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The Code of Federal Regulations is sold by the Superintendent of Documents.

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

7 CFR Part 1719

RIN 0572–AC45

Rural Energy Savings Program

AGENCY: Rural Utilities Service, USDA.

ACTION: Final rule; request for comments.

SUMMARY: The Rural Utilities Service (RUS), a Rural Development agency of the United States Department of Agriculture (USDA), hereinafter referred to as RUS or the Agency, is issuing a final rule to establish the Rural Energy Savings Program (RESP) as authorized by Section 6407 of the Farm Security and Rural Investment Act of 2002, as amended and the Agriculture Improvement Act of 2018 to assist rural families and small businesses achieve cost savings by providing loans to eligible entities that agree to make loans to qualified consumers to implement durable cost-effective energy efficiency measures. This rule describes the eligibility requirements, the application process, the criteria that will be used by RUS to assess Applicants' creditworthiness and how to obtain application materials.

DATES: This rule is effective April 2, 2020.

Electronic and written comments must be received on or before May 18, 2020.

ADDRESSES: Submit your comments on this final rule by the following method:

• *Electronically using the Federal eRulemaking Portal:* Go to *https://www.regulations.gov* and, in the lower ''Search Regulations and Federal Actions'' box, select ''Rural Utilities Service'' from the agency drop-down menu, then click on ''Submit.'' In the Docket ID column, select RUS–19–Electric–0024 to submit or view public comments and to view supporting and related materials available electronically. Information on using *Regulations.gov*, including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site's ''User Tips'' link.

Other Information: Additional information about Rural Development and its programs is available on the internet at *http://www.rd.usda.gov*.

FOR FURTHER INFORMATION CONTACT: Robert Coates, Rural Utilities Service, Electric Program, Rural Development, United States Department of Agriculture, 1400 Independence Avenue SW, STOP 1568, Room 5165–S, Washington, DC 20250;

Telephone: (202) 260–5415; Email *Robert.Coates@usda.gov.*

SUPPLEMENTARY INFORMATION:

Executive Order 12866, Regulatory Planning and Review

This final rule has been determined to be not significant for purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget (OMB).

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Management and Budget designated this final rule as not a major rule, as defined by 5 U.S.C. 804(2).

Executive Order 12988, Civil Justice Reform

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. The Agency has determined that this final rule meets the applicable standards provided in section 3 of the Executive Order. In addition, all state and local laws and regulations that conflict with this rule will be preempted. No retroactive effect will be given to this final rule and, in accordance with section 212(e) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. 6912(e)), administrative appeal procedures must be exhausted before an action against the Department or its agencies may be initiated.

Executive Order 12372, Intergovernmental Review

This final rule is not subject to the requirements of Executive Order 12372, Intergovernmental Review, as implemented under USDA's regulations at 7 CFR part 3015.

Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs

Executive Order Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This final rule is not subject to the requirements of Executive Order 13771 (82 FR 9339, February 3, 2017) because this final rule is not significant under Executive Order 12886.

Executive Order 13132, Federalism

The policies contained in this final rule do not have any substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Nor does this final rule impose substantial direct compliance costs on State and local governments. Therefore, consultation with States is not required.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

This final rule has been reviewed in accordance with the requirements of Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments.'' Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Rural Development has assessed the impact of this final rule on Indian tribes and determined that this final rule does not, to our knowledge, have tribal implications that require tribal consultation under E.O. 13175. If a tribe would like to engage in consultation with Rural Development on this rule, please contact Rural Development's Native American Coordinator at (720) 544–2911 or *AIAN@wdc.usda.gov.*

Regulatory Flexibility Act Certification

RUS has determined that this final rule will not have a significant economic impact on a substantial number of small entities, as defined in the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). RUS provides loans to borrowers at interest rates and on terms that are more favorable than those generally available from the private sector. RUS borrowers, as a result of obtaining federal financing, receive economic benefits that exceed any direct economic costs associated with complying with RUS regulations and requirements.

Information Collection and Recordkeeping Requirements

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), OMB approved this information collection under OMB Control Number 0572–0151. This final rule contains no new reporting or recordkeeping burdens under OMB control number 0572–0151 that would require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

E-Government Act Compliance

The Rural Utilities Service is committed to the E-Government Act, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

National Environmental Policy Act Certification

This final rule has been examined under Agency environmental regulations at 7 CFR part 1970. The Administrator has determined that this is not a major Federal action significantly affecting the environment. Therefore, in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an Environmental Impact Statement is not required.

Catalog of Federal Domestic Assistance

The program described by this final rule is listed in the Catalog of Federal Domestic Assistance Programs under number 10.751—Rural Energy Savings Program. This catalog is available on a subscription basis from the Superintendent of Documents, the United States Government Printing Office, Washington, DC, 20402–9325, telephone number (202) 512–1800 and at *https://www.cfda.gov.*

Unfunded Mandates

This final rule contains no Federal mandates (under the regulatory provision of title II of the Unfunded Mandates Reform Act of 1995) for State, local, and Tribal governments or the private sector. Therefore, this final rule is not subject to the requirements of section 202 and 205 of the Unfunded Mandates Reform Act.

Civil Rights Impact Analysis

Rural Development has reviewed this final rule in accordance with USDA Regulation 4300–4, ''Civil Rights Impact Analysis,'' to identify any major civil rights impacts the rule might have on program participants on the basis of age, race, color, national origin, sex or disability. After review and analysis of the final rule and available data, it has been determined that based on the analysis of the program purpose, application submission and eligibility criteria, issuance of this final Rule will neither adversely nor disproportionately impact very low, low and moderate-income populations, minority populations, women, Indian tribes or persons with disability, by virtue of their race, color, national origin, sex, age, disability, or marital or familiar status.

USDA Non-Discrimination Policy

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD–3027, found online at *http://www.ascr.usda.gov/complaint_filing_cust.html* and at any USDA office or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632–9992. Submit your completed form or letter to USDA by: (1) Mail: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410; (2) fax: (202) 690–7442; or (3) email: *program.intake@usda.gov.*

USDA is an equal opportunity provider, employer, and lender.

Background

Rural Development is a mission area within the USDA comprised of the Rural Utilities Service, Rural Housing Service and Rural Business/Cooperative Service. Rural Development's mission is to increase economic opportunity and improve the quality of life for all rural Americans. Rural Development meets its mission by providing loans, loan guarantees, grants, and technical assistance through more than 40 programs aimed at creating and improving housing, businesses, and infrastructure throughout rural America.

Promoting the American agriculture and protecting our rural communities where food, fiber, forestry and many of our renewable fuels are cultivated have been recognized as matters of national interest. It has further been recognized in the national interest to ensure that regulatory burdens do not unnecessarily encumber agricultural production, harm rural communities, constrain economic growth, or hamper job creation. On April 25, 2017, President Trump established the Interagency Task Force on Agriculture and Rural Prosperity, Executive Order 13790, 82 FR 20237 (April 28, 2017). This working group (the Task Force) was charged with identifying legislative, regulatory, and policy changes to promote agriculture, economic development, job growth, infrastructure improvements, technical innovation, energy security, and quality of life in rural America. In response to the President's call to action, the Task Force envisioned a rural America with world-class resources, tools, and support to build robust, sustainable communities for generations to come. Ensuring rural Americans can achieve a high quality of life is the foundation of prosperity. *See* the Report to the President of the United States from the Task Force on Agriculture and Rural Prosperity, October 21, 2017 (the Report).

RUS loan, loan guarantee, and grant programs act as a catalyst for economic and community development. By financing improvements to rural electric, water and waste, telecom and broadband infrastructure, RUS also plays a big role in improving other measures of quality of life in rural America, including public health and safety, environmental protection and conservation, and cultural and historic preservation.

Consistent with the above stated policy and under the authority of Section 6407 of the Farm Security and Rural Investment Act of 2002, as amended, the USDA, through the RUS, provides RESP loans to eligible entities that agree, in turn, to make loans to qualified consumers for energy efficiency measures, including cost effective energy storage and renewable energy systems. Eligible energy efficiency measures must be for or at a property or properties served by a RESP borrower and use commercially available technologies that would allow qualified consumers to decrease their energy use or costs through cost-effective energy efficiency investments. Loans made by RESP borrowers under this program are repaid through a recurring service bill to the qualified consumer.

Assisting Rural Communities

The purpose of the RESP is to help rural families and small businesses achieve cost savings by providing loans to qualified consumers through eligible entities to implement durable cost-effective energy efficiency measures pursuant to 7 U.S.C. 8107a(a) of the RESP authorizing statute. Rurality was not defined in the statute and there is no cross-reference for an existing definition for ''rurality'' in another statute. Thus ''rurality'' was left to the Agency's discretion. The Agency has determined that the definition of ''rural'' in § 1719.2 of this rule will be ''any area that has a population of 50,000 or less inhabitants or any other area designated eligible by statute.'' The Agency believes this definition is appropriate for RESP because Congress, rather than amending the Rural Electrification Act of 1936 (RE Act) which is RUS's primary authority to facilitate financing for energy efficiency and renewable energy technologies in rural areas, intended the RESP to be a standalone program under Section 6407 of the Farm Security and Rural Investment Act of 2002, as amended. Although RUS makes loans for energy efficiency and renewable energy technologies in rural areas under the RE Act, the RESP was clearly intended as a separate distinct program, providing additional authority to the Secretary for facilitating these types of technologies under RESP. This directive was further stressed, in the Consolidated Appropriations Act of 2018, where the Secretary was authorized to allow eligible RESP entities to offer loans to customers in any part of their service territory. And more recently, Section 732, Title 3, of the FY 2020 Appropriations, ''provided that the Secretary may allow eligible entities, or comparable entities that provide energy efficiency services using their own billing mechanism to offer loans to customers in any part of their service territory and to offer loans to replace a manufactured housing unit with another manufactured housing unit, if replacement would be more cost effective in saving energy.''

RUS acknowledges that there are several population thresholds to determine the rural nature of an area in order to participate in the multiple USDA Rural Development programs. Under the traditional RUS-Electric Program authorized by the RE Act, entities serving any area other than a city, town, or unincorporated area that has a population of greater than 20,000 inhabitants are eligible to participate in the program. The Administrator may also approve the use of loan funds to serve non-RE Act beneficiaries upon finding that it is necessary and incidental to the primary purpose of the loan. The Agency recognizes the distinct nature of the RESP and adopts a population threshold that enables more rural families and small businesses to achieve cost savings through energy efficiency investments.

In April 2017 President Trump issued the Presidential Executive Order on Promoting Agriculture and Rural Prosperity in America, Exec. Order No. 13790, 82 FR 20237 (April 25, 2017). The Executive Order charged the task force with identifying legislative, regulatory, and policy changes to promote economic development, job growth, energy security, infrastructure improvements and quality of life amongst others. In particular, it instructed the task force to identify the policy changes that remove barriers to economic prosperity and quality of life in rural America, advance the adoption of innovations and technology for agricultural production and long-term, sustainable rural development; empower the State, local, and tribal agencies that implement rural economic development, agricultural, and environmental programs to tailor those programs to relevant regional circumstances, and further the Nation's energy security by advancing traditional and renewable energy production in the rural landscape.

Taking into account the above mentioned guiding principles, the Interagency Task Force on Agriculture and Rural Prosperity, in its Report to the President, predominantly considered nonmetropolitan counties (counties outside of Metropolitan Statistical Areas, as defined by the Office of Management and Budget (OMB)) when referring to rural areas. According to the OMB definition, the Metropolitan Statistical Areas include cities of 50,000 or more and counties connected to those cities through commuting. Furthermore, the 50,000 threshold is consistent with many of the Rural Development programs currently offering financial assistance in areas with populations of 50,000 or less inhabitants or that are rural in character, such as the Business and Industry Loan Guaranty Program and the Rural Energy for America Loan Guaranty Program.

The Report identified several indicators to promote rural prosperity in America, many of which can be supported with the RESP. High quality of life was identified as a foundational element of rural prosperity. One way to improve the quality of life is providing the necessary tools to utilities, energy service companies and similar entities so that they can provide the modern financing mechanisms and equipment that empower rural residents and businesses to take control of their energy use. The RESP enables those entities to access low-cost capital to carry out those activities. Economic development in rural communities was also identified in the Report as a key element to promote rural prosperity. Through RESP, small businesses in rural communities will be able to reduce their operational costs. This program also fosters the development of a workforce with transferable skills, capable of delivering energy efficiency services in diverse rural settings.

In light of the above stated policies and circumstances, the Agency will consider the term ''rural''—for RESP beneficiaries' purposes—as any area that has a population of 50,000 or less inhabitants or any other area designated eligible by statute.

Types of Eligible Borrowers

RESP is made available to any public power district, public utility district, or similar entity, or any electric cooperative described in section 501(c)(12) or 1381(a)(2) of title 26, that borrowed and repaid, prepaid, or is paying an electric loan made or guaranteed by the Rural Utilities Service (or any predecessor agency) and any

entity primarily owned or controlled by one or more of those entities. In addition, the program is available to any other entity that is an eligible borrower of the Rural Electric Service, as determined under 7 CFR 1710.101 or a successor regulation.

Section 1710.101 provides that RUS makes loans to corporations, states, territories, and subdivisions and agencies thereof; municipalities; people's utility districts; and cooperative, nonprofit, limited-dividend, or mutual associations that provide or propose to provide: (1) The retail electric service needs of rural areas, or (2) the power supply needs of distribution borrowers under the terms of power supply arrangements satisfactory to RUS. This provision has been traditionally construed as referring to electric related services through utilities in rural areas.

In addition, the original implementing statute provided that loans from the RUS borrower to the qualified consumers had to be repaid through charges added to the electric service bill for the property, or at which, the energy efficiency measures were implemented or would be implemented. The Agriculture Improvement Act of 2018 replaced the term ''electric'' with the term ''recurring'' service bill, effectively expanding the reach of the program to a diverse set of energy efficiency initiatives.

The Agency recognizes that states have arranged different and diverse approaches and mechanisms to deliver energy efficiency programs. The evolution and restructuring of the electric industry and the broader efforts to save energy across the utility sector have led some states to look to specialized entities and other utilities to administer energy efficiency programs. Some jurisdictions have assigned the implementation of energy efficiency programs to state government entities or quasi-public organizations or entered into agreements with non-profits or private entities to deliver the energy efficiency services. States have compelling reasons to facilitate energy efficiency in rural areas since research shows that rural households in America spend 40 percent more on their energy bills than households in metropolitan areas. Energy efficiency upgrades have the potential of reducing as much as 25 percent of the energy burden in rural households. Alleviating the energy burden in rural America has the potential of improving the quality of life and promoting economic development in our rural communities.

In recognition of the multiple and distinct models and mechanisms that have been developed by the states to deliver energy efficiency programs as the energy industry has evolved, the amendments to the program introduced by the Agriculture Improvement Act of 2018, and to fulfill the goals set forth in Executive Order 13790 of removing the barriers to economic development and quality of life in rural America, the Agency is amending § 1710.101 to meet the purposes of RESP. Section 1710.101 has been revised to recognize that corporations, states, territories, and subdivisions and agencies thereof; municipalities; people's utility districts; and cooperative, nonprofit, limited-dividend, or mutual associations that provide or propose to provide eligible purposes under the Rural Energy Savings Program, including energy efficiency, renewable energy, energy storage or energy conservation measures are considered eligible entities.

Eligible Activities and Energy Efficiency Measures

Eligible entities that participate in RESP need to submit with their loan application a list of energy efficiency measures that will be implemented with a RESP loan funds. The eligible entity may update the list of the energy efficiency measures from time to time upon approval of the Administrator to account for newly available efficiency technologies. RESP loan funds will only be approved to fund projects where commercially available technologies are used to increase energy efficiency (including cost-effective on- and off-grid renewable energy technologies or energy storage systems).

In § 1719.9 of this rule, the Agency has outlined a series of energy efficiency measures that will be eligible under the program. This list is not exhaustive. The Agency recognizes the dynamic nature and frequent evolution of the energy efficiency technologies and applications that could benefit the RESP beneficiaries. To avoid depriving rural communities from commercialized technological innovations in energy efficiency, energy storage, and renewable energy applications, the Agency may update the acceptable energy efficiency measures, adjust, and clarify the scope of the eligible activities by amending this rule from time to time. RUS will welcome innovative solutions to deliver durable cost-effective energy efficiency measures in our rural communities if they are consistent with the statutory requirements of the program. Consideration will be given to the payback period of those solutions.

Measurement and Verification

RESP loans require eligible entities to implement an appropriate measurement and verification (M&V) plan, addressed in § 1719.10 of this rule, to ensure the effectiveness of the energy efficiency loans and the avoidance of conflicts of interest in carrying out their energy efficiency programs.

Our experience in RESP shows that energy efficiency programs using RESP loan funds target multiple customer classes with a wide variety of energy efficiency project profiles. The eligible entities or their designees, will have to exercise professional judgment in developing their M&V plans. Considering the circumstances, it is in the best interest of RESP to facilitate a framework upon which the eligible entities or their designees, can exercise professional judgement in developing their M&V plans. The M&V plans will need to be based on generally accepted principles and apply the best practices of the industry, using reliable data, reasonable assumptions and verifiable analytical methodologies. In developing the M&V plans, eligible entities are expected to exercise professional judgment in attaining the satisfactory level of effort needed to quantify and verify the energy savings. The nature, scope, and complexity of the energy efficiency measures and activities will dictate the level of effort so that it can be commensurate with the project capital investment and the risk of miscalculating the savings. In other words, the value of the information provided by the M&V activities is appropriate to the value of the project itself. The goal for each project ought to be balancing the uncertainty in reporting the savings values with the cost of the measuring and verifying those saving values.

