attain the applicable standard have (at least in practice) maintenance plan requirements. The commenter states that, on the other hand, areas with attainment plans approved under CAA section 179B ''may never have additional obligations [even] if the area never attains.'' The commenter states that a state may never have the opportunity or obligation to submit a maintenance plan because the EPA can only redesignate an area based on its design value and the design value cannot be modified based on international border emissions. The commenter concludes, ''In other words after EPA approves an attainment plan under section 179B(a) and exempts the area from reclassification, there is a gap in the statute: The state has no

[7] 81 FR 18766 (April 1, 2016).

[8] While several board members expressed support for staffing a position dedicated to the coordination of various border-related initiatives at its December 13, 2018 meeting, the Board did not state that it intended to establish an assistant executive officer for border pollution. California Air Resources Board meeting transcript, 258–265, December 13, 2018.

additional obligations to address maintenance of the NAAQS.''

The commenter states that the EPA must address the statutory terms ''maintenance'' and ''maintain.'' The commenter identifies a few arguments that it believes the EPA might make in response to this initial comment and puts forth counter arguments to those anticipated EPA arguments. The commenter contends that the EPA cannot show that Congress did not mean ''maintenance'' and ''maintain'' as a matter of historical fact (*i.e.,* legislative history) or as a matter of logic and statutory construction, and that the EPA cannot negate the ''maintenance'' requirement by arguing that it is not an applicable requirement.

Similarly, the commenter states that certain permitting programs (minor new source review, prevention of significant deterioration, and nonattainment new source review) are designed to maintain the NAAQS with respect to emissions from stationary sources and speculates that the EPA might assert that these programs are the portion of the implementation plan to which ''maintenance'' in CAA section 179B(a) applies. The commenter provides a counter argument that these permitting programs are insufficient to satisfy CAA section 179B(a)'s requirements regarding maintenance because they are not designed to maintain the NAAQS in section 179B areas and do not cover mobile sources, pesticides, fertilizers, and most non-point sources such as confined animal feeding operations.

The commenter suggests one possible way to interpret the meaning of ''maintenance'' and ''maintain'' in CAA section 179B would be to require the plan ''to show that emissions within the state will not grow after the attainment date in such a way that the root cause of the failure to attain shifts from international border emissions to in-state emissions.''

Response: As noted by the commenter, CAA section 179B(a) provides that the EPA must approve a state implementation plan or plan revision if (1) the plan meets all applicable requirements, other than a requirement to demonstrate attainment and maintenance by the applicable attainment date, and (2) the state establishes to the satisfaction of the Administrator that a state plan would be adequate to attain and maintain by the applicable attainment date ''but for emissions emanating from outside of the United States.'' As further noted by the commenter, CAA section 179B(b) provides that a state that establishes that it would have attained the standard by the attainment date is not subject to classification to a higher nonattainment classification pursuant to CAA section 181(b)(2)[9] or (5), but does not condition this exemption from reclassification on any demonstration of maintenance of the NAAQS.

The statute provides little guidance regarding the meaning of the terms ''maintenance'' and ''maintain'' in CAA sections 179B(a)(1) and (2). For example, regarding the timing of the maintenance requirement, one possible interpretation of the statutory language is that the state's demonstration must show that the plan revision is adequate to attain and ''maintain'' the NAAQS ''by,'' that is, up to, the attainment date. Another possible interpretation is that the statute requires the state to demonstrate that the plan revision is adequate to maintain the NAAQS beyond the attainment date. Under either of these readings, available emissions information from California indicates that its plan is adequate to maintain the NAAQS but for emissions emanating from Mexico, as the State's emissions are projected to decline into the future. Therefore, we disagree that it is necessary to resolve this ambiguity in this action and we disagree with the commenter's conclusion that the proposal was ''contrary to law'' based on a failure to provide notice of the EPA's interpretation of those terms.

The commenter suggests that if the EPA were to interpret ''maintain'' in CAA section 179B(a)(1) and (2) as requiring a demonstration of maintenance beyond the attainment date, one way to do so would be to conduct an analysis of the area's emissions some time into the future. We note that the EPA evaluates these types of prospective emissions projections in other maintenance analyses such as in the context of redesignations of nonattainment areas to attainment under CAA sections 107(d)(3)(E) and 175A, although such provisions are not applicable here.[10]