In general, the Agency will consider M&V plans from eligible entities that apply any of the following techniques to measure, calculate and report the savings:

1. The retrofit isolation with key parameter measurement whereby measurements will be taken at the component or system level for the baseline and the retrofit equipment, including the key performance parameters that define the energy use of the energy reduction measure.

2. The retrofit isolation with all parameter measurement whereby short-term, periodic or continuous measurements of baseline and post-retrofit use is taken at the component or system level and saving values will result from the analysis of the baseline

and reporting-period energy use (or proxies of energy use).

3. The whole facility measurement whereby the whole facility energy use or sub-facility level energy use is continuously measured during the baseline and post-retrofit period. The analysis of the baseline and post-retrofit energy use will be used to determine the savings.

4. The calibrated simulation where computer simulations are used to model energy performance of the whole facility and the model is calibrated with actual billing data from the facility.

5. Applying deemed savings values and calculations when reference to technical resource manuals upon which the savings values and calculations are based is available and adequate mechanisms to ensure that such values and calculations are maintained up to date.

The Agency considers that deemed savings is a reasonable mechanism to quantify the energy savings in certain projects where the performance of commercially available technology and related energy efficiency measures are well known, accepted in the industry and documented with repeatable results.

In those above circumstances, requiring costly and sophisticated measurement activities are unlikely to produce a meaningful difference in the expected savings while significantly increasing the cost of the project. It could further jeopardize an otherwise cost-effective energy efficiency project. A material cost increase in a project as a result of measurement and verification activities that do not significantly reduce the risk of miscalculating the energy savings, would unreasonably limit the access to energy efficiency measures that the RESP aims to support. In accepting M&V plans based on deemed savings, the Agency will be taking into consideration applicable technical resource manuals, M&V studies performed by entities like the eligible entity, or such other M&V analysis reasonably applicable to the conditions in the area where the energy efficiency measures will be implemented.

Auditing and Accounting Requirements

Section 6303 of The Agriculture Improvement Act of 2018 (Pub. L. 115–334) amended the RESP and required the Agency ''to take the appropriate steps to streamline the accounting requirements on [RESP] borrowers . . . while maintaining adequate assurances of the repayment of the loans.'' Auditing and accounting requirements are found in § 1719.13 of this rule.

As a lending program, the Agency monitors the borrowers' ability to repay their indebtedness to the Federal Government. In order to provide a standardized method to carry out the Agency's responsibility, borrowers are required to adopt and follow systems of accounts based on the generally accepted accounting principles in the United States of America (GAAP). The Agency further requires the financial statements to be audited to ensure that information upon which decisions will be made are based on legitimate data.

Traditional RUS-Electric Program borrowers follow 7 CFR 1767, the RUS Uniform Systems of Accounts-Electric, and submit annual audited comparative financial statements in accordance with 7 CFR part 1773. Audits are required to follow Generally Accepted Governmental Auditing Standards (GAGAS) as set forth by the Comptroller General of the United States and the provisions of 2 CFR part 200, subpart F. These requirements are material covenants in the existing loan contracts executed by the RUS borrowers and these existing RUS borrowers that apply for RESP loans will be required to continue to comply with these provisions in their existing loan documents.

The Agency acknowledges that there may be eligible entities interested in participating in RESP that are not bound by existing loan contracts with RUS and thus are not familiar with the RUS Uniform Systems of Accounts-Electric. There also may be provisions of the RUS Uniform Systems of Accounts-Electric that do not apply in the context of certain eligible entities' business models.

In the interest of balancing the statutory mandate and preserving the integrity of the portfolio and taxpayer's money, the Agency will accept systems of accounts based on GAAP as the baseline standard for new and RESP borrowers. The Agency will consider reasonable proposals of RESP borrowers to streamline the accounting requirements only if such proposals afford the Agency adequate mechanisms to ensure the full and timely repayment of the RESP loan.

RESP borrowers will be required to prepare and furnish to RUS, at least once during each 12- month period, a full and complete audited financial report. RESP borrowers must also comply with the requirements of 2 CFR part 200, subpart F. As noted above, RESP borrowers with existing RUS loans must continue to comply with the auditing requirements in their existing RUS loan documents. The Administrator may modify the audit requirements for RESP Borrowers if in his or her judgement it is necessary to satisfy RESP Program goals.

Application Process and Agency Review

The application process in RESP is comprised of two steps. In the initial step, an entity interested in RESP will submit a Letter of Intent as described in § 1719.5 of this rule. The Letter of Intent will be a brief description of the proposed energy efficiency program and a description of the prospective RESP applicant. RUS will consider the letters of intent in the order they are received and will review it to determine if the Applicant and the proposed project are eligible to participate in the program as well as to whether the Applicant's financial condition will allow it to complete the application process and successfully repay the loan. At this stage of the process the Applicant is expected to provide a brief overview of its energy efficiency program and its financial status in enough detail for RUS to make a determination that the potential borrower is likely to successfully complete a loan application. A successful Letter of Intent will be followed by an invitation to proceed with a complete loan application. In the interest of avoiding unnecessary time and effort, and expenses on behalf of the Applicant, RUS will only consider complete loan applications from entities that have been officially invited to proceed with a loan application.

In reviewing RESP loan applications, the Administrator will assess the Applicant's ability to repay the loan in full and its ability to meet all other obligations and will also review its past performance as well as its determination to satisfy its obligations. The Administrator will also consider the financial resources retained by the Applicant to provide for a cushion against unexpected losses. In addition, the Agency will consider the adequacy of the collateral to ensure the interest of the government is sufficiently protected and secured. In approving a RESP loan, the Agency will review the energy efficiency program implementation and the proposed M&V methods and activities.

Loan Closing

Upon approval of a RESP loan, the Applicant will be notified by written notification through a conditional commitment letter. This notification will be a RESP loan offer and will include all the terms and conditions considered necessary by the Administrator to make the RESP loan. The conditional commitment letter will

indicate the steps the RESP applicant will need to take to inform RUS of its intent to meet the stated loan conditions and will also include further loan closing instructions.

Federal Register Notices

To implement this Part, the Agency will publish at least an annual **Federal Register** notice. Each notice will address the following items as necessary:

Funding Availability. The Agency will issue notices each year specifying the amount of funds available for RESP loans. Notices may also include funding priorities and application periods.

Program Changes. If there are any changes to the RESP Program, this rule will be amended accordingly.

Request for Comments

Since its inception in 2016, the RESP has evolved. New and clarifying authorities have been added to the program including changes made by the Agriculture Improvement Act of 2018 (2018 Farm Bill) (Pub. L. 115–334) which reauthorized the implementation of the RESP. Title VI, subtitle C, Section 6303 of the 2018 Farm Bill introduced several amendments to Section 6407 of the Farm Security and Rural Investment Act of 2002 (7 U.S.C. 8107a). These changes include an increase in the maximum interest rate RUS eligible borrowers may charge to their qualified consumers, streamlining the accounting requirements, and the use of a recurring bill to the qualified consumer as a repayment mechanism for the RUS borrowers.

To enhance program delivery, the Agency seeks input from the public on this rule. The Agency will follow this final rule which affords the public an opportunity to comment, with a subsequent final rule which will be published in the **Federal Register**.

List of Subjects

Electric power, Grant programs-energy, Loan programs-energy, Reporting and recordkeeping requirements, Rural areas.

Therefore, for reasons set forth in the preamble, chapter XVII, title 7, the Code of Federal Regulations is amended as follows:

PART 1710—GENERAL AND PRE–LOAN POLICIES AND PROCEDURES COMMON TO ELECTRIC LOANS AND GUARANTEES

■ 1. The authority citation for part 1710 continues to read as follows:

Authority: 7 U.S.C. 901 *et seq,* 1921 *et seq.,* 6941 *et seq.*

■ 2. In § 1710.101, revise (a)(2) and add new paragraph (a)(3) to read as follows:

§ 1710.101 Types of eligible borrowers.

(a) * * *

(2) The power supply needs of distribution borrowers under the terms of power supply arrangement satisfactory to RUS, or

(3) Eligible purposes under the Rural Energy Savings Program, including energy efficiency, renewable energy, energy storage or energy conservation measures and related services, improvements, investments, financing or relending.

■ 3. Add part 1719 to read as follows:

PART 1719—RURAL ENERGY SAVINGS PROGRAM

Subpart A—General Provisions

Sec.
1719.1 Purpose.
1719.2 Definitions.
1719.3 Policy.

Subpart B—Application, Submission and Administration of RESP Loans

1719.4 Eligibility.
1719.5 Application process and required information.
1719.6 Agency review.
1719.7 Conditional commitment letter and loan closing.
1719.8 Loan provisions.
1719.9 Eligible activities and energy efficiency measures.
1719.10 Measurement and verification.
1719.11 Compliance with USDA departmental regulations, policies, and other federal laws.
1719.12 Reporting.
1719.13 Auditing and accounting requirements.

Authority: 7 U.S.C. 8107a (Section 6407).

Subpart A—General Provisions

§ 1719.1 Purpose.

This part establishes policies and procedures for the implementation of the Rural Energy Savings Program (RESP) under Section 6407 of the Farm Security and Rural Investment Act of 2002, as amended, by the Rural Utilities Service (RUS). It is the purpose of this part to help rural families and small businesses achieve cost savings by providing loans through eligible entities to qualified consumers to implement durable cost-effective energy efficiency measures.

§ 1719.2 Definitions.

The following definitions apply to subparts A and B of this part and must have the following meanings for purposes of the Rural Energy Savings Program:

Administrator means the Administrator of the Rural Utilities Service, an agency under the Rural Development mission area of the United States Department of Agriculture.

Applicant means an Eligible entity interested in applying for a RESP loan that is planning to submit a Letter of Intent.

Commercial technology means equipment, devices, applications, or systems that have a proven, reliable performance and replicable operating history specific to the proposed application. The equipment, device, application or system is based on established patented design or has been certified by an industry-recognized organization and subject to installation, operating, and maintenance procedures generally accepted by industry practices and standards. Service and replacement parts for the equipment, device, application or system must be readily available in the marketplace with established warranty applicable to parts, labor and performance.

Completed loan application means an application containing all information required by RUS to approve a loan and that is materially complete in form and substance satisfactory to RUS within the specified time.

Conditional commitment letter means the notification issued by the Administrator to a RESP Applicant advising it of the total loan amount approved for it as a RESP borrower, the acceptable security arrangement, and such controls and conditions on the RESP borrower's financial, investment, operational and managerial activities deemed necessary by the Administrator to adequately secure the Government's interest. This notification will also describe the accounting standards and audit requirements applicable to the transaction.

Conflict of interest means a situation or situations, event or series of events, that taken together or separately undermine an individual's judgement, ability, or commitment to providing an accurate, unbiased, fair and reliable assessment, or determination about the cost effectiveness of the Energy efficiency measures, due to self-interest or if such judgement, ability, commitment or determination cannot be justified by the prevailing and sound application of the generally accepted standards and principles of the industry.

Deemed savings means the per-unit energy savings values that can be claimed from installing specific measures under specific operating situations. Savings are based on stipulated values stemming from historical and verified data, derived

from research of historical savings values from typical projects.

Deemed savings calculations means standardized algorithms to calculate energy savings applicable to well-defined energy efficiency measures that have documented and consistent savings values.

Eligible entity means an entity described in § 1719.4.

Energy audit means an analysis of the current energy usage or costs of a Qualified consumer with the goal of identifying opportunities to enhance energy efficiency. The activity should result in an objective standard-based technical report containing recommendations on the Energy efficiency measures to reduce energy costs or consumption of the Qualified consumer and an analysis of the estimated benefits and costs of pursuing each recommendation in a payback period not to exceed the loan term to the Qualified consumer. The analysis must meet professional and industry standards and be commensurate to the complexity of the project.

Energy efficiency measures (EE measures) means for or at property served by an Eligible entity, structural improvements and investments in cost-effective, commercial technologies to increase energy efficiency (including cost-effective on- or off-grid renewable energy or energy storage systems).

Energy efficiency program (EE Program) means a program set up by an Eligible entity to provide financing to Qualified consumers so that they can implement durable cost-effective Energy efficiency measures.

Financial feasibility means an Eligible entity's capacity to generate enough revenues to cover its expenses, sufficient cash flow to service its debts and obligations as they come due, and meet the financial ratios set forth in the applicable loan documents.

Government means the Federal Government.

GAAP means the generally accepted accounting principles in the United States of America as issued by the Financial Accounting Standards Board (FASB) in the Accounting Standards Codification (ASC).

Implementation Work Plan or EE Program Implementation Work Plan (IWP) means an Implementation work plan that meets the requirements listed in § 1719.5(b)(3)(i)(F).

Invitation to proceed means the written notification issued by RUS to the Eligible entity acknowledging that the Letter of Intent was received and reviewed, describing the next steps in the application process, and inviting the Eligible entity to submit a complete loan application.

Key performance indicators mean the set of measures that help an entity to determine if it is reaching its performance and operational goals. These indicators can be both financial and non-financial.

Letter of Intent means a signed letter issued by an Applicant notifying RUS of its intent to apply for a RESP loan and addressing all the elements identified in § 1719.5(b)(2).

Loan to a Qualified consumer means a transaction by which an RUS borrower makes RESP funds available to a Qualified consumer for the purpose of implementing Energy efficiency measures at a property or for the property of a Qualified consumer to increase energy efficiency on the condition that the RUS borrower will be able to collect the funds made available to the Qualified consumer.

Manufactured home means a structure that is transportable, built on a permanent chassis and designed to be used as a dwelling that meets the U.S Department of Housing and Urban Development definition set forth in 24 CFR 3280.2 or a successor rule.

Measurement and Verification (M&V) means the process of quantifying the energy and cost savings resulting from the improvements in an energy-consuming system or systems.

Multi-tier Agreement means an agreement entered into by the RESP applicant that complies with the Rural Development's Environmental Policies and Procedures, pursuant to 7 CFR part 1970 or its successor regulation.

Qualified consumer means a consumer served by an Eligible entity that has the ability to repay a loan made by a RESP borrower under the RESP program, as determined by the Eligible entity.

RESP applicant means an Eligible entity that has received a written Invitation to proceed from RUS to apply for a RESP loan.

RESP borrower means an Eligible entity with an approved RESP loan as evidenced by duly executed RESP loan documents.

Rural, for purposes of 7 U.S.C. 8107a(a), means any area that has a population of 50,000 or less inhabitants or any other area designated eligible by statute.

Small business means an entity that is in accordance with the Small Business Administration's (SBA) small business size standards found in 13 CFR part 121.

Special advance means an advance, not to exceed 4 percent of the total approved loan amount, that a RESP borrower may request to defray the startup costs of establishing a new EE Program.

Start-up costs mean amounts paid or incurred for:

(1) Creating or implementing an active EE program; or

(2) Investing in the integration of an active EE Program. Start-up costs may include, but are not limited to, amounts paid or incurred in the analysis or survey of potential markets, products such as software and hardware, labor supply, consultants, salaries and other working capital directly related to the creation or enhancement of an EE Program consistent with RESP.

Technical Resource Manual (TRM) means a resource document that includes information used in program planning and reporting of EE Programs. A TRM may include savings values for measures, engineering algorithms to calculate savings, impact factors to be applied to calculated savings, foundational documentation, specified assumptions, and such other pertinent information to support the calculation of measure and program savings and the application of such values and algorithms in appropriate applications.

§ 1719.3 Policy and Federal Register Notices.

(a) Eligible entities (see § 1719.2 and § 1719.4) are permitted to participate in the Rural Energy Saving Program on the condition that loan funds will be used to make loans to Qualified consumers for the purpose of implementing EE measures.

(b) The Agency will issue annual **Federal Register** notices each year specifying the amount of funds available under this Part. Notices may also include program priorities and loan application periods. The Administrator in setting funding priorities and application periods may consider the amount of available funds, the nature and amount of unfunded loan applications, prior commitments, Agency resources, Agency priorities and policy goals, and any other pertinent information.

(c) In making loans under this Part, the Administrator may consider a proposed EE Program's effect on existing RUS borrowers and the integrity of the RUS portfolio and deny or limit approval of a specific RESP loan application on that basis if it is determined that such requested loan would have a negative effect on existing RUS or RESP borrowers or the RUS loan portfolio.

(d) The Administrator may, on a case-by-case basis, grant an exception to any requirement or provision of this subpart provided that such an exception is in

the best financial interests of the Federal government. Exercise of this authority cannot be in conflict with applicable law.

(e) With regard to the rules of grammatical construction, unless the context otherwise indicates, ''includes'' and ''including'' are not limiting, and ''or'' is not exclusive.

Subpart B—Application, Submission and Administration of RESP Loans

§ 1719.4 Eligibility.

Under this subpart, Eligible entities for the RESP include:

(a) Any public power district, public utility district, or similar entity, or any electric cooperative described in section 501(c)(12) or 1381(a)(2) of the Internal Revenue Code of 1986, that borrowed and repaid, prepaid, or is paying an electric loan made or guaranteed by the Rural Utilities Service (or any predecessor agency);

(b) Any entity primarily owned or controlled by one (1) or more entities described in paragraph (a) of this section; or

(c) Any other entity that is an eligible borrower of the Rural Utilities Service, as determined under 7 CFR 1710.101.

§ 1719.5 Application process and required information.

(a) *General.* The following are general provisions for the application process:

(1) The RUS, from time to time and subject to appropriations, will notify the public specifying funding priorities, funding availability, and deadlines.

(2) Complete applications for loans to Eligible entities will be processed pursuant to the provisions in this Part and on a first-come-first served basis until the funding appropriated to the program is fully obligated.

(3) The submittal of a Letter of Intent is required to participate in the program. The letters of intent will be queued as they are received. If it advances program and policy goals, RUS may consider loan applications from Eligible entities that have submitted Letters of Intent under prior funding announcements but that were not invited to proceed with a loan application.

(4) Upon review of the Letter of Intent, RUS may issue an Invitation to proceed with a loan application. RUS reserves the right to notify the Applicant in the queue that the amount of financing RUS will consider for a loan is below the level sought in the Letter of Intent. In making this consideration, RUS will consider overall RUS program objectives or budgetary constraints. An Invitation to proceed with the loan application issued by RUS is not to be deemed as an offer by RUS.

(5) A RESP applicant will have up to ninety (90) days to complete the documentation for a complete loan application. The ninety (90) day timeframe will begin on the date the RESP applicant receives RUS' Invitation to proceed. If the deadline to submit the completed loan application falls on Saturday, Sunday, or a Federal holiday, the application is due the next business day.

(6) The Administrator may grant an extension of time to complete the documentation required for an application if, in the Administrator's sole judgment, the interest of the program would be advanced by the extension.

(7) RUS may limit the number of applications it will consider in the same funding cycle from the same Applicant or combine applications from a single entity.

(b) *Application process.* The application process consists of the following two steps:

(1) An Applicant seeking financing must submit a Letter of Intent to be considered under this Part.

(2) The Letter of Intent must include the following information:

(i) Legal name and status of the entity seeking financing under this Part and its address and principal place of business.

(ii) The Applicant's tax identification number, SAM Managed Identifier (SAMMI), Dun and Bradstreet (DUNS) number, and such similar information as it may be subsequently amended or required for federal funding.

(iii) A statement indicating if the Applicant is a current or a former RUS borrower.

(iv) A description of the service territory.

(v) Value of the net assets, including any information as to whether the Applicant has been placed in receivership, liquidation, or under a workout agreement or whether the Applicant has declared bankruptcy or has had a decree or order issued for relief in any bankruptcy, insolvency or other similar action over the last 10 years. The Applicant must submit a copy of its balance sheet and income statements for the last 3 years. If applicable, the Applicant must provide the balance sheet and income statements for the last 3 years of the entity or entities providing equity or security for the RESP loan together with an explanation of the legal relationship among the entities.

(vi) Identification of a point of contact and provide contact information.

(vii) Description of the program or projects expected to be financed with the RESP loans funds. This description must not exceed five (5) pages (size 8.5 x 11). RUS reserves the right not to consider Letters of Intent where the project description exceeds five (5) pages. The description should include the following:

(A) Description of the service to be provided to Qualified consumers.

(B) Identity of the staff or contractors that will be implementing the EE Program and their credentials.

(C) A summarized version of the expected IWP addressing the following elements:

(*1*) The marketing strategy.

(*2*) The relending process.

(*3*) A brief description of the processes, procedures, and capabilities to quantify and verify the reduction in energy consumption or decrease in the energy costs of the Qualified consumers.

(*4*) A list of eligible EE measures expected to be implemented. An Applicant with an existing EE Program in place by April 8, 2014, may describe the EE measures, its IWP, and its M&V plan for the existing program in its Letter of Intent to expedite the application process.

(viii) The Applicant must provide evidence of its key performance indicators for the 5 complete years prior to the submission of the loan application if the total loan amount exceeds $5 million.

(3) Instructions on how to submit the loan application package will be included in the RUS Invitation to proceed to the RESP applicant. RUS will timely schedule an initial conference call with the RESP applicant to discuss the elements of the loan application.

(i) Content of the application package includes the following:

(A) A signed cover letter from the RESP applicant's General Manager or highest-ranking officer requesting RESP loan funds to make loans to Qualified consumers for the purpose of implementing EE measures.

(B) A signed copy of the board resolution or applicable authorizing document approving and establishing the EE Program and authorizing the Eligible entity to take a RESP loan.

(C) The RESP applicant must provide the Applicant's articles of incorporation or other applicable organizational documents currently in effect, as filed with the appropriate state office, setting forth the RESP applicant's corporate purpose; and the RESP Applicant must also provide the bylaws or other applicable governing documents currently in effect, as adopted by the RESP applicant's applicable governing body. RESP applicants that are active RUS borrowers may comply with this requirement by notifying RUS in writing

that there are no material changes to the documents already on file with RUS.

(D) A copy of the duly executed Multi-Tier Action Environmental Compliance Agreement (Multi-Tier Agreement) consistent with Rural Development's Environmental Policies and Procedures, 7 CFR part 1970 or its successor regulation. A copy of the Multi-tier Agreement will be provided to the RESP applicant with the Invitation to proceed and the requirements of § 1970.55 will be discussed with the RESP applicant in the initial conference call. Activities and investments listed in the IWP must match the activities and investments identified in the Multi-tier Agreement executed between RUS and the RESP applicant. Additional RUS environmental review will be required if the RESP applicant pursues additional or different activities other than the ones listed in the Multi-tier Agreement. If funded, a RESP borrower would be responsible for performing and documenting environmental reviews consistent with § 1970.55.

(E) A financial forecast approved by the applicable governing body of the RESP applicant in support of its loan application. The financial forecast must cover a period of at least 10 years and must demonstrate that the RESP applicant's operation is economically viable and that the proposed loan is financially feasible. RUS may request additional information or projections for a longer period, if RUS deems such supplemental data necessary based on the financial structure of the RESP Applicant or necessary to make a determination regarding loan feasibility. A RESP applicant must, after submitting a loan application, promptly notify RUS of any changes in its circumstances that materially affect the information contained in the loan application. The financial forecast and related projections submitted in support of a loan application must include:

(*1*) Current and projected cash flows.

(*2*) A pro forma balance sheet, statement of operations, and general funds summary projected for each year during the forecast period. The requested RESP loan must be included in the financial forecast. Revenue from the interest charged to the Qualified consumer must also be included together with an explanation of the expected use of such proceeds.

(*3*) The financial goals established for margins, debt service coverage, equity, and levels of general funds to be invested in the EE Program. The financial forecast must use the accrual method of accounting for analyzing costs and revenues and, as applicable, compare the economic results of the various alternatives on a present value basis.

(*4*) A full explanation of the assumptions, supporting data, and analysis used in the forecast, including the methodology used to project revenues, operating expenses, and any other factors having a material effect on the balance sheet and the financial ratios such as equity and debt service coverage. RUS may require additional data and analysis on a case-by-case basis to assess the probable future competitiveness of the RESP applicant.

(*5*) Current and projected nonoperating income and expense.

(*6*) An itemized budget and schedule for the activities to be implemented with the RESP funds and a discussion on the expected delinquency and default rates and how the loan loss reserve will be set up. The RESP applicant is expected to forecast the amount of loans to be made to Qualified consumers over a 10-year timeframe. If the RESP applicant determines to charge interest, the RESP applicant must describe how it is going to use the funds generated from the interest to be received from the loans to the Qualified consumers.

(*7*) A sensitivity analysis may be required by RUS on a case-by-case basis.

(F) The RESP applicant must produce, to the satisfaction of the Administrator, an Implementation Work Plan or EE Program Implementation Work Plan (IWP), duly approved by the applicable governing body of the Eligible entity. The IWP will cross reference the Financial Forecast and must address the following core elements:

(*1*) The RESP applicant will identify the Qualified consumers by customer classes that will benefit from the proceeds of a loan made under this Part and explain the promotional activities that will be executed to carry out the energy efficiency relending program. The RESP applicant should also include the target penetration rates by market segment and expected investments in marketing the relending program. In doing so, it is expected that racial and ethnic demographics for the service area would be provided.

(*2*) The RESP applicant will describe the activities and investments (list of EE measures) to be implemented in the EE Program and the expected energy savings.

(*i*) The RESP applicant must include a schedule for implementation with an itemized list of anticipated costs for each task.

(*ii*) The RESP applicant must specify whether a Special advance will be requested and, if so, must detail the expected use of such loan proceeds.

(*iii*) In describing the EE Program, the RESP applicant must describe the intake process, including but not limited to, the underwriting criteria, if applicable, and the quantifiable elements considered in recommending energy retrofits or investments to reduce the Qualified consumer's energy cost or consumption. It is also expected that a description of the process for documenting and perfecting collateral arrangements with Qualified Consumers, when applicable, be also included in the narrative.

(*iv*) The RESP applicant will also identify the staff that will be carrying out the EE Program and will describe the tasks that will be performed by such individuals together with their expertise and credentials. Should the RESP applicant decide to outsource implementation of the EE Program, the credentials and expertise of the third party implementing the outsourced tasks must be described. Consideration must be given to the third party's ability and expertise in implementing an EE Program at the scale pursued with the RESP funding. The statement of qualifications must show the party's experience carrying out the financial and technical components of an EE Program at the desired scale. A RESP applicant with an existing EE Program as of April 8, 2014, may submit the IWP plan previously established to fulfill this requirement.

(*3*) The RESP applicant must include an evaluation of the financial and operational risk associated with the EE Program. When applicable, the RESP applicant should include an estimate of the prospective consumer loan losses consistent with the loan loss reserve.

(*4*) A Measurement and Verification (M&V) plan that meets the requirements of § 1719.10. In the alternative, a RESP applicant may provide an M&V plan approved by a state or local regulatory entity.

(G) The RESP applicant must provide a statement of compliance with the federal statutes as provided in § 1719.11.

§ 1719.6 Agency review.

(a) *General.* Loans made under this program will be made only when the Administrator finds and certifies that in his or her judgment there is reasonably adequate security and the loan will be repaid within the time agreed.

(b) *Eligibility for other loans.* RUS will not include any debt incurred by a borrower under this program in the calculation of the debt-equity ratios of the borrower for purposes of eligibility

for loans under the Rural Electrification Act of 1936 (7 U.S.C. 901 *et seq.*).

(c) *Letter of intent.* RUS will consider complete Letters of intent in the order they are received. In reviewing Letters of intent, RUS will be assessing:

(1) *Applicant eligibility.* Applicant's eligibility to participate in the program.

(2) *Project eligibility.* Eligibility of the proposed EE Program or project.

(3) *Financial status.* The financial status of the RESP applicant to determine the Applicant's likelihood to complete a loan application and successfully repay a RESP loan.

(d) *Loan application.* Prudent lending practices require that the Administrator make certain findings prior to approving a RESP loan. RESP applicants must provide the evidence, in form and substance satisfactory to the Administrator, to be able to make such findings. In making loans under this Section, the Administrator will consider, including, but not limited to, the following factors:

(1) *Loan feasibility.* The RESP applicant's ability to repay the loan in full as scheduled and all other obligations of the borrower will be met.

(2) *RESP applicant's character.* The RESP applicant's past performance and determination to satisfy its obligations; evidenced by such factors as credit history, previous experience addressing adversity, and manner of conducting business.

(3) *RESP applicant's equity.* The financial resources retained by the RESP applicant to provide a cushion against unexpected losses.

(4) *Overall condition of RESP applicant and project.* Verification that the proposed EE Program meets all the requirements of the Rural Energy Savings Program and an assessment of those factors that may affect the RESP applicant's ability to repay the RESP loan or implement the EE Program as proposed.

(5) *Loan security.* The RESP applicant's assets pledged to secure the loan. Collateral will be assessed for each applicant taking into consideration asset value, lien position, credit risk and borrower's profile. Collateral pledged should be adequate to protect the Government's interest. RUS reserves the right to require an asset appraisal.

(6) *EE program implementation and measurement and verification.* RESP applicant's IWP must be based on reasonable assumptions and adequate supporting data and the M&V plan reasonably complies with § 1719.10. However, the Administrator, in his or her sole discretion, may deem this requirement satisfied upon finding that the IWP and M&V plan from an existing EE Program as of April 8, 2014 is consistent with the purpose of the Rural Energy Savings Program. A RESP applicant with an existing EE Program as of April 8, 2014, may submit the M&V plan previously established to fulfill this requirement.

§ 1719.7 Conditional commitment letter and loan closing.

(a) *Conditional commitment letter.* A successful RESP loan applicant will receive a Conditional commitment letter from the Administrator notifying the RESP applicant of the total loan amount approved by RUS; any additional controls on the its financial, investment, operational and managerial activities; acceptable security arrangements; and such other conditions deemed necessary by the Administrator to adequately secure the Government's interest, ensure repayment, and abide by the RESP requirements as outlined in this Part. This written notification is a conditional RESP loan offer.

(1) The requirements for coverage ratios will be set forth in the Conditional commitment letter.

(2) Receipt of a Conditional commitment letter from the Administrator does not authorize the RESP applicant to commence performance under the approved loan.

(b) *Intent to meet conditions.* The RESP applicant must acknowledge receipt of the Conditional commitment letter and notify RUS in writing within 60 days or otherwise specified in the Conditional commitment letter that it has reviewed and understood the conditions set forth in the Conditional commitment letter and that it is the intent of the RESP applicant to meet all the conditions. The RESP applicant must promptly notify RUS should circumstances or its intent of meeting the conditions change. The Administrator may consider requests to amend the conditions and amend the conditions in a subsequent Conditional commitment letter, when it advances program and policy goals and is in the best interest of the Government.

(c) *Loan closing.* The loan will be closed in accordance with RUS instructions.

(1) Upon receipt of the acceptance of the loan offer from the RESP applicant, RUS, working with its legal counsel, will draft the loan documents which will include the loan conditions and other applicable legal requirements.

(2) The loan documents will be forwarded to the RESP applicant by RUS for execution by the RESP applicant's signatories and returned to RUS prior to a mutually acceptable closing date. RUS reserves the right to unilaterally set a closing date to advance program and policy goals.

(3) The loan closing date will be used to determine the RESP loan maturity date which under no circumstances will exceed 20 years.

(4) An opinion of counsel is required at closing and must be in form and substance acceptable to the Administrator. A form opinion of counsel will be included in the closing instructions.

(d) *Post-closing activities.* All RUS requirements and conditions for lending set forth in the loan agreement must be met before the loan will be advanced. RUS will notify the RUS borrower when it is authorized to commence activities to be funded by the RESP loan.

§ 1719.8 Loan provisions.

(a) *Financial ratios.* The Administrator will set financial coverage ratios based on the risk profile of the RESP applicant and specific loan terms. Those financial ratios will be included in the RESP borrower's loan documents with RUS.

(1) Unless otherwise notified, existing RUS borrowers will be subject to their current debt service coverage ratios as provided in their previously executed loan contracts with RUS.

(2) The minimum coverage ratio required for RESP borrowers, whether applied on annual or average basis is 1.05 Debt Service Coverage (DSC) unless specifically waived by the Administrator.

(3) DSC for RESP borrowers that are not existing RUS borrowers under the Rural Electrification Act will be defined as (Net Income or Total Margins) + (Interest Charges on Long Term Debt) + (Principal payments from RESP relending activities) + (Depreciation and Amortization Expenses)/Total Debt Service Billed.

(4) In reviewing and approving a RESP loan, the Administrator may increase the coverage ratio required to be met by an individual RESP borrower if the Administrator determines that higher ratios are required to ensure the repayment of the loan made by RUS, or reduce the coverage ratios if the Administrator determines that the lower ratios are in the best interest of the Government. The coverage ratios will be set forth in the loan documents.

(b) *Collateral.* RUS generally requires that borrowers provide it with a first priority lien on all of the borrower's real and personal property, including intangible personal property and any property acquired after the date of the loan. Collateral that is used to secure a loan must ordinarily be free from liens or security interests other than those

permitted by RUS or existing security documents.

(1) For existing RUS borrowers, the Administrator may, in his or her sole discretion, rely on existing security arrangements with RUS.

(2) When a RESP borrower is unable, by reason of preexisting encumbrances, or otherwise, to furnish a first priority lien on its entire system, the Administrator may accept other forms of security, including but not limited to a parent guarantee, state guarantee, an irrevocable letter of credit, surety bond, pledge of revenues, or other security if the Administrator determines such credit support is reasonably adequate to protect the government's interests and otherwise acceptable in form and substance.

(3) RUS may in certain circumstances agree to share its priority lien position with another lender provided the RESP loan is adequately secured and the security arrangements are acceptable to RUS. In such circumstances, RUS will consider entering into joint security arrangements with other lenders on a *pari passu* basis.

(c) *Equity contributions.* To be eligible for a RESP loan, a newly created Eligible entity or an entity primarily owned or controlled by one (1) or more entities as described in § 1719.4 must meet a minimum equity contribution in the proposed EE Program requirement at the time of the loan closing. The eligible entity will be required to continue to maintain the minimum equity contribution for the life of the loan or other time period as determined by the Administrator and as set forth in the loan documents. The minimum acceptable equity contribution for each RESP borrower will be determined by the Administrator as set forth below and will be included in the Conditional commitment letter and the loan documents as a condition and covenant to the RESP loan.

(1) The required equity contribution and related terms will be determined by the Administrator for the individual RESP applicant based upon the its risk profile and available collateral for the RESP loan.

(2) RUS reserves the right to require additional equity contributions from existing RUS or RESP borrowers when it is in the best interest of the Government.

(3) If the RESP applicant under this section is unable to achieve a minimal acceptable contribution, as set forth in the Conditional commitment letter, the Administrator may consider the following to meet such shortfall to the minimum acceptable equity contribution:

(i) The infusion of additional capital into the EE Program by an Investor to meet the shortfall to the minimum acceptable equity contribution. RUS may require that the additional capital be deposited into a RESP applicant's special account subject to a deposit account control agreement with RUS prior to loan closing.

(ii) An unconditional, irrevocable letter of credit, in form and substance satisfactory to the Administrator, in the amount necessary to meet the shortfall to the minimum acceptable equity contribution. RUS must be an unconditional payee under the letter of credit and the letter of credit must be in place prior to loan closing and remain in place until the loan is repaid unless specified otherwise in the loan documents.

(iii) General obligation bonds or special revenue bonds issued by tribal, state or local governments in the amount necessary to meet the shortfall to the minimum acceptable equity contribution. If the minimum acceptable equity position is satisfied in full or part with general obligation bonds or special revenue bonds, any lien securing the bonds must be subordinate to the lien of the Government securing the RESP loan.