Available emissions inventory information from the District and CARB regarding future domestic emissions of ozone precursors (NO_X and VOC) in Imperial County and regionally indicates that emissions will decline.[11] For example, in February 2019, the District and CARB submitted a redesignation request and maintenance plan for the 1987 PM_{10} NAAQS. The District included NO_X and VOC emissions inventories for 2030 as part of the maintenance plan's demonstration that Imperial County will maintain the 1987 PM_{10} NAAQS. (NO_X and VOCs are subject to regulation as precursors for both PM_{10} and ozone.) The NO_X and VOC inventories for 2030 in the PM_{10} maintenance plan show declining emissions for both pollutants. Specifically, the District projects that annual average NO_X emissions will decline from 17.14 tons per day (tpd) in 2016 to 11.77 tpd in 2030 and that annual average VOC emissions will decline from 15.26 tpd in 2016 to 14.51 tpd in 2030.[12] In addition, CARB's California Emissions Projections Analysis Model (CEPAM) emissions database shows that ozone precursors will decline in Imperial County over the same time-period.[13] Specifically, the summer day emissions inventory[14] for ozone precursors shows decreases that are consistent with those in the PM_{10} maintenance plan.

Additionally, CARB's CEPAM emissions database indicates that region-wide domestic emissions of ozone precursors in upwind areas that have potential contribution to ozone levels in Imperial County are also projected to decrease over the next decade.[15] For example, NO_X emissions in the South Coast Air Basin are projected to decline from 306.5 tpd in

[9] As we explained in our proposed action, CAA section 179B(b) erroneously refers to section CAA 181(a)(2); the correct cross-reference is section 181(b)(2). 84 FR 58660.

[10] In the EPA's guidance regarding redesignations, the EPA suggests that maintenance of the NAAQS for areas that have already attained the standard may be demonstrated by either showing that future emissions of a pollutant and its precursors will not exceed the level of the attainment inventory (*i.e.,* emissions at the time the area attained the relevant NAAQS) or by modeling to show that the mix of sources and emission rates will not cause a violation of the NAAQS. Memorandum dated September 4, 1992, from John Calcagni, Director, Air Quality Management Division, EPA Office of Air Quality Planning and Standards, Subject: ''Procedures for Processing Requests to Redesignate Areas to Attainment.''

[11] Memorandum dated February 3, 2020, from Carol Bohnenkamp (EPA) to Rulemaking Docket EPA–R09–OAR–2018–0562, Subject: ''Ozone Precursor Emission Inventory Trends for Imperial County, California.''

[12] ''Imperial County 2018 Redesignation Request and Maintenance Plan for Particulate Matter Less Than 10 Microns in Diameter (PM_{10}),'' submitted by CARB to EPA on February 13, 2019 as a revision to the Imperial County portion of the California SIP, accessible at *https://ww3.arb.ca.gov/planning/sip/planarea/imperial/sip.pdf.*

[13] CARB's CEPAM 2016 Standard Emission Tool is accessible at *https://www.arb.ca.gov/app/emsinv/fcemssumcat/fcemssumcat2016.php.*

[14] Because warm weather facilitates the formation of ground-level ozone, attainment demonstrations in ozone plans are based on emissions inventories for summer days. There is not a strong seasonal correlation for PM_{10} levels in Imperial County, so the PM_{10} inventories are based on annual average days.

[15] CARB's CEPAM 2016 Standard Emission Tool. Emissions of ozone precursors in the South Coast Basin, as well as other areas in southern California, including San Diego, and Ventura, are projected to decline from 2020 to 2031.

2020 to 204.9 tpd in 2031, and VOC emissions are projected to decline from 388.6 tpd in 2020 to 358.3 tpd in 2031.[16]

In response to the commenter's concern that there is a ''gap'' in the statute, we note that if domestic emissions were to increase such that the nonattainment problem were to be exacerbated, the EPA has the authority under CAA section 110(k)(5) to call for plan revisions to address substantially inadequate implementation plans.

III. Final Action

For the reasons discussed in detail in the proposed rule and summarized herein, under CAA section 110(k)(3), the EPA is taking final action to approve as a revision to the California SIP the following portions of the Imperial Ozone Plan and the 2018 SIP Update submitted by CARB on November 14, 2017 and December 11, 2018, respectively:

- Emissions statement element, as meeting the requirements of CAA section 182(a)(3)(B) and 40 CFR 51.1102 for the 2008 ozone NAAQS;
- Base year emissions inventory element in the Imperial ozone plan as meeting the requirements of CAA sections 172(c)(3) and 182(a)(1) and 40 CFR 51.1115 for the 2008 ozone NAAQS;
- RACM demonstration element as meeting the requirements of CAA section 172(c)(1) and 40 CFR 51.1112(c) for the 2008 ozone NAAQS;
- RFP demonstration as meeting the requirements of CAA section 182(b)(1) and 40 CFR 51.1110(a)(2)(i) for the 2008 ozone NAAQS; and
- Motor vehicle emissions budgets for the RFP milestone year of 2017, as shown in Table 1 below, because they are consistent with the RFP demonstration and demonstration of attainment but for international emissions for the 2008 ozone NAAQS finalized for approval herein and meet the other criteria in 40 CFR 93.118(e).