(iv) Any other requirements or mechanisms approved by the Administrator to meet the shortfall to the minimum acceptable equity contribution.

(d) *Loan advances.* RUS will disburse loan funds to the RESP borrower in accordance with the terms and conditions of the executed loan documents.

(1) Excluding the Special Advance, all loan funds will be disbursed either as an advance in anticipation of loans to be made by the RESP borrower to the Qualified consumers; or as a reimbursement for eligible program costs, including loans already made to Qualified consumers. No disbursements will be made until the RESP borrower has complied with the loan conditions set forth in the loan documents. Any disbursement of loan funds to a RESP borrower within a 12-month consecutive period must not exceed 50 percent of the approved loan amount.

(i) The RESP borrower must provide to the Qualified consumers all RESP loan funds that the RESP borrower receives within one year of receiving them from RUS. If the RESP borrower does not re-lend the RESP loan funds within one year, the unused RESP loan funds, and any interest earned on those RESP loan funds, must be returned to the Government and will be applied to the RESP borrower's debt.

(ii) The RESP borrower will not be eligible to receive additional RESP loan funds from RUS until providing evidence, in form and substance satisfactory to the Administrator, that RESP loan funds from a previous advance have been fully relent to Qualified consumers or returned to the Government.

(iii) RUS will disburse the RESP loan funds as an advance in anticipation of loans to be made by the RESP borrower to the Qualified consumers only if the RESP borrower has established written procedures that will minimize the time elapsing between the transfer of RESP loan funds from RUS to the RESP borrower and its corresponding disbursement to the Qualified consumer.

(iv) A RESP borrower's request for an advance in anticipation of loans to Qualified consumers should be limited to the minimum amounts needed and timed to be in accordance with the actual immediate cash needs to carry out the EE Program.

(2) The RESP borrower may elect to request a Special advance to defray the appropriate start-up costs of establishing a new EE Program or modify an existing EE Program.

(i) The Special advance must not exceed 4 percent of the total approved loan amount.

(ii) Repayment of the Special advance must be required during the 10-year period beginning on the date on which the Special advance is made.

(iii) The RESP borrower may elect to defer the repayment of the Special advance to the end of the 10-year period.

(iv) All Special advances must be made during the first 10-years of the term of the loan.

(v) All amounts advanced on the loan by RUS to the RESP borrower, including the Special advance, must be paid prior to the final maturity which must not exceed 20 years.

(vi) The Special advance maximum amount must be requested by the Borrower and approved by RUS prior to loan closing.

(e) *Loans to Qualified Consumers.* RUS borrowers loans to Qualified Consumers will be subject to the following terms and for the purposes listed below.

(1) RESP borrower's loans to its Qualified consumers must be for the purpose of implementing EE measures.

(2) Loans to Qualified consumers may bear interest not to exceed 5 percent.

(3) Each loan made by the RESP borrower to a Qualified consumer may not exceed a term of 10 years.

(4) The EE measures financed with a RESP loan proceeds must be for the purpose of decreasing energy (not just electricity) usage or costs of the Qualified consumer by an amount that ensures, to the maximum extent practicable, that a loan term of not more than 10 years will not pose an undue financial burden on the Qualified consumer.

(5) RESP loan proceeds must not be used to fund purchases of, or modifications to, personal property unless the personal property is or becomes attached to real property (including a manufactured home) as a fixture.

(6) Loans made to Qualified consumers must be repaid through charges added to the recurring service bill for the property for, or, at which the EE measures have been or will be implemented. This requirement does not prohibit the voluntary prepayment of the loan by the owner of the property; or the use of any additional repayment mechanisms that are demonstrated to have appropriate risk mitigation measures, as determined by the RESP borrower, or required if the Qualified consumer is no longer a customer of the RESP Borrower.

(7) Loans made by a RESP borrower to a Qualified consumer using RESP loan funds must require an Energy audit by the RESP borrower to determine the impact of the proposed EE measures on the energy costs and consumption of the Qualified consumer. For purposes of this section, an energy audit performed by a contractor or agent of the RESP borrower would be deemed as performed by the RESP borrower.

(8) The RESP borrower must comply with all applicable federal, state, and local laws and regulations in making loans to Qualified consumers. Approval by RUS and its employees of a loan under this section does not constitute a Government endorsement. The Government and its employees assume no legal liability for the accuracy, completeness or usefulness of any information, product, service, or process funded directly or indirectly with financial assistance provided under RESP. Nothing in the loan documents between RUS and the RESP borrower will confer upon any other person any right, benefit or remedy of any nature whatsoever. Neither the Government nor its employees make any warranty, express or implied, including the warranties of merchantability and fitness for a particular purpose, with respect to any information, product, service, or process available from a RESP borrower or its agents.

(f) *Loan term and repayment. RUS loans to an eligible borrow will be subject to the following terms and repayment conditions set forth in this section.*

(1) The RESP loans under this section will bear no interest (0 percent) and have a maturity not exceeding 20 years.

(2) The amortization schedule must be based on a loan term that does not exceed 20 years from the date on which the loan is closed.

(3) Except for the Special advance, the repayment of each advance must be amortized for a period not to exceed 10 years.

(4) The Administrator may include additional conditions on the repayment schedule if, in his or her sole discretion, it is in the best interest of the Government.

(5) The RESP borrower is responsible for fully repaying the RESP loan to RUS according to the loan documents regardless of repayment by its Qualified consumers.

(6) The RESP borrower may use the revenues from the interest charged to the Qualified consumer to establish a loan loss reserve, and to offset personnel and EE Program costs.

(7) Loans under this Section will not bear interest (0 percent), however, indebtedness not paid when due will be subject to interest, penalties, administrative costs and late fees as provided in the loan documents.

§ 1719.9 Eligible activities and energy efficiency measures.

(a) A RESP Borrower may provide financing to Qualified consumers to implement or invest in one or more set of EE measures such as those listed in this section.

(b) A RESP borrower may be able to provide financing to Qualified consumers for EE measures not listed in this section, if it can justify, to the satisfaction of the Administrator, that the proposed EE measure is consistent with the RESP statute, is cost effective, and the technology is commercially available. The Administrator must make the determination prior to the borrower implementing the EE measure.

(c) A RESP applicant with an existing EE Program as of April 8, 2014, may submit the list of the EE measures used in its program to RUS for validation and approval. The Administrator will make a finding as to whether such EE measures are consistent with the purpose of RESP.

(d) A RESP borrower, subject to the Administrator's written approval, may modify the list of EE measures if those measures are consistent with the statutory purpose of RESP.

(e) RESP loan proceeds must finance EE measures for the purpose of decreasing energy usage or costs of the Qualified consumer by an amount that ensures, to the maximum extent practicable, that the loan term will not pose an undue financial burden on the Qualified consumer.

(f) Eligible EE measures and investments include, but are not limited, to:

(1) Lighting:

(i) Lighting fixture upgrades to improve efficiency.

(ii) Lighting control technologies.

(iii) Daylighting systems.

(iv) Energy-efficient lighting technologies.

(2) Space conditioning, including Heating, Ventilation, and Air Conditioning (HVAC):

(i) Central Air Systems—Energy Star ® qualified equipment.

(ii) Room air conditioners.

(iii) Boilers.

(iv) Heat pumps.

(v) Ducts and duct sealing.

(vi) Furnaces—Energy Star® qualified equipment.

(vii) Thermostats.

(viii) Economizers.

(ix) Air handlers.

(x) Automated controls.

(3) Building Envelope Improvements:

(i) Improved insulation—adding insulation beyond existing levels, or above existing building codes.

(ii) Moisture barrier improvements and air sealing.

(iii) Caulking and weather stripping of doors and windows.

(iv) Windows upgrades—Energy Star® qualified windows.

(v) Door upgrades—including man-doors, overhead doors with integrated insulation and energy efficient windows.

(4) Motor Systems:

(i) Pumps, coupling and low-friction pipes.

(ii) Capacitors.

(iii) Variable frequency drives.

(iv) Induction motors repairs or replacements for energy efficiency.

(v) High efficiency motors—motors with a rated efficiency beyond the Energy Policy Act standards.

(vi) Permanent magnet motors.

(vii) Reluctance motors.

(5) Waste Heat Recovery:

(i) Recuperators.

(ii) Regenerators.

(iii) Waste heat boilers.

(iv) Combined heat and power (CHP) and Waste heat to power (WHP).

(6) Compressed Air Systems.

(7) Water heaters.

(8) Fuel switching.

(9) Irrigation or water system and waste disposal system efficiency improvements.

(10) On or off-grid renewable energy systems if consistent with the statutory purpose of this section.

(11) Energy storage devices if permanently installed to reduce energy cost or usage of the Qualified consumer.

(12) Energy efficient appliance upgrades if attached to real property as fixtures.

(13) Energy audits.

(14) Necessary and incidental activities and investments directly related to the implementation of an Energy efficiency measure.

§ 1719.10 Measurement and verification and quality control.

(a) *General.* A RESP applicant must provide a Measurement and Verification (M&V) plan, satisfactory to the Administrator, to ensure the effectiveness of the energy efficiency loans made to its Qualified Consumers and that there is no conflict of interest in carrying out the EE Program.

(1) RUS acknowledges the broad nature of energy efficiency projects and diverse scope of EE Programs that can be carried out under RESP. A RESP applicant, and its designees, must exercise professional judgment in developing their M&V plans. The nature, scope, and complexity of the EE measures and activities will dictate the level of effort needed for quantifying and verifying the savings. The effort expended should be commensurate with the project capital investment and the risk of miscalculating the savings.

(2) A RESP applicant with an existing EE Program as of April 8, 2014, may submit for consideration the M&V plan previously established to fulfill this requirement.

(3) RUS may reject a loan application or refuse to disburse loan proceeds to an RESP borrower that fails to demonstrate that the Energy audits or M&V plan have been adequately implemented and performed by qualified individuals.

(4) The M&V plan should be based on generally accepted principles and use the best practices of the industry, reliable data, reasonable assumptions and verifiable analytical methodologies.

(5) The M&V plan must describe the organized activities that the RESP applicant will implement to facilitate the adoption of the Energy efficiency measures that will result in energy use or cost savings to the Qualified consumer.

(6) Energy savings should be determined by comparing measured energy unit values (consumption or demand) before and after the implementation of the EE measures, making appropriate adjustments for changes in conditions.

(7) The computation of the savings formula is as follow:

Savings = (Baseline Energy—Post-Installation of EE Measures Energy*) ± Adjustments

Note: * = performance period

(b) *M&V Techniques for measuring, calculating and reporting savings.* The RESP borrower may address the M&V requirements by applying any of the following techniques recognized in the International Performance Measurement and Verification Protocol.

(1) The Retrofit Isolation with Key Parameter Measurement Option (RIKPM) alternative is based on a combination of measured and estimated factors. Measurements will be taken at the component or system level for both the baseline and the retrofit equipment and should include the key performance parameters that define the energy use of the energy conservation measure. Savings will be determined by calculating the baseline and reporting period energy use predicated on the measured and estimated values. Estimated values will have to be supported by historical or manufacturer's data.

(2) The Retrofit Isolation with All Parameter Measurement Option (RIAPM) option will be based on short-term, periodic or continuous measurements of baseline and post-retrofit energy use (or proxies of energy use) taken at the component or system level. Savings will be based on the analysis of the baseline and reporting-period energy use or proxies of energy use.

(3) The Whole Facility Measurement Option (WFMO) will be based on continuous measurement of the energy use (such as utility billing data) at the whole facility or sub-facility level during the baseline and post-retrofit periods. Savings will be established from the analysis of the baseline and reporting-period energy data.

(4) The Calibrated Simulation Option (CSO) is an alternative where computer simulations can be used to model energy performance of a whole facility (or sub-facility). Models must be calibrated with actual hourly or monthly billing data from the facility. In this option, savings will be determined by comparing a simulation of the baseline (after having calibrated the model) with either a simulation of the performance period or actual utility data.

(c) *Use of deemed savings.* A RESP applicant may elect to meet the M&V plan requirements by applying deemed savings values and calculations. If choosing this option, the RESP applicant's M&V plan must:

(1) Describe the process to stipulate with the Qualified consumer the values and assumptions for determining the energy savings.

(2) Identify the TRMs upon which the deemed savings values and assumptions are based. In the alternative, identify such other technical M&V studies reasonably applicable to the conditions of the RESP applicant's service area or such other detailed M&V studies performed by similar entities to determine deemed savings for identical or similar energy programs or energy efficiency measures.

(3) Describe the mechanism to ensure that deemed savings values and related calculations will be maintained and kept up to date.

(4) The approval by RUS of a M&V plan under this section is solely for the benefit of RUS. Approval of a plan pursuant to this section does not constitute an RUS endorsement of the M&V plan or an EE Program. RUS and its employees assume no legal liability for the accuracy, completeness or usefulness of any information, product, service, or process funded directly or indirectly with financial assistance provided under RESP.

(d) *Quality control.* The RESP borrower must produce a detailed explanation, in form and substance satisfactory to the Administrator, describing the methods and processes to verify that the installation of the EE measures for the EE program, for which those measures have been implemented were properly executed.

(1) The RESP borrower and the Qualified consumer must agree on the EE measures to be implemented based on a quantifiable and verifiable assessment of the impacts that such measures will have in reducing the Qualified consumer's energy cost or consumption.

(2) A RESP borrower may elect to engage a third-party contractor to carry out the assessments required in this Section and install the EE measures as long as there is no Conflict of interest.

(3) RESP borrower employees and third-party contractors engaged to carry out activities in the EE Program must be qualified and have adequate expertise to perform energy audits, retrofit installations, and do the quality control assessments according to the applicable industry best-practices. Individual's credentials and expertise should be accredited through one of the following options:

(i) Possessing a current Home Energy Professional Certification or a similar certification from a nationally, industry-recognized organization that is consistent with the Job Task Analyses

Guidelines issued by the US Department of Energy's National Renewable Energy Laboratory or its successor.

(ii) Possessing a current certification issued by an organization recognized by the U.S. Department of Energy in accordance with the Better Buildings Workforce Guidelines or its successor.

(iii) Producing evidence, in form and substance satisfactory to the Administrator, that the individual possesses proficiency in the knowledge, skills and abilities needed to perform the tasks and critical work functions relevant to the duties assigned in the EE Program.

(4) A RESP borrower that elects to carry out the EE Program with a contractor, must validate and document the following:

(i) The contractor has adequate capacity and resources to engage with customers, conduct whole-property assessments, performance testing, diagnostic reasoning, and fulfill all data collection and reporting requirements. This includes, but is not limited to, having access to satisfactory diagnostic equipment, tools, qualified staff, data systems and software, and administrative support.

(ii) The contractor is current and in good standing with all applicable registration and licensing requirements for their specific jurisdiction and trade.

(iii) The contractor employs individuals (either its own employees or subcontractors) that are qualified to install or physically oversee the installation of home improvements in compliance with local building codes and industry-accepted protocols.

(5) A RESP borrower is responsible for actions or omissions departing from the required standards under this Section by third party partners or contractors employed in connection with an EE Program funded under this Section.

(6) The RESP loan documents are solely for the benefit of RUS and the RESP Borrower and nothing in the loan documents between RUS and the RESP borrower will confer upon any third party any right, benefit or remedy of any nature whatsoever. Neither RUS nor its employees makes any warranty, express or implied, including the warranties of merchantability and fitness for a particular purpose, with respect to any information, product, service, or process available from a RESP borrower or its agents.

§ 1719.11 Compliance with USDA departmental regulations, policies and other federal laws.

(a) *Equal opportunity and nondiscrimination.* RUS will ensure that equal opportunity and nondiscriminatory requirements are met in accordance with the Equal Credit Opportunity Act and 7 CFR part 15. In accordance with federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the USDA, its agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs).

(b) *Civil rights compliance.* Recipients of federal assistance hereunder must comply with the Americans with Disabilities Act of 1990, Title VI of the Civil Rights Act of 1964, and Section 504 of the Rehabilitation Act of 1973. In general, recipients should have available the Agency racial and ethnic data showing the extent to which members of minority groups are beneficiaries of federally assisted programs. The Agency will conduct compliance reviews in accordance with 7 CFR part 15. Awardees will be required to complete Form RD 400–4, ''Assurance Agreement,'' for each federal award received.

(c) *Discrimination complaints.* Persons believing, they have been subjected to discrimination prohibited by this section may file a complaint personally, or by an authorized representative with USDA, Director, Office of Adjudication, 1400 Independence Avenue SW, Washington, DC 20250. A complaint must be filed no later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the designated officials of USDA or the Agency.

(d) *Appeal Rights.* Applicants and RESP applicants have appeal or review rights for RUS decisions made under this part.

(1) Programmatic decisions based on clear and objective statutory or regulatory requirements are not appealable; however, such decisions are reviewable for appealability by the National Appeals Division (NAD).

(2) An Applicant and a RESP applicant can appeal any RUS decision that directly and adversely impacts it. Appeals will be conducted by USDA NAD and will be handled in accordance with 7 CFR part 11.

(e) *Federal Debt and Settlement of Debt.* It is the policy of the Administrator that, whenever possible, all debt owed to the Government shall be collected in full in accordance with the terms of the borrower's loan documents. Debt owed to RUS constitutes federal debt and is subject to collection under the Debt Collection Improvement Act. RUS can use all remedies available to it to collect the debt from the borrower, including offset in accordance with part 3 of this title. In addition, it is the intent of the Administrator, notwithstanding § 1717.1200(b) of this chapter, that debt settlements under this Part will be governed by the provisions set forth in 7 CFR part 1717, subpart Y or its successor Agency policies or regulations.

§ 1719.12 Reporting.

(a) *General.* RESP borrowers must file periodic performance and financial reports as provided in the loan documents.

(b) *Frequency of reporting.* Performance and financial reports will be filed semiannually for the first 10 years of the RESP loan and annually thereafter through the term of the loan. However, RUS may require additional, or more frequent, reporting when necessary to preserve the quality and integrity of the program portfolio or advance policy goals.

(c) *Reporting elements.* RUS will identify the reporting requirements, in form and substance, in the loan documents based on the RESP borrower and EE Program profile. The RESP borrower's reports to RUS will include, but will not be limited to, the following information:

(1) Number and amount of loans to qualified consumers.

(2) Types of investments in EE measures and eligible activities.

(3) EE Program portfolio performance.

(4) Evidence of compliance with Multi-Tier Action Environmental Compliance Agreement.

(5) Status and amount of Loan Loss Reserve (when applicable).

§ 1719.13 Auditing and accounting requirements.

(a) *Accounting requirements.* RESP borrowers must follow RUS accounting requirements as set forth in the loan documents.

(1) Existing RUS borrowers must continue recording and reporting transactions pursuant to the RUS Uniform Systems of Accounts—Electric, 7 CFR part 1767. Such borrowers will continue to follow the accounting and reporting requirements set forth in the previously executed loan documents for RUS outstanding loans.

(2) New and RESP only borrowers must adopt and follow a GAAP based system of accounts acceptable to RUS, as well as compliance with the requirements of 2 CFR part 200 (for RESP Awardees, the term ''grant recipient'' in 2 CFR part 200 will also mean ''loan recipient.'')

(3) All RESP borrowers must promptly notify RUS should a state regulatory authority with jurisdiction over it require it to apply accounting methods or principles different from the ones specified in the loan documents.

(4) RUS will consider borrowers' reasonable proposals to streamline reporting and accounting requirements only when such proposals afford RUS adequate mechanisms to ensure the full and timely repayment of the loan, as determined by RUS.

(5) The Administrator may modify the accounting requirements for RESP borrowers if, in his or her judgement, it is necessary to satisfy the statutory purpose of the program, streamline procedures, or advance policy goals.

(6) Nothing in this policy shall be construed as a limitation or waiver of any other federal statute or requirement or the Administrator's authority and discretion to implement the RESP in such a way that the Government's interest is adequately preserved.

(b) *Auditing requirements.* RESP borrowers will be required to prepare and furnish to RUS, at least once during each 12-month period, a full and complete report of its financial condition, operations, and cash flows, on a comparative basis, along with a report on internal control over financial reporting and on compliance in other matters, both reports in form and substance satisfactory to RUS, audited and certified by an independent certified public accountant, satisfactory to RUS according to the requirements set forth in 7 CFR 1773.5.

(1) Audits must follow governmental auditing standards issued by the Comptroller General of the United States (GAGAS) and the provisions of 2 CFR part 200, subpart F—Audit Requirements if applicable.

(2) RESP borrowers with outstanding RUS loans will be subject to the auditing requirements set forth in their existing RUS loan documents. RUS Policy on Audits of RUS Borrowers as provided in 7 CFR part 1773 will govern audits under this paragraph.

(3) RESP borrowers must comply with all reasonable RUS requests to support ongoing monitoring efforts. The RESP borrowers must afford RUS, through their representatives, a reasonable opportunity, at all times during business hours and upon prior notice, to have access to and the right to inspect any or all books, records, accounts, invoices, contracts, leases, payrolls, timesheets, cancelled checks, statements, and other documents, electronic or paper of every kind belonging to or in possession of the RESP borrowers or in any way pertaining to its property or business, including its parents, affiliates, and subsidiaries, if any, and to make copies or extracts therefrom.

(4) The Administrator may modify the audit requirements for RESP borrowers if, in his or her judgement, it is necessary to satisfy the statutory purpose of the program or advance policy goals.

(5) Nothing in this policy shall be construed as a limitation or waiver of any other federal statute or requirement or the Administrator's authority and discretion to implement the RESP in such a way that the Government's interest is adequately preserved.

Chad Rupe,

Administrator, Rural Utilities Service.

[FR Doc. 2020–06215 Filed 4–1–20; 8:45 am]

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FEDERAL RESERVE SYSTEM

12 CFR Parts 225 and 238

[Regulations Y and LL; Docket No. R–1662]

RIN 7100–AF 49

Control and Divestiture Proceedings

AGENCY: Board of Governors of the Federal Reserve System (Board).

ACTION: Final rule; delay of effective date.

SUMMARY: The Board is delaying the effective date of its final rule that revises the Board's framework for determining whether a company controls another company for purposes of the Bank Holding Company Act or the Home Owners' Loan Act, as published on March 2, 2020.

DATES: The effective date for the final rule published March 2, 2020, at 85 FR 12398, is delayed from April 1, 2020, until September 30, 2020.

FOR FURTHER INFORMATION CONTACT: Mark Buresh, Senior Counsel, (202) 452–5270, Greg Frischmann, Senior Counsel, (202) 452–2803, and Brian Phillips, (202) 452–3221, Senior Attorney, Legal Division, Board of Governors of Federal Reserve System, 20th and C Streets, Washington, DC 20551. You may also contact any person listed in the final rule document published in 85 FR 12398, March 2, 2020. For users of Telecommunication Device for Deaf (TDD) only, call (202) 263–4869.

SUPPLEMENTARY INFORMATION:

I. Final Rule and Delay of Effective Date

On January 30, 2020, the Board adopted a final rule to revise the Board's regulations related to determinations of whether a company controls another company for purposes of the Bank Holding Company Act or the Home Owners' Loan Act (*see* 85 FR 12398, March 2, 2020). The control final rule was originally to become effective April 1, 2020.

The Board recognizes that, as a result of COVID–19, there have been recent dislocations in the U.S. economy. Many companies, including regulated financial institutions, have also expressed a desire to consult with Board staff about the effect of the new control rule on various existing investments and relationships. For these reasons, the Board is delaying the effective date of the control final rule by two quarters, which should provide companies affected by the new control rule additional time to analyze the impact of the rule on existing investments and relationships, and to consult with Board staff as necessary about such matters.

II. Administrative Law Matters

A. Administrative Procedure Act

The Board is issuing the final rule without prior notice and the opportunity for public comment and the delayed effective date ordinarily prescribed by the Administrative Procedure Act (APA)).[1] Pursuant to section 553(b)(B) of the APA, general notice and the opportunity for public comment are not required with respect to a rulemaking when an ''agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.''[2]

The Board believes that the public interest is best served by having the final rule become effective immediately upon publication in the **Federal Register**. As a result of this rule, the changes approved by the Board on January 30, 2020 to parts 225 and 238 of the Board's regulations on control and divestiture proceedings will not be reflected in the Code of Federal Regulations until September 30, 2020. The spread of COVID–19 has disrupted economic activity in the United States. In addition, U.S. financial markets have

[1] 5 U.S.C. 553.

[2] 5 U.S.C. 553(b)(3)(B).

featured significant levels of volatility. In approving changes to parts 225 and 238 of the Board's regulations, the Board noted that companies may need to consult with Board staff about prior investments and relationships that have not been previously reviewed by the Board. Delaying the changes to parts 225 and 238 of the Board's regulations will allow companies additional time to consult with Board staff about existing investments and relationships, allowing companies greater flexibility to focus on COVID–19-related issues. For these reasons, the Board finds that there is good cause consistent with the public interest to issue the rule without advance notice and comment.[3]

The APA also requires a 30-day delayed effective date, except for (1) substantive rules which grant or recognize an exemption or relieve a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause.[4] As noted above, the Board finds that there is good cause to delay the effective date of the previously approved changes to parts 225 and 238 of the Board's regulations, for the reasons noted above.[5]

B. Congressional Review Act

For purposes of Congressional Review Act, the OMB makes a determination as to whether a final rule constitutes a ''major'' rule.[6] If a rule is deemed a ''major rule'' by the Office of Management and Budget (OMB), the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.[7]

The Congressional Review Act defines a ''major rule'' as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in (A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions, or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.[8]

For the same reasons set forth above, the Board is adopting the final rule without the delayed effective date generally prescribed under the Congressional Review Act. The delayed effective date required by the Congressional Review Act does not apply to any rule for which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.[9] In light of current market uncertainty, the Board believes that delaying the effective date of the rule would be contrary to the public interest.

As required by the Congressional Review Act, the Board will submit the final rule and other appropriate reports to Congress and the Government Accountability Office for review.

C. Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act (PRA), an agency may not conduct or sponsor, and a 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 Board has reviewed this final rule pursuant to authority delegated by the OMB and has determined that it does not contain any collections of information pursuant to the PRA.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)[10] requires an agency to consider whether the rules it proposes will have a significant economic impact on a substantial number of small entities.[11] The RFA applies only to rules for which an agency publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b). As discussed previously, consistent with section 553(b)(B) of the APA, the Board has determined for good cause that general notice and opportunity for public comment is unnecessary, and therefore the Board is not issuing a notice of proposed rulemaking. Accordingly, the Board has concluded that the RFA's requirements relating to initial and final regulatory flexibility analysis do not apply.

E. Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act[12] requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The Board has sought to present the final rule in a simple and straightforward manner. The Board invites comments on whether there are additional steps it could take to make the rule easier to understand.

By order of the Board of Governors of the Federal Reserve System, March 31, 2020.

Ann Misback,

Secretary of the Board.

[FR Doc. 2020–06993 Filed 3–31–20; 11:15 am]

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[3] 5 U.S.C. 553(b)(3)(B); 553(d)(3).

[4] 5 U.S.C. 553(d).

[5] *Id.*

[6] 5 U.S.C. 801 *et seq.*

[7] 5 U.S.C. 801(a)(3).

[8] 5 U.S.C. 804(2).

[9] 5 U.S.C. 808.

[10] 5 U.S.C. 601 *et seq.*

[11] Under regulations issued by the Small Business Administration, a small entity includes a depository institution, bank holding company, or savings and loan holding company with total assets of $600 million or less and trust companies with total assets of $41.5 million or less. *See* 13 CFR 121.201.

[12] 12 U.S.C. 4809.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0210; Product Identifier 2020–NM–045–AD; Amendment 39–19887; AD 2020–06–18]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Airbus SAS Model A318, A319, A320, and A321 series airplanes. This AD was prompted by a recent maintenance repair organization's report to Airbus of deviations from the component maintenance manual acceptance test procedure for certain trimmable horizontal stabilizer actuators (THSAs). This AD requires replacement of affected THSAs with serviceable THSAs, 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 becomes 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.

The FAA must receive comments on this AD by May 18, 2020.

ADDRESSES: You may send comments, using the procedures found in 14 CFR

11.43 and 11.45, by any of the following methods:

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

For 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–2020–0210.

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–2020–0210; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the 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: 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 2020–0073, dated March 26, 2020 (''EASA AD 2020–0073'') (also referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for all Airbus SAS Model A318–111, –112, –121, and –122 airplanes; Model A319–111, –112, –113, –114, –115, –131, –132, –133, –151N, –153N, and –171N airplanes; Model A320–211, –212, –214, –215, –216, –231, –232, –233, –251N, –252N, –253N, –271N, –272N, and –273N airplanes; and Model A321–111, –112, –131, –211, –212, –213, –231, –232, –251N, –251NX, –252N, –252NX, –253N, –253NX, –271N, –271NX, –272N, and –272NX airplanes. (Model A320–215 airplanes are not certified by the FAA and are not included on the U.S. type certificate data sheet; this AD therefore does not include those airplanes in the applicability.)

This AD was prompted by a recent maintenance repair organization's report to Airbus of deviations from the acceptance test procedure for certain THSAs as specified in the Airbus component maintenance manual (CMM) after disassembly and reassembly of the THSA ball screw sub-assembly. A deviation from the accepted test procedure affects, in particular, the verification of proper installation of the THSA ball screw in shop. Improper installation of the THSA ball screw jack compromises the fail safe design of the THSA that prevents the axial separation of the screw shaft. Subsequent missed inspections or testing regimes further compromise the fail safe design of the THSA. A compromised fail safe design of the THSA can result in a single failure of the THSA. The FAA is issuing this AD to address this unsafe condition, which can compromise fail safe design of the THSA, which may result in uncontrolled movement of the horizontal stabilizer as a result of a single failure, and consequent loss of control of the airplane. See the MCAI for additional background information.

Related IBR Material Under 1 CFR Part 51

EASA AD 2020–0073 describes procedures for replacing affected THSAs with serviceable THSAs. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination

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

Requirements of This AD

This AD requires accomplishing the actions specified in EASA AD 2020–0073 described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA initially worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and civil aviation authorities (CAAs) to use this process. As a result, EASA AD 2020–0073 is incorporated by reference in this final rule. This AD, therefore, requires compliance with EASA AD 2020–0073 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in the EASA AD. Service information specified in EASA AD 2020–0073 that is required for compliance with EASA AD 2020–0073 is available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0210.

Justification for Immediate Adoption and Determination of the Effective Date

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

rules effective in less than thirty days, upon a finding of good cause.

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies foregoing notice and comment prior to adoption of this rule because, as described in the Discussion section of this AD, improper installation of THSA ball screw jack compromises fail safe design of the THSA, which can result in uncontrolled movement of the horizontal stabilizer as a result of a single failure of the THSA, and consequent loss of control of the airplane. Given the significance of the risk presented by this unsafe condition, it must be immediately addressed.

Accordingly, notice and opportunity for prior public comment are impracticable pursuant to 5 U.S.C. 553(b)(3)(B). In addition, for the reasons stated above, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment effective in less than 30 days.

Regulatory Flexibility Act (RFA)

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

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and the FAA did not precede it by notice and opportunity for public comment. The FAA invites you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2020–0210; Product Identifier 2020–NM–045–AD'' at the beginning of your comments. The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of this AD. The FAA will consider all comments received by the closing date and may amend this AD based on those comments.

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

Costs of Compliance

The FAA estimates that this AD affects 89 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 13 work-hours × $85 per hour = Up to $1,105	$0	Up to $1,105	Up to $98,345.

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, and

(2) Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2020–06–18 Airbus SAS: Amendment 39–19887; Docket No. FAA–2020–0210; Product Identifier 2020–NM–045–AD.

(a) Effective Date

This AD becomes effective April 2, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the Airbus SAS airplanes identified in paragraphs (c)(1) through (4) of this AD, certificated in any category, all manufacturer serial numbers.

(1) Model A318–111, –112, –121, and –122 airplanes.

(2) Model A319–111, –112, –113, –114, –115, –131, –132, –133, –151N, –153N, and –171N airplanes.

(3) Model A320–211, –212, –214, –216, –231, –232, –233, –251N, –252N, –253N, –271N, –272N, and –273N airplanes.

(4) Model A321–111, –112, –131, –211, –212, –213, –231, –232, –251N, –251NX, –252N, –252NX, –253N, –253NX, –271N, –271NX, –272N, and –272NX airplanes.

(d) Subject

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

(e) Reason

This AD was prompted by a maintenance repair organization's report of deviations from the component maintenance manual acceptance test procedure for certain trimmable horizontal stabilizer actuators (THSAs). The FAA is issuing this AD to address improper installation of the THSA ball screw jack, which can compromise fail safe design of the THSA, that may result in uncontrolled movement of the horizontal stabilizer as a result of a single failure of the THSA, and consequent loss of control 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, European Union Aviation Safety Agency (EASA) AD 2020–0073, dated March 26, 2020 (''EASA AD 2020–0073'').

(h) Exceptions to EASA AD 2020–0073

(1) Where EASA AD 2020–0073 refers to its effective date, this AD requires using the effective date of this AD.

(2) The ''Remarks'' section of EASA AD 2020–0073 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 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 2020–0073 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.

(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 2020–0073, dated March 26, 2020.

(ii) [Reserved]

(3) For information about EASA AD 2020–0073, 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–2020–0210.

(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 March 30, 2020.

Ross Landes,

Deputy Director for Regulatory Operations, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–07009 Filed 3–31–20; 11:15 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0876; Product Identifier 2019–NM–070–AD; Amendment 39–19877; AD 2020–05–27]

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 BD–700–1A10 and BD–700–1A11 airplanes. This AD was prompted by a report that cracking was discovered in a channel within a structural support member for the rudder quadrant, rudder feel unit assembly, and environmental control system due to fatigue. This AD requires repetitive inspections of the rudder quadrant box assembly for any cracking, and modification of the rudder quadrant box assembly. The FAA issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective May 7, 2020.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of May 7, 2020.

ADDRESSES: For service information identified in this final rule, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; email *thd.crj@aero.bombardier.com;* internet *https://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–2019–0876.

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–2019–0876; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the regulatory evaluation, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

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

SUPPLEMENTARY INFORMATION:

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian AD CF–2019–11, dated March 22, 2019 (also referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Bombardier, Inc., Model BD–700–1A10 and BD–700–1A11 airplanes. You may examine the MCAI in the AD docket on the internet at *https://www.regulations.gov* by searching for

and locating Docket No. FAA–2019–0876.

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 BD–700–1A10 and BD–700–1A11 airplanes. The NPRM published in the **Federal Register** on December 16, 2019 (84 FR 68370). The NPRM was prompted by a report that cracking was discovered in a channel within a structural support member for the rudder quadrant, rudder feel unit assembly, and environmental control system due to fatigue. The NPRM proposed to require repetitive inspections of the rudder quadrant box assembly for any cracking, and modification of the rudder quadrant box assembly. The FAA is issuing this AD to address cracking in the rudder quadrant support structure, which can lead to progressive deterioration in the performance of the systems it supports, and could eventually lead to uncommanded rudder movement and bleed air leakage. 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 the following service information.

- Bombardier Service Bulletin 700–53–054, Basic Issue, dated October 1, 2018.
- Bombardier Service Bulletin 700–53–5013, Basic Issue, dated October 1, 2018.
- Bombardier Service Bulletin 700–53–6012, Basic Issue, dated October 1, 2018.
- Bombardier Service Bulletin 700–1A11–53–029, Basic Issue, dated October 1, 2018.