TABLE 1—2017 MOTOR VEHICLE EMISSIONS BUDGETS FOR IMPERIAL COUNTY FOR THE 2008 OZONE NAAQS

	2017	
	NO_X (tpd)	VOC (tpd)
On-road Mobile Sources	6.53	3.13
Safety Margin	0.4	0.8
Motor Vehicle Emissions Budget (rounded to nearest whole number)	7	4

Source: 2018 SIP Update, Table II–2, and CARB's *Technical Clarification Letter,* Attachment A.

With respect to the MVEBs, we are taking final action to limit the duration of the approval of the MVEBs to last only until the effective date of the EPA's adequacy finding for any subsequently submitted budgets. We are doing so at CARB's request and in light of the benefits of using EMFAC2017-derived budgets[17] prior to our taking final action on the future SIP revision that includes the updated budgets.

In finalizing this action, we are also rendering the RFP contingency measure requirement of CAA section 172(c)(9) moot and determining that attainment contingency measures are no longer required as discussed in section II.J of the proposed rule.

Given our final determination that the Imperial Ozone Plan meets all requirements for the Imperial County Moderate ozone nonattainment area, other than the requirement to demonstrate attainment, and our evaluation of the State's lines of evidence that together support the conclusion that Imperial County would attain the 2008 ozone NAAQS by the July 20, 2018 attainment date but for emissions emanating from Mexico, the EPA is approving the Imperial Ozone Plan's section 179B attainment demonstration as meeting the requirements of CAA sections 172(c)(1), 182(b)(1)(A), and 179B(a) and 40 CFR 51.1108.

Concurrently, we are determining, consistent with our evaluation of the Imperial Ozone Plan, the 2018 SIP Update, and the Imperial Ozone Retrospective Demonstration, that the Imperial County nonattainment area would have attained the 2008 ozone NAAQS by the Moderate area attainment date of July 20, 2018 but for emissions emanating from Mexico, under CAA section 179B(b). Therefore, the EPA's obligation under section 181(b)(2)(A) to determine whether the area attained by its attainment date no longer applies and the area will not be reclassified.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state plans 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 it is not a significant regulatory action 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

[16] These projections are included in Table IX–2 of CARB's ''2018 Updates to the California State Implementation Plan,'' which the EPA approved on October 31, 2019 (84 FR 52005).

[17] On August 15, 2019, the EPA approved and announced the availability of EMFAC2017, the latest update to the EMFAC model for use by State and local governments to meet CAA requirements. 84 FR 41717.

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 Clean Air Act; and
- Does not provide the EPA with the discretionary authority to address disproportionate human health or environmental effects with practical, appropriate, 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 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 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).

However, with respect to our determination that Imperial County attained the 2008 ozone NAAQS by July 20, 2018, but for emissions from Mexico, this action has tribal implications. Nonetheless, it neither imposes substantial direct compliance costs on federally recognized tribal governments, nor preempts tribal law. Two tribes have areas of Indian country within or directly adjacent to the Imperial County ozone nonattainment area: The Quechan Tribe of the Fort Yuma Indian Reservation and the Torres Martinez Desert Cahuilla Indians. The EPA contacted both tribes with offers to consult on our proposed action; however, neither tribe requested consultation.

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 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 in 40 CFR Part 52

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

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

Dated: February 4, 2020.

Deborah Jordan,

Acting Regional Administrator, Region IX.

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 F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(514)(ii)(A)(*5*) and (c)(530)(ii)(A)(*3*) to read as follows:

§ 52.220 Identification of plan—in part.

* * * * *

(c) * * *

(514) * * *

(ii) * * *

(A) * * *

(*5*) 2018 Updates to the California State Implementation Plan, adopted on October 25, 2018, Chapter II (''SIP Elements for Imperial County'') and pages A–3 through A–6 of Appendix A (''Nonattainment Area Inventories''), only.

* * * * *

(530) * * *

(ii) * * *

(A) * * *

(*3*) Imperial County 2017 State Implementation Plan for the 2008 8-Hour Ozone Standard, adopted September 12, 2017, except Chapter 7 (''Reasonably Available Control Technology Assessment'') and Appendix B (Reasonably Available Control Technology Analysis for the 2017 Imperial County State Implementation Plan for the 2008 8-Hour Ozone Standard'').