This service information describes procedures for repetitive detailed visual inspections of the rudder quadrant box assembly for any cracking. These documents are distinct since they apply to different airplane models.

Bombardier also issued the following service information:

- Bombardier Service Bulletin 700–53–052, Basic Issue, dated October 1, 2018.
- Bombardier Service Bulletin 700–53–6010, Basic Issue, dated October 1, 2018.
- Bombardier Service Bulletin 700–1A11–53–027, Basic Issue, dated October 1, 2018.
- Bombardier Service Bulletin 700–53–5011, Basic Issue, dated October 1, 2018.

This service information describes procedures for modification of the rudder quadrant box assembly. The modification includes surface and bolt-hole eddy current inspections for cracking of the left-hand (LH) channel; a detailed visual inspection for cracking of the forward and aft half ribs and bottom and top skins; replacement of the rudder quadrant box half ribs, air systems support fitting, and LH channel; and installation of new rudder quadrant box back-up fittings. These documents are distinct 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 123 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
2 work-hours × $85 per hour = $170 per inspection cycle	$0	$170 per inspection cycle	$20,910 per inspection cycle.

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 ACTION

Labor cost	Parts cost	Cost per product
46 work-hours × $85 per hour = $3,910	$355	$4,265

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 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):

2020–05–27 Bombardier, Inc.: Amendment 39–19877; Docket No. FAA–2019–0876; Product Identifier 2019–NM–070–AD.

(a) Effective Date

This AD is effective May 7, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc., Model BD–700–1A10 and BD–700–1A11 airplanes, certificated in any category, serial numbers 9001 through 9844 inclusive, and 9998.

(d) Subject

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

(e) Reason

This AD was prompted by a report that cracking was discovered in a channel within a structural support member for the rudder quadrant, rudder feel unit assembly, and environmental control system due to fatigue. The FAA is issuing this AD to address cracking in the rudder quadrant support structure, which can lead to progressive deterioration in the performance of the systems it supports, and could eventually lead to uncommanded rudder movement and bleed air leakage.

(f) Compliance

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

(g) Initial and Repetitive Inspections

For airplanes that have accumulated fewer than 2,900 total flight cycles as of the effective date of this AD, and that have not been modified as specified in paragraph (i) of this AD: At the applicable time specified in paragraph (g)(1) or (2) of this AD, do a detailed visual inspection for cracking of the rudder quadrant box assembly, in accordance with paragraph 2.B. of the Accomplishment Instructions of the applicable service bulletin specified in figure 1 to paragraph (g) of this AD. Repeat the inspection thereafter at intervals not to exceed 1,000 flight cycles.

(1) For airplanes that have accumulated fewer than 2,000 total flight cycles as of the effective date of this AD: Inspect within 1,000 flight cycles after the effective date of this AD.

(2) For airplanes that have accumulated 2,000 total flight cycles or more, but fewer than 2,900 total flight cycles, as of the effective date of this AD: Inspect within 100 flight cycles after the effective date of this AD.

Figure 1 to paragraph (g) – *Inspection Service Information*

Airplane Model	Service Information
BD-700-1A10 airplanes having serial numbers 9002 through 9312 inclusive, 9314 through 9380 inclusive, and 9384 through 9429 inclusive	Bombardier Service Bulletin 700-53-054, Basic Issue, dated October 1, 2018
BD-700-1A10 airplanes having serial numbers 9313, 9381, and 9432 through 9844 inclusive	Bombardier Service Bulletin 700-53-6012, Basic Issue, dated October 1, 2018
BD-700-1A11 airplanes having serial numbers 9127 through 9383 inclusive, 9389 through 9400 inclusive, 9404 through 9431 inclusive, and 9998	Bombardier Service Bulletin 700-1A11-53-029, Basic Issue, dated October 1, 2018
BD-700-1A11 airplanes having serial numbers 9386, 9401, and 9445 through 9840 inclusive	Bombardier Service Bulletin 700-53-5013, Basic Issue, dated October 1, 2018

(h) Corrective Actions for Inspection Findings

If any cracking is found during any inspection specified in paragraph (g) of this AD, do the actions specified in paragraph (i) of this AD at the applicable time specified in paragraphs (h)(1) through (4) of this AD.

(1) If any crack of 1.20 inch (30.48 mm) or longer is found on the forward (FWD) upper half rib: Do the actions within 100 flight cycles after discovery of the crack.

(2) If any crack of 0.40 inch (10.16 mm) or longer is found on the AFT lower half rib, do the actions within 100 flight cycles after discovery of the crack.

(3) If any crack is found on the left-hand (LH) channel that has grown from the air system's support fitting aft fastener hole to the adjacent air systems support fitting fastener hole (which is 0.625 inch (15.88 mm) from hole edge to hole edge) or longer, do the actions before further flight.

(4) If any crack is found on the LH channel that is less than 0.625 inch (15.88 mm) from hole edge to hole edge (which is the distance from the air system's support fitting aft fastener hole to the adjacent air system's support fitting fastener hole), do the actions within 50 flight cycles after discovery of the crack.

(i) Modification of the Rudder Quadrant Box Assembly

At the applicable time specified in paragraph (i)(1) or (2) of this AD, except as required by paragraph (h) of this AD: Modify the rudder quadrant box assembly. The modification includes surface and bolt-hole eddy current inspections for cracking of the left-hand channel; a detailed visual inspection for cracking of the forward and aft half ribs and bottom and top skins; applicable corrective actions; replacement of the rudder quadrant box half ribs, air systems support fitting, and LH channel; and installation of new rudder quadrant box back-up fittings. Do the modification and associated actions in accordance with paragraph 2.B., 2.C., and 2.D., of the Accomplishment Instructions of the applicable service bulletin specified in figure 2 to paragraph (i) of this AD; except, where the applicable service bulletin specifies to contact Bombardier for appropriate action, corrective actions must be done before further flight in accordance with the procedures specified in paragraph (l)(2) of this AD.

(1) For airplanes that have accumulated 2,900 total flight cycles or fewer as of the effective date of this AD, do the required actions before the accumulation of 3,000 total flight cycles, or within 60 months after the effective date of this AD, whichever occurs first.

(2) For airplanes that have accumulated more than 2,900 total flight cycles as of the effective date of this AD, do the required actions within 100 flight cycles or 12 months, whichever occurs first, after the effective date of this AD.

Figure 2 to paragraph (i) – *Modification Service Information*

Airplane Model	Service Information
BD-700-1A10 airplanes having serial numbers 9002 through 9312 inclusive, 9314 through 9380 inclusive, and 9384 through 9429 inclusive	Bombardier Service Bulletin 700-53-052, Basic Issue, dated October 1, 2018
BD-700-1A10 airplanes having serial numbers 9313, 9381, and 9432 through 9844 inclusive	Bombardier Service Bulletin 700-53-6010, Basic Issue, dated October 1, 2018.
BD-700-1A11 airplanes having serial numbers 9127 through 9383 inclusive, 9389 through 9400 inclusive, 9404 through 9431 inclusive, and 9998	Bombardier Service Bulletin 700-1A11-53-027, Basic Issue, dated October 1, 2018
BD-700-1A11 airplanes having serial numbers 9386, 9401, and 9445 through 9840 inclusive	Bombardier Service Bulletin 700-53-5011, Basic Issue, dated October 1, 2018

(j) Alternative Modification

Airplanes that have been modified as specified by any modification identified in paragraphs (j)(1) through (4) of this AD (which are not required by this AD), meet the requirements specified in paragraph (i) of this AD.

(1) Bombardier Repair Modification R700T400669, Revision C, dated January 19, 2018, or Bombardier Repair Modification R700T400669, Revision G, dated May 30, 2018.

(2) Bombardier In-Service Modification IS700–53–0024, Revision A, dated July 24, 2018.

(3) Bombardier Service Request for Product Support Action (SRPSA) 000220372.

(4) Bombardier Service Request for Product Support Action (SRPSA) 000271526.

(k) Terminating Action for Repetitive Inspections

Accomplishing the actions in paragraph (i) or (j) of this AD terminates all of the requirements in paragraph (g) of this AD.

(l) Other FAA AD Provisions

The following provisions also apply to this AD:

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

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

(m) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) Canadian AD CF–2019–11, dated March 22, 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–2019–0876.

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

(n) Material Incorporated by Reference

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

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

(i) Bombardier Service Bulletin 700–53–052, Basic Issue, dated October 1, 2018.

(ii) Bombardier Service Bulletin 700–53–054, Basic Issue, dated October 1, 2018.

(iii) Bombardier Service Bulletin 700–53–5011, Basic Issue, dated October 1, 2018

(iv) Bombardier Service Bulletin 700–53–5013, Basic Issue, dated October 1, 2018.

(v) Bombardier Service Bulletin 700–53–6010, Basic Issue, dated October 1, 2018.

(vi) Bombardier Service Bulletin 700–53–6012, Basic Issue, dated October 1, 2018.

(vii) Bombardier Service Bulletin 700–1A11–53–027, Basic Issue, dated October 1, 2018.

(viii) Bombardier Service Bulletin 700–1A11–53–029, Basic Issue, dated October 1, 2018.

(3) For service information identified in this AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; email *thd.crj@aero.bombardier.com;* internet *https://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 March 10, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–06786 Filed 4–1–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0701; Product Identifier 2019–NM–107–AD; Amendment 39–19853; AD 2020–04–16]

RIN 2120–AA64

Airworthiness Directives; Yaborã Indústria Aeronáutica S.A. (Type Certificate Previously Held by Embraer S.A.) 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 Yaborã Indústria Aeronáutica S.A. Model ERJ 190–100 STD, –100 LR, –100 IGW, –200 STD, –200 LR, and –200 IGW airplanes. This AD was prompted by reports of structural cracks in the wing lower skin stringers on both half wings. This AD requires repetitive inspections for cracking and fuel leakage of the lower skin stringers on both half wings, and applicable related investigative and corrective actions, as specified in an Agência Nacional de Aviação Civil National Civil Aviation Agency (ANAC) Brazilian AD, which is incorporated by reference. This AD also provides optional terminating action for the repetitive inspections. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective May 7, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of May 7, 2020.

ADDRESSES: For the ANAC material incorporated by reference (IBR) in this AD, contact National Civil Aviation Agency, Aeronautical Products Certification Branch (GGCP), Rua Laurent Martins, no209, Jardim Esplanada, CEP 12242–431—São José dos Campos—SP, Brazil; telephone 55 (12) 3203–6600; email *pac@anac.gov.br;* internet *www.anac.gov.br/en/.* You may find this IBR material on the ANAC website at *https://sistemas.anac.gov.br/certificacao/DA/DAE.asp.*

For the Embraer material incorporated by reference in this AD, contact Embraer S.A., Technical Publications Section (PC 060), Av. Brigadeiro Faria Lima, 2170—Putim—12227–901 São Jose dos Campos—SP—Brazil; telephone +55 12 3927–5852 or +55 12 3309–0732; fax +55 12 3927–7546; email *distrib@embraer.com.br;* internet *http://www.flyembraer.com.*

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–2019–0701.

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–2019–0701; 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: Krista Greer, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3221; email *krista.greer@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The ANAC, which is the aviation authority for Brazil, has issued Brazilian AD 2019–06–01, effective June 17, 2019 (''Brazilian AD 2019–06–01'') (also referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Embraer S.A. Model ERJ 190–100 STD, –100 LR, –100 IGW, –100 SR, –200 STD, –200 LR, and –200 IGW airplanes. (Model ERJ 190–100 SR airplanes are not certified by the FAA and are not included on the U.S. type certificate data sheet; this AD therefore does not include those airplanes in the applicability.)

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Embraer S.A. Model ERJ 190–100 STD, –100 LR, –100 IGW, –200 STD, –200 LR, and –200 IGW airplanes. The NPRM published in the **Federal Register** on September 30, 2019 (84 FR 51469). The NPRM was prompted by reports of structural cracks in the wing lower skin stringers on both half wings. The NPRM proposed to require repetitive inspections for cracking and fuel leakage of the lower skin stringers on both half wings, and applicable related investigative and corrective actions.

The FAA is issuing this AD to address structural cracks in the wing lower skin, which could result in fuel leakage and reduced structural integrity of the wing. 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 NPRM and the FAA's response to each comment.

Request To Revise Applicability

American Airlines (AA) stated that Brazilian AD 2019–06–01 failed to explain why airplane serial numbers (S/Ns) 19000040 through 19000077 are affected and asked that the FAA explain why the proposed AD would affect those airplanes. AA stated that

according to Brazilian AD 2019–06–01, the damaged stringers were modified in accordance with related Brazilian AD 2008–01–02, effective February 25, 2008 (which corresponds to FAA AD 2009–06–11, Amendment 39–15847 (74 FR 12233, March 24, 2009) (''AD 2009–06–11'')), Brazilian AD 2008–01–02 and FAA AD 2009–06–11 mandate Embraer Service Bulletin SB190–57–0005, Revision 01, dated October 27, 2006. AA added that that service information did not apply to AA airplanes, which were modified with an equivalent modification in production.

The FAA does not agree to revise the applicability but provide the following clarification. FAA AD 2009–06–11 applies to airplanes having S/Ns 19000004, 19000006 through 19000028, and 19000030 through 19000039, and requires doing the action specified in Embraer Service Bulletin SB190–57–0005, dated October 10, 2006. The FAA has determined that those actions do not adequately address the unsafe condition identified in this AD. Airplanes having S/Ns 19000029, and 19000040 through 19000077, had a similar factory-installed modification that also does not adequately address the unsafe condition. This modification was installed on new airplanes until a redesigned lower wing skin panel was installed on airplanes having S/N 19000078 and subsequent. The airplanes identified in this AD have been modified by Embraer Service Bulletin SB190–57–0005 or the equivalent production modification. The AD has not been changed in regard to this issue.

Request To Clarify Instructions for Access for Inspection

AA and JetBlue Airways asked for clarification of whether the access panels must be removed and the exposed area inspected. AA also asked that a panel number and a figure be identified to denote the exact areas to be inspected. JetBlue stated that removal of just the pylon fairings will not provide adequate access to the area requiring inspection, especially if the intent is to identify cracking before significant growth past the pylon attachment fitting. JetBlue asked whether the pylon itself must be dropped for access to the inspection area. The commenters are concerned that there is not enough information for mechanics to effectively do the inspection specified in the proposed AD.

The FAA agrees that clarification is necessary. The area required to be inspected is accessible only if the engine pylon fairings are removed. The area between spar 1 and spar 2, and from rib 7 to rib 10, is both inside and outside of the engine pylon fairing. Figure 1 of Embraer Service Bulletin SB190–57–0005, dated October 10, 2006, shows the area affected. The pylon does not have to be removed for the inspection of the area; while the cracking typically originates at the wing stringer runout underneath the pylon lower link, a crack in that area would be identified by fuel leakage. The AD has not been changed in regard to this issue.

Request To Approve Terminating Action for the Repetitive Inspections

AA, JetBlue, and Embraer asked for approval of a permanent repair as terminating action for the repetitive inspections specified in the proposed AD when one becomes available. AA asked that a permanent repair be developed or identified to allow for proper preparation for that repair by the operator if there are findings. AA stated that the estimated permanent repair downtime is almost 900 hours, and would significantly impact revenue if the repair is done at a non-maintenance station. AA added that if a permanent repair is developed, it would be reasonable to complete the repair, depending on the remaining lifecycle of the airplane. JetBlue referenced an Embraer Relevant Event Communication describing later service information that will include terminating action for the repetitive inspections. Embraer asked if the FAA would accept the repair identified in FAA AMOC letter AIR–676–18–280 (FAA AD 2009–06–11), as terminating action for the repetitive inspections. Embraer also stated that it has issued Service Bulletin SB190–57–0056, dated December 5, 2019, which provides a terminating action for the repetitive inspections by specifying the installation of doublers to reinforce the forward and rear lower skin panels of the wing. The commenters are concerned with the operational impact of performing repetitive inspections and repairing damage.

The FAA agrees with the requests to approve the terminating action specified in Embraer Service Bulletin SB190–57–0056, dated December 5, 2019. The FAA has revised the **SUMMARY** to include optional terminating action for the repetitive inspections, explained this as a difference between this AD and Brazilian AD 2019–06–01 in the **SUPPLEMENTARY INFORMATION**, and included an optional terminating action in paragraph (h) of this AD.

The FAA does not agree to reference the repair identified in AMOC AIR–676–18–280 as terminating action for the repetitive inspections in this AD. However, under the provisions of paragraph (j)(1) of this AD, the FAA will consider requests for approval of a repair which provides an acceptable level of safety. The AD has not been changed in this regard.

Request To Allow Ferry Flight

JetBlue asked whether conducting an MX (maintenance) ferry flight of the airplane to a facility capable of accomplishing the repair is allowed if cracks are found in the inspection area and the crack damage must be repaired before further flight per the requirements in the proposed AD. JetBlue also asked what provisions Embraer, ANAC, and the FAA are prepared to provide if cracking is found during inspection at a facility capable of accomplishing the repair. JetBlue recommended that the proposed AD be revised to specify that corrective action must be done before the next ''revenue flight'' in lieu of before the next flight as specified in paragraphs (a)(1)(i) and (ii) of Brazilian AD 2019–06–01, effective June 17, 2019, and as required by the proposed AD.

We acknowledge the commenter's concern; however, this AD does not prohibit ferry flights because the ferry flight provisions of 14 CFR 39.23 are implicitly included in the NPRM. Therefore, this AD has not been changed in regard to this issue.

Explanation of Change to Manufacturer's Name Specified in This Final Rule

The FAA has revised references to the manufacturer's name specified throughout this final rule to identify the manufacturer name as published in the most recent type certificate data sheet for the affected models.

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 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

Brazilian AD 2019–06–01 describes procedures for repetitive detailed inspections of the lower skin stringers on both half wings for cracking or fuel leakage, and applicable related investigative and corrective actions. Related investigative actions include a high frequency eddy current (HFEC) inspection of any area with crack indications to confirm the damage extension. Corrective actions include repairs.

Embraer issued Service Bulletin SB190–57–0056, dated December 5, 2019, which describes procedures for installing doublers reinforcement on the wing forward and rear lower skin panel, which would eliminate the need 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.

Difference Between This AD and the MCAI

Brazilian AD 2019–06–01 does not include a terminating action for the repetitive inspections of the lower skin stringers on both half wings for cracking or fuel leakage; however, Embraer Service Bulletin SB190–57–0056, dated December 5, 2019 (which was issued after Brazilian AD 2019–06–01 was issued), does include a terminating action that the FAA considers will adequately address the unsafe condition. This difference has been coordinated with ANAC.

Costs of Compliance

The FAA estimates that this AD affects 29 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
12 work-hours × $85 per hour = $1,020	$0	$1,020	$29,580

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

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
Up to 898 work-hours × $85 per hour = Up to $76,330	Negligible	Up to $76,330.

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):

2020–04–16 Yaborã Indústria Aeronáutica S.A. (Type Certificate Previously Held by Embraer S.A.): Amendment 39–19853; Docket No. FAA–2019–0701; Product Identifier 2019–NM–107–AD.

(a) Effective Date

This AD is effective May 7, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Yaborã Indústria Aeronáutica S.A. (Type Certificate Previously Held by Embraer S.A.) Model ERJ 190–100 STD, –100 LR, –100 IGW, –200 STD, –200 LR, and –200 IGW airplanes, certificated in any category, as identified in Agência Nacional de Aviação Civil (ANAC) Brazilian AD 2019–06–01, effective June 17, 2019 (''Brazilian AD 2019–06–01'').

(d) Subject

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

(e) Reason

This AD was prompted by reports of structural cracks in the wing lower skin stringers on both half wings. The FAA is issuing this AD to address such cracking,

which could result in fuel leakage and reduced structural integrity of the wing.

(f) Compliance

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

(g) Requirements

Except as specified in paragraphs (h) and (i) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, Brazilian AD 2019–06–01.

(h) Optional Terminating Action

Accomplishing the installation of doublers reinforcement on the wing forward and rear lower skin panel, in accordance with the Accomplishment Instructions of Embraer Service Bulletin SB190–57–0056, dated December 5, 2019, terminates the repetitive inspections required by this AD, as specified in Brazilian AD 2019–06–01.

(i) Exceptions to Brazilian AD 2019–06–01

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

(1) Where Brazilian AD 2019–06–01 refers to its effective date, this AD requires using the effective date of this AD.

(2) The ''Alternative method of compliance (AMOC)'' section of Brazilian AD 2019–06–01 does not apply to this AD.

(3) Where paragraph (a)(1) of Brazilian AD 2019–06–01 specifies an initial inspection time, this AD requires an initial inspection at the applicable time specified in paragraph (i)(3)(i) or (ii) of this AD, whichever occurs later.

(i) Before the accumulation of 17,000 total flight cycles or 27,000 total flight hours, whichever occurs first.

(ii) Within 680 flight cycles or 900 flight hours after the effective date of this AD, whichever occurs first.

(4) Where paragraph (a)(1)(ii) of Brazilian AD 2019–06–01 specifies to do a special detailed inspection (SDI) in case of any ''signal'' of cracks, this AD requires doing an SDI before further flight after the detection of any ''sign'' of structural cracks in the inspected area.

(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) of this AD. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

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

(k) Related Information

For more information about this AD, contact Krista Greer, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3221; email *krista.greer@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) Agência Nacional de Aviação Civil National Civil Aviation Agency (ANAC) Brazilian AD 2019–06–01, effective June 17, 2019.

(ii) Embraer Service Bulletin SB190–57–0056, dated December 5, 2019.

(3) For information about Brazilian AD 2019–06–01, contact National Civil Aviation Agency, Aeronautical Products Certification Branch (GGCP), Rua Laurent Martins, n° 209, Jardim Esplanada, CEP 12242–431—São José dos Campos—SP, Brazil; telephone 55 (12) 3203–6600; email *pac@anac.gov.br;* internet *www.anac.gov.br/en/.* You may find this IBR material on the ANAC website at *https://sistemas.anac.gov.br/certificacao/DA/DAE.asp.* For information about Embraer service information, contact Embraer S.A., Technical Publications Section (PC 060), Av. Brigadeiro Faria Lima, 2170—Putim—12227–901 São Jose dos Campos—SP—Brazil; telephone +55 12 3927–5852 or +55 12 3309–0732; fax +55 12 3927–7546; email *distrib@embraer.com.br;* internet *http://www.flyembraer.com.*

(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–2019–0701.

(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 25, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–06793 Filed 4–1–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 732 and 734

[Docket No. 200312–0076]

RIN 0694–AF47

Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML); Notifying the Public of the Bureau's Interim Measures With Respect to March 6, 2020 Court Order

AGENCY: Bureau of Industry and Security, Department of Commerce.

ACTION: Notification of court order.

SUMMARY: The Bureau of Industry and Security (BIS) is publishing this notification to alert the public of the Bureau's interim measures with respect to a court order issued on March 6, 2020.

DATES: The court order was effective March 6, 2020.

FOR FURTHER INFORMATION CONTACT: Steven Clagett, Office of Nonproliferation Controls and Treaty Compliance, Nuclear and Missile Technology Controls Division, tel. (202) 482–1641 or email *steven.clagett@bis.doc.gov.*

SUPPLEMENTARY INFORMATION: On March 6, 2020, the Honorable Richard A. Jones, District Judge of the U.S. District Court for the Western District of Washington issued an order enjoining the U.S. Department of State from implementing or enforcing the regulation entitled International Traffic In Arms Regulations: U.S. Munitions List Categories I, II, and III, 85 FR 3819 (Jan. 23, 2020) ''insofar as it alters the status quo restrictions on technical data and software directly related to the production of firearms or firearm parts using a 3D-printer or similar equipment.'' (Case No. 2:20–cv–00111–RAJ).

As a result, any request for licenses of items that would otherwise fall under the U.S. Department of Commerce regulation, 15 CFR 732.2(b) and 734.7(c) (added by the final rule, entitled, Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML); 85 FR 4136, Jan. 23, 2020), should instead be directed to the U.S. Department of State.

BIS posted information on its website to alert the public of the Bureau's

interim measures with respect to this court order. See *https://www.bis.doc.gov/index.php/component/docman/?task=doc_download&gid=2535.* For additional information about the court ordered injunction pertaining to revisions to the U.S. *https://www.pmddtc.state.gov/ddtc_public?id=ddtc_public_portal_news_and_events&timeframe=week.*

Dated: March 16, 2020.

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

[FR Doc. 2020–05934 Filed 4–1–20; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 5, 801, 803, 807, 814, 820, 821, 822, 830, 860, 884, 900, and 1002

[Docket No. FDA–2020–N–0011]

Medical Devices; Technical Amendments

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; technical amendments.

SUMMARY: The Food and Drug Administration (FDA, the Agency, or we) is amending its medical device regulations. These revisions are necessary to reflect changes to the Agency's Center for Devices and Radiological Health's organizational structure, including the reorganization of its offices. The revisions replace references to the obsolete offices and positions with the current information, update the physical addresses for such offices, and correct inaccurate citations. In addition, as part of this effort we made other editorial non-substantive changes to correct other addresses, references, and citations, as appropriate. The rule does not impose any new regulatory requirements on affected parties. This action is editorial in nature and is intended to improve the accuracy of the Agency's regulations.

DATES: This rule is effective April 1, 2020.

FOR FURTHER INFORMATION CONTACT: Madhusoodana Nambiar, Office of Policy, Center for Devices and Radiological Health, 10903 New Hampshire Ave., Bldg. 66, Rm. 5519, Silver Spring, MD 20993–0002, 301–796–5837.

SUPPLEMENTARY INFORMATION:

I. Background

The FDA Center for Devices and Radiological Health (CDRH) has reorganized (84 FR 22854, May 20, 2019) to create an agile infrastructure that can adapt to future organizational, regulatory, and scientific needs. The goal of this change is to implement more efficient, consistent work processes across CDRH that better support and advance CDRH's public health mission and vision. The reorganization will integrate CDRH's premarket and postmarket program functions along product lines, allowing experts to leverage their knowledge to optimize decision making across the product life cycle. Implementation took a phased approach starting on March 18, 2019, and was completed on September 30, 2019.

Historically, CDRH has been organized according to the stage of the product's life cycle, *e.g.,* premarket review, postmarket surveillance, and compliance, rather than by the type of product regulated. The reorganization integrates these functions by product type within the Office of Product Evaluation and Quality (OPEQ). OPEQ was formed by combining the Office of Compliance, the Office of Device Evaluation, the Office of Surveillance and Biometrics, and the Office of In Vitro Diagnostics and Radiological Health into one super office focused on a Total Product Lifecycle approach to medical device oversight. Within OPEQ, there are offices divided by product type, referred to as Offices of Health Technology (OHT), as well as cross-cutting offices focusing on specific policy and programmatic needs including the Office of Regulatory Programs and the Office of Clinical Evidence and Analysis. In addition, the reorganization established the Office of Policy, which includes two teams, the Guidance, Legislation and Special Projects Team and the Regulatory Documents and Special Projects Team, with no changes in the functions for CDRH Policy. The reorganization also established the Office of Strategic Partnerships and Technology Innovation (OST), which combined the Science and Strategic Partnerships, Digital Health, Health Informatics and Innovation teams. There are no changes in functions within the different OST teams. CDRH reorganization also realigned Management Services within the Center to ensure administrative functions in CDRH are optimally aligned, structured, and deliver excellent service. The reorganization streamlined the Center's communication functions, by combining the internal and external communication functions, including CDRH Executive Secretary and Speaker Liaison, into the renamed Division of Communication in the Office of Communication and Education, and created an Internal Communication Branch. The structure of the Office of Science and Engineering Laboratories remains unchanged.

As part of this effort, we are also making other editorial non-substantive changes to correct other addresses, references, and citations, as appropriate.

II. Description of the Technical Amendments

The regulations specified in this rule have been revised to replace all references to ''Office of Device Evaluation'', ''Office of Compliance'', ''Office of Surveillance and Biometrics'' with ''Office of Product Evaluation and Quality,'' and where, appropriate, we have used the term ''Office,'' ''Division,'' ''Team'' or ''Office of Health Technology'' to reflect the responsible unit within CDRH. We have also made conforming edits, as appropriate. In addition, because of the reorganization, the physical location for many of the offices changed, and thus, we have made non-substantive amendments to ensure that the room numbers and addresses reflect the current information, and other changes as necessary to update outdated addresses, references, and citations in the regulations pertaining to medical devices. The rule does not impose any new regulatory requirements on affected parties. The amendments are editorial in nature and should not be construed as modifying any substantive standards or requirements.

III. Notice and Public Comment

Publication of this document constitutes final action of these changes under the Administrative Procedure Act (5 U.S.C. 553). Section 553 of the Administrative Procedure Act (APA) exempts ''rules of agency organization, procedure, or practice'' from proposed rulemaking (*i.e.,* notice and comment rulemaking). 5 U.S.C. 553(b)(3)(A). Rules are also exempt when an agency finds ''good cause'' that notice and comment rulemaking procedures would be ''impracticable, unnecessary, or contrary to the public interest.'' 5 U.S.C. 553(b)(3)(B).

FDA has determined that this rulemaking meets the notice and comment exemption requirements in 5 U.S.C. 553(b)(3)(A) and (B). FDA's revisions make technical or non-substantive changes that pertain solely to the CDRH reorganization and office move and do not alter any substantive

standard. FDA does not believe public comment is necessary for these minor revisions.

The APA allows an effective date less than 30 days after publication as ''provided by the agency for good cause found and published with the rule'' (5 U.S.C. 553(d)(3)). A delayed effective date is unnecessary in this case because the amendments do not impose any new regulatory requirements on affected parties. As a result, affected parties do not need time to prepare before the rule takes effect. Therefore, FDA finds good cause for the amendments to become effective on the date of publication of this action.

List of Subjects

21 CFR Part 5

Authority delegations (Government agencies), Imports, Organization and functions (Government agencies).

21 CFR Part 801

Labeling, Medical devices, Reporting and recordkeeping requirements.

21 CFR Parts 803 and 821

Imports, Medical devices, Reporting and recordkeeping requirements.

21 CFR Part 807

Confidential business information, Imports, Medical devices, Reporting and recordkeeping requirements.

21 CFR Part 814

Administrative practice and procedure, Confidential business information, Medical devices, Medical research, Reporting and recordkeeping requirements.

21 CFR Parts 820 and 822

Medical devices, Reporting and recordkeeping requirements.

21 CFR Part 830

Administrative practice and procedure, Labeling, Medical devices, Reporting and recordkeeping requirements.

21 CFR Part 860

Administrative practice and procedure, Medical devices.

21 CFR Part 884

Medical Devices.

21 CFR Part 900

Electronic products, Health facilities, Medical devices, Radiation protection, Reporting and recordkeeping requirements, X-rays.

21 CFR Part 1002

Electronic products, Radiation protection, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under the authority delegated to the Commissioner of Food and Drugs, 21 CFR parts 5, 801, 803, 807, 814, 820, 821, 822, 830, 860, 884, 900, and 1002 are amended as follows:

PART 5—ORGANIZATION

■ 1. The authority citation for part 5 continues to read as follows:

Authority: 5 U.S.C. 552; 21 U.S.C. 301–397.

■ 2. In § 5.1100, revise the entries for ''*Center for Devices and Radiological Health*'' through ''*Office of In Vitro Diagnostics and Radiological Health*'' to read as follows:

§ 5.1100 Headquarters.

* * * * *

Center for Devices and Radiological Health.[12]
Office of the Center Director.
  Quality Management Staff.
Office of Communication and Education.
  Digital Communication Media Staff.
  Program Management Operations Staff.
  Division of Communication.
  External Communications Branch.
  Web and Graphics Branch.
  Internal Communication Branch.
Division of Employee Training and Development.
  Employee Development Branch.
  Technology and Learning Management Branch.
Division of Industry and Consumer Education.
  Premarket Programs Branch.
  Postmarket and Consumer Branch.
Division of Information Disclosure.
  Freedom of Information Branch A.
  Freedom of Information Branch B.
Office of Management.
  Planning and Program Analysis Staff.
  Division of Acquisition Services.
  Advanced Acquisitions.
  Simplified Acquisitions.
  Acquisition Planning Assistance.
Division of Workforce Management.
  Recruitment.
  Human Capital Management.
  Special Programs.
Division of Management Services.
  Travel and Conference Management.
  Committee Management and Planning.
  Space and Facilities Management.
Division of Financial Management.
  Budget Formulation.
  Budget Execution.
  Financial Accountability.
Office of Policy.
  Guidance, Legislation and Special Projects.
  Regulatory Documents and Special Projects.
Office of Product Evaluation and Quality.
  Quality and Analytics Staff.
  Clinical and Scientific Policy Staff.
  Strategic Initiatives Staff.
  Regulation, Policy and Guidance Staff.
  Compliance and Quality Staff.
  Operations Staff.
Office of Regulatory Programs.
  Division of Regulatory Programs 1 (Division of Submission Support).
  Division of Regulatory Programs 2 (Division of Establishment Support).
  Division of Regulatory Programs 3 (Division of Market Intelligence).
Office of Clinical Evidence and Analysis.
  Division of Clinical Evidence and Analysis 1 (Division of Clinical Science and Quality).
  Division of Clinical Evidence and Analysis 2 (Division of Biostatistics).
Office of Health Technology 1 (OHT1: Office of Ophthalmic, Anesthesia, Respiratory, ENT and Dental Devices).
  Division of Health Technology 1A (Division of Ophthalmic Devices).
  Division of Health Technology 1B (Division of Dental Devices).
  Division of Health Technology 1C (Division of ENT, Sleep Disordered Breathing, Respiratory and Anesthesia Devices).
Office of Health Technology 2 (OHT2: Office of Cardiovascular Devices).
  Division of Health Technology 2A (Division of Cardiac Electrophysiology, Diagnostics, and Monitoring Devices).
  Division of Health Technology 2B (Division of Circulatory Support, Structural and Vascular Devices).
  Division of Health Technology 2C (Division of Coronary and Peripheral Interventional Devices).
Office of Health Technology 3 (OHT3: Office of Gastrorenal, ObGyn, General Hospital and Urology Devices).
  Division of Health Technology 3A (Division of Renal, Gastrointestinal, Obesity, and Transplant Devices).
  Division of Health Technology 3B (Division of Reproductive, Gynecology and Urology Devices).
  Division of Health Technology 3C

[12] Mailing address: 10903 New Hampshire Ave., Bldg. 66, Silver Spring, MD 20993.

(Division of Drug Delivery and General Hospital Devices, and Human Factors).
Office of Health Technology 4 (OHT4: Office of Surgical and Infection Control Devices).
Division of Health Technology 4A (Division of General Surgery Devices).
Division of Health Technology 4B (Division of Infection Control and Plastic Surgery Devices).
Office of Health Technology 5 (OHT5: Office of Neurological and Physical Medicine Devices).
Division of Health Technology 5A (Division of Neurological, Neurointerventional and Neurodiagnostic Devices).
Division of Health Technology 5B (Division of Neuromodulation and Physical Medicine Devices).
Office of Health Technology 6 (OHT6: Office of Orthopedic Devices).
Division of Health Technology 6A (Division of Joint Arthroplasty Devices).
Division of Health Technology 6B (Division of Spinal Devices).
Division of Health Technology 6C (Division of Stereotaxic, Trauma and Restorative, Devices).
Office of Health Technology 7 (OHT7: Office of In Vitro Diagnostics and Radiological Health).
Division of Program Operations and Management.
Division of Chemistry and Toxicology Devices.
Chemistry Branch.
Diabetes Branch.
Toxicology Branch.
Cardio-Renal Diagnostics Branch.
Division of Molecular Genetics and Pathology.
Molecular Pathology and Cytology Branch.
Molecular Genetics Branch.
Division of Immunology and Hematology Devices.
Hematology Branch.
Immunology and Flow-Cytometry Branch.
Division of Microbiology Devices.
Viral Respiratory and HPV Branch.
General Viral and Hepatitis Branch.
General Bacterial and Antimicrobial Susceptibility Branch.
Bacterial Respiratory and Medical Countermeasures Branch.
Division of Radiological Health.
Magnetic Resonance and Electronic Products Branch.
Diagnostic X-Ray Systems Branch.
Nuclear Medicine and Radiation Therapy Branch.
Mammography, Ultrasound and Imaging Software Branch.
Division of Mammography Quality Standards.
Office of Science and Engineering Laboratories.
Immediate Office of the Director
Division of Applied Mechanics.
Division of Biomedical Physics.
Division of Biology, Chemistry and Materials Science.
Division of Imaging, Diagnostics, and Software Reliability.
Division of Administrative and Laboratory Support.
Office of Strategic Partnerships and Technology Innovation.
Innovation.
Division of All Hazards Response Science and Strategic Partnerships.
Medical Device Development Tools.
Health of Women.
Pediatrics and Special Populations.
All Hazards Readiness Response and Cybersecurity.
Patient Science and Engagement.
Partnerships to Advance Innovation and Regulatory Science.
Science and Special Projects Incubator.
Standards and Conformity Assessment Program.
Division of Digital Health.
Operational Excellence.
Technical and Policy Leadership Strategic Partnerships and Initiatives 1.
Technical and Policy Leadership Strategic Partnerships and Initiatives 2.
Strategic Initiatives and Special Projects.
Division of Technology and Data Services.
Business and Transformation Services.
Data Services.
Technology Services.

* * * * *

PART 801—LABELING

■ 5. The authority citation for part 801 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 360d, 360i, 360j, 371, 374.

■ 6. In § 801.55, revise paragraph (b)(2) to read as follows:

§ 801.55 Request for an exception from or alternative to a unique device identifier requirement.

* * * * *

(b) * * *

(2) In all other cases, by email to: *GUDIDSupport@fda.hhs.gov,* or by correspondence to: UDI Regulatory Policy Support, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 3293, Silver Spring, MD 20993–0002.

* * * * *

■ 7. In § 801.57, revise paragraph (c)(2) to read as follows:

§ 801.57 Discontinuation of legacy FDA identification numbers assigned to devices.

* * * * *

(c) * * *

(2) No later than September 24, 2014, the labeler submits, and obtains FDA approval of, a request for continued use of the assigned labeler code. A request for continued use of an assigned labeler code must be submitted by email to: *GUDIDSupport@fda.hhs.gov,* or by correspondence to: UDI Regulatory Policy Support, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 3293, Silver Spring, MD 20993–0002.

* * * * *

PART 803—MEDICAL DEVICE REPORTING

■ 8. The authority citation for part 803 continues to read as follows:

Authority: 21 U.S.C. 352, 360, 360i, 360j, 371, 374.

■ 9. In § 803.11, revise paragraph (d) to read as follows:

§ 803.11 What form should I use to submit reports of individual adverse events and where do I obtain these forms?

* * * * *

(d) Form FDA 3500A is available on the internet at *https://www.accessdata.fda.gov/scripts/medwatch/index.cfm.*

■ 10. In § 803.19(b), revise the second sentence to read as follows:

§ 803.19 Are there exemptions, variances, or alternative forms of adverse event reporting requirements?

* * * * *

(b) * * * You must submit the request to us in writing at the following address: MDR Exemption Requests, Medical Device Report (MDR) Team, Division of Regulatory Programs 3, Office of Regulatory Programs, Office of Product Evaluation and Quality, 10903 New Hampshire Ave., Bldg. 66, Rm.1523, Silver Spring, MD 20993–0002. * * *

* * * * *

■ 11. In § 803.21, revise paragraph (a) to read as follows:

§ 803.21 Where can I find the reporting codes for adverse events that I use with medical device reports?

(a) The MedWatch Medical Device Reporting Code Instruction Manual contains adverse event codes for use with Form FDA 3500A. You may obtain the coding manual from FDA's website

at: *https://www.fda.gov/medical-devices/mandatory-reporting-requirements-manufacturers-importers-and-device-user-facilities/mdr-adverse-event-codes.*

* * * * *

■ 12. In § 803.33, revise paragraph (a) to read as follows:

§ 803.33 If I am a user facility, what must I include when I submit an annual report?

(a) You must submit to us an annual report on Form FDA 3419. You must submit an annual report by January 1, of each year. You may obtain this form on the internet at: *https://www.fda.gov/media/72292/download.*

* * * * *

PART 807—ESTABLISHMENT REGISTRATION AND DEVICE LISTING FOR MANUFACTURERS AND INITIAL IMPORTERS OF DEVICES

■ 13. The authority citation for part 807 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 360, 360c, 360e, 360i, 360j, 360bbb-8b, 371, 374, 379k–1, 381, 393; 42 U.S.C. 264, 271.

■ 14. In § 807.21, revise paragraph (b) introductory text to read as follows:

§ 807.21 How to register establishments and list devices.

* * * * *

(b) If the information under § 807.21(a) cannot be submitted electronically, a waiver may be requested. Waivers will be granted only if use of electronic means is not reasonable for the person requesting the waiver. To request a waiver, applicants must send a letter to the Imports and Registration and Listing Team, Division of Regulatory Programs 2, Office of Regulatory Programs, Office of Product Evaluation and Quality, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm.1432, Silver Spring, MD 20993–0002, that includes the following information:

* * * * *

■ 15. In § 807.34, revise paragraph (a) to read as follows:

§ 807.34 Summary of requirements for owners or operators granted a waiver from submitting required information electronically.

(a) For initial registration and listing, owners or operators who have been granted a waiver from electronic filing using the procedures set forth in § 807.21(b) must send a letter containing all of the registration and listing information described in §§ 807.22, 807.25 (and § 807.26 when such information is requested by FDA), at the times described in § 807.22, to: The Imports and Registration and Listing Team, Division of Regulatory Programs 2, Office of Regulatory Programs, Office of Product Evaluation and Quality, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1432, Silver Spring, MD 20993–0002.

* * * * *

■ 16. In § 807.37, revise paragraph (a) to read as follows:

§ 807.37 Public availability of establishment registration and device listing information.

(a) Establishment registration and device listing information is available for public inspection in accordance with section 510(f) of the Federal Food, Drug, and Cosmetic Act and will be posted on the FDA website, with the exception of the information identified in paragraph (b) of this section. Requests for information by persons who do not have access to the internet should be directed to the Imports and Registration and Listing Team, Division of Regulatory Programs 2, Office of Regulatory Programs, Office of Product Evaluation and Quality, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm.1432, Silver Spring, MD 20993–0002. In addition, there will be available for inspection at each of the Food and Drug Administration district offices the same information for firms within the geographical area of such district offices. Upon request, verification of a registration number or location of a registered establishment will be provided.

* * * * *

PART 814—PREMARKET APPROVAL OF MEDICAL DEVICES

■ 17. The authority citation for part 814 continues to read as follows:

Authority: 21 U.S.C. 351, 352, 353, 360, 360c–360j, 360bbb–8b, 371, 372, 373, 374, 375, 379, 379e, 379k–1, 381.

■ 18. In § 814.42, revise paragraph (d)(2) to read as follows:

§ 814.42 Filing a PMA.

* * * * *

(d) * * *

(2) Request in writing within 10 working days of the date of receipt of the notice refusing to file the PMA, an informal conference with the Director of the associated Office of Health Technology to review FDA's decision not to file the PMA. FDA will hold the informal conference within 10 working days of its receipt of the request and will render its decision on filing within 5 working days after the informal conference. If, after the informal conference, FDA accepts the PMA for filing, the date of filing will be the date of the decision to accept the PMA for filing. If FDA does not reverse its decision not to file the PMA, the applicant may request reconsideration of the decision from the Director of the Office of Product Evaluation and Quality, the Director of the Center for Biologics Evaluation and Research, or the Director of the Center for Drug Evaluation and Research, as applicable. The Director's decision will constitute final administrative action for the purpose of judicial review.

* * * * *

■ 19. In § 814.100, revise paragraph (e)(2) to read as follows:

§ 814.100 Purpose and scope.

* * * * *

(e) * * *

(2) Submitting an HDE to the Office of Product Evaluation and Quality (OPEQ), Center for Devices and Radiological Health (CDRH), the Center for Biologics Evaluation and Research (CBER), or the Center for Drug Evaluation and Research (CDER), as applicable.

* * * * *

PART 820—QUALITY SYSTEM REGULATION

■ 20. The authority citation for part 820 continues to read as follows:

Authority: 21 U.S.C. 351, 352, 360, 360c, 360d, 360e, 360h, 360i, 360j, 360l, 371, 374, 381, 383; 42 U.S.C. 216, 262, 263a, 264.

■ 21. In § 820.1, revise paragraph (e)(1) to read as follows:

§ 820.1 Scope.

* * * * *

(e) * * * (1) Any person who wishes to petition for an exemption or variance from any device quality system requirement is subject to the requirements of section 520(f)(2) of the Federal Food, Drug, and Cosmetic Act. Petitions for an exemption or variance shall be submitted according to the procedures set forth in § 10.30 of this chapter, the FDA's administrative procedures. For guidance on how to proceed for a request for a variance, contact Division of Regulatory Programs 2, Office of Regulatory Programs, Office of Product Evaluation and Quality, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1438, Silver Spring, MD 20993–0002.

* * * * *

PART 821—MEDICAL DEVICE TRACKING REQUIREMENTS

■ 22. The authority citation for part 821 continues to read as follows:

Authority: 21 U.S.C. 331, 351, 352, 360, 360e, 360h, 360i, 371, 374.

■ 23. In § 821.2, revise paragraph (b) introductory text to read as follows:

§ 821.2 Exemptions and variances.

* * * * *

(b) A request for an exemption or variance shall be submitted in the form of a petition under § 10.30 of this chapter and shall comply with the requirements set out therein, except that a response shall be issued in 90 days. The Director or Deputy Directors, CDRH, or the Director of the Office of Regulatory Program, CDRH, shall issue responses to requests under this section. The petition shall also contain the following:

* * * * *

PART 822—POSTMARKET SURVEILLANCE

■ 24. The authority citation for part 822 continues to read as follows:

Authority: 21 U.S.C. 331, 352, 360i, 360l, 371, 374.

■ 25. In § 822.7, revise paragraph (a)(1) to read as follows:

§ 822.7 What should I do if I do not agree that postmarket surveillance is appropriate?

(a) * * *

(1) Requesting a meeting with the individual who issued the order for postmarket surveillance;

* * * * *

■ 26. In § 822.22, revise paragraph (a)(1) to read as follows:

§ 822.22 What recourse do I have if I do not agree with your decision?

(a) * * *

(1) Requesting a meeting with the individual who issued the order for postmarket surveillance;

* * * * *

PART 830—UNIQUE DEVICE IDENTIFICATION

■ 27. The authority citation for part 830 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 352, 353, 360, 360d, 360i, 360j, 371.

* * * * *

■ 28. In § 830.110, revise paragraph (a)(1) to read as follows:

§ 830.110 Application for accreditation as an issuing agency.

(a) * * *(1) An applicant seeking initial FDA accreditation as an issuing agency shall notify FDA of its desire to be accredited by sending a notification by email to: *GUDIDSupport@fda.hhs.gov,* or by correspondence to: UDI Regulatory Policy Support, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 3293, Silver Spring, MD 20993–0002.

* * * * *

■ 29. In § 830.320, revise paragraphs (c)(1) and (3) to read as follows:

§ 830.320 Submission of unique device identification information.

* * * * *

(c) * * * (1) A labeler may request a waiver from electronic submission of UDI data by submitting a letter addressed to the appropriate Center Director explaining why electronic submission is not technologically feasible; send the request by email to: *udi@fda.hhs.gov,* or by correspondence to: UDI Regulatory Policy Support, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 3293, Silver Spring, MD 20993–0002.

* * * * *

(3) A labeler that has a waiver from electronic submission of UDI data must send a letter containing all of the information required by § 830.310, as well as any ancillary information permitted to be submitted under § 830.340 that the labeler wishes to submit, within the time permitted by § 830.330, addressed to: UDI Regulatory Policy Support, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 3293, Silver Spring, MD 20993–0002.

PART 860—MEDICAL DEVICE CLASSIFICATION PROCEDURES

■ 30. The authority citation for part 860 continues to read as follows:

Authority: 21 U.S.C. 360c, 360d, 360e, 360i, 360j, 371, 374.

■ 31. In § 860.123, revise paragraph (b)(1) to read as follows:

§ 860.123 Reclassification petition: Content and form.

* * * * *

(b) * * *

(1) For devices regulated by the Center for Devices and Radiological Health, addressed to the Food and Drug Administration, Center for Devices and Radiological Health, Office of Policy Staff, 10903 New Hampshire Ave., Bldg. 66, Rm. 5445, Silver Spring, MD 20993–0002; for devices regulated by the Center for Biologics Evaluation and Research, addressed to the Food and Drug Administration, Center for Biologics Evaluation and Research, Document Control Center, 10903 New Hampshire Ave., Bldg. 71, Rm. G112, Silver Spring, MD 20993–0002; for devices regulated by the Center for Drug Evaluation and Research, addressed to the Food and Drug Administration, Center for Drug Evaluation and Research, Central Document Control Room, 5901–B Ammendale Rd., Beltsville, MD 20705–1266, as applicable.

* * * * *

PART 884—OBSTETRICAL AND GYNECOLOGICAL DEVICES

■ 32. The authority citation for part 884 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 360*l,* 371.

■ 33. In § 884.5360, remove and reserve paragraph (c).

PART 900—MAMMOGRAPHY

■ 34. The authority citation for part 900 continues to read as follows:

Authority: 21 U.S.C. 360i, 360nn, 374(e); 42 U.S.C. 263b.

■ 35. In § 900.3, revise paragraph (b)(1) to read as follows:

§ 900.3 Application for approval as an accreditation body.

* * * * *

(b) * * *(1) An applicant seeking initial FDA approval as an accreditation body shall inform the Division of Mammography Quality Standards, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 3621, Silver Spring, MD 20993, Attn: Program Management Branch, of its desire to be approved as an accreditation body and of its requested scope of authority.

* * * * *

■ 36. In § 900.15, revise paragraph (d)(3)(i) to read as follows:

§ 900.15 Appeals of adverse accreditation or reaccreditation decisions that preclude certification or recertification.

* * * * *

(d) * * *

(3) * * *

(i) A facility must request reconsideration by DMQS within 60 days of the accreditation body's adverse

appeals decision, at the following address: Food and Drug Administration, Center for Devices and Radiological Health, Division of Mammography Quality Standards, Attn: Facility Accreditation Review Committee, 10903 New Hampshire Ave., Bldg. 66, Rm. 3621, Silver Spring, MD 20993–0002.

* * * * *

■ 37. In § 900.18, revise paragraph (c) introductory text to read as follows:

§ 900.18 Alternative requirements for § 900.12 quality standards.

* * * * *

(c) *Applications for approval of an alternative standard.* An application for approval of an alternative standard or for an amendment or extension of the alternative standard shall be submitted in an original and two copies to the Food and Drug Administration, Center for Devices and Radiological Health, Director, Division of Mammography Quality Standards, 10903 New Hampshire Ave., Bldg. 66, Rm. 3621, Silver Spring, MD 20993–0002. The application for approval of an alternative standard shall include the following information:

* * * * *

■ 38. In § 900.21, revise paragraph (b)(1) to read as follows:

§ 900.21 Application for approval as a certification agency.

* * * * *

(b) * * * (1) An applicant seeking FDA approval as a certification agency shall inform the Food and Drug Administration, Center for Devices and Radiological Health, Director, Division of Mammography Quality Standards, Attn: Program Management Branch, 10903 New Hampshire Ave., Bldg. 66, Rm. 3621, Silver Spring, MD 20993–0002, in writing, of its desire to be approved as a certification agency.

* * * * *

PART 1002—RECORDS AND REPORTS

■ 39. The authority citation for part 1002 continues to read as follows:

Authority: 21 U.S.C. 352, 360, 360i, 360j, 360hh–360ss, 371, 374.

■ 40. In § 1002.50, revise paragraph (c)(3) to read as follows:

§ 1002.50 Special exemptions.

* * * * *

(c) * * *

(3) Such conditions as are deemed necessary to protect the public health and safety. Copies of exemptions shall be available upon request from the Food and Drug Administration, Center for Devices and Radiological Health, Division of Mammography Quality Standards, 10903 New Hampshire Ave., Bldg. 66, Rm. 3621, Silver Spring, MD 20993–0002.

* * * * *

Dated: March 23, 2020.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2020–06354 Filed 4–1–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 862 and 866

[Docket No. FDA–2020–N–0011]

Medical Devices; Technical Amendment

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; technical amendment.

SUMMARY: The Food and Drug Administration (FDA or Agency) is amending certain medical device regulations to accurately reflect the devices exempted from premarket notification (510(k)) as indicated in the lists published on April 13, 2017, and July 11, 2017. FDA published a final amendment, final order in the **Federal Register** of December 30, 2019 (''Final Order'') codifying the two **Federal Register** notices. The present revisions are necessary to correct editorial errors to ensure that the codified is consistent with the exemptions in the **Federal Register