* * * * *

■ 3. Section 52.244 is amended by adding paragraph (a)(10) to read as follows:

§ 52.244 Motor vehicle emissions budgets.

(a) * * *

(10) Imperial, approved March 30, 2020.

* * * * *

[FR Doc. 2020–03152 Filed 2–26–20; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL REGISTER

Vol. 85 Thursday,
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Part VII

The President

Federal Register
Vol. 85, No. 39
Thursday, February 27, 2020

Presidential Documents

Title 3—

The President

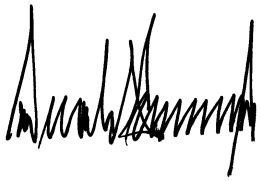
Notice of February 25, 2020

Continuation of the National Emergency With Respect to Cuba and of the Emergency Authority Relating to the Regulation of the Anchorage and Movement of Vessels

On March 1, 1996, by Proclamation 6867, a national emergency was declared to address the disturbance or threatened disturbance of international relations caused by the February 24, 1996, destruction by the Cuban government of two unarmed United States-registered civilian aircraft in international airspace north of Cuba. On February 26, 2004, by Proclamation 7757, the national emergency was expanded to deny monetary and material support to the Cuban government. On February 24, 2016, by Proclamation 9398, and on February 22, 2018, by Proclamation 9699, the national emergency was further modified based on continued disturbances or threatened disturbances of the international relations of the United States related to Cuba. The Cuban government has not demonstrated that it will refrain from the use of excessive force against United States vessels or aircraft that may engage in memorial activities or peaceful protest north of Cuba.

In addition, the unauthorized entry of any United States-registered vessel into Cuban territorial waters continues to be detrimental to the foreign policy of the United States because such entry could facilitate a mass migration from Cuba. It continues to be United States policy that a mass migration from Cuba would endanger the security of the United States by posing a disturbance or threatened disturbance of the international relations of the United States. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing the national emergency with respect to Cuba and the emergency authority relating to the regulation of the anchorage and movement of vessels set out in Proclamation 6867, as amended by Proclamation 7757, Proclamation 9398, and Proclamation 9699.

This notice shall be published in the *Federal Register* and transmitted to the Congress.



THE WHITE HOUSE,
February 25, 2020.

[FR Doc. 2020–04190
Filed 2–26–20; 11:15 am]
Billing code 3295–F0–P

Federal Register
Vol. 85, No. 39
Thursday, February 27, 2020

Presidential Documents

Notice of February 25, 2020

Continuation of the National Emergency With Respect to Ukraine

On March 6, 2014, by Executive Order 13660, the President declared a national emergency pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States constituted by the actions and policies of persons that undermine democratic processes and institutions in Ukraine; threaten its peace, security, stability, sovereignty, and territorial integrity; and contribute to the misappropriation of its assets.

On March 16, 2014, the President issued Executive Order 13661, which expanded the scope of the national emergency declared in Executive Order 13660, and found that the actions and policies of the Government of the Russian Federation with respect to Ukraine undermine democratic processes and institutions in Ukraine; threaten its peace, security, stability, sovereignty, and territorial integrity; and contribute to the misappropriation of its assets.

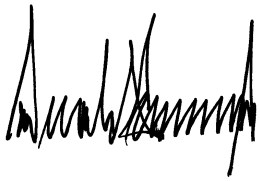
On March 20, 2014, the President issued Executive Order 13662, which further expanded the scope of the national emergency declared in Executive Order 13660, as expanded in scope in Executive Order 13661, and found that the actions and policies of the Government of the Russian Federation, including its purported annexation of Crimea and its use of force in Ukraine, continue to undermine democratic processes and institutions in Ukraine; threaten its peace, security, stability, sovereignty, and territorial integrity; and contribute to the misappropriation of its assets.

On December 19, 2014, the President issued Executive Order 13685, to take additional steps to address the Russian occupation of the Crimea region of Ukraine.

On September 20, 2018, the President issued Executive Order 13849, to take additional steps to implement certain statutory sanctions with respect to the Russian Federation.

The actions and policies addressed in these Executive Orders continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States. For this reason, the national emergency declared on March 6, 2014, and the measures adopted on that date, on March 16, 2014, on March 20, 2014, on December 19, 2014, and on September 20, 2018, to deal with that emergency, must continue in effect beyond March 6, 2020. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency declared in Executive Order 13660.

This notice shall be published in the *Federal Register* and transmitted to the Congress.



THE WHITE HOUSE,
February 25, 2020.

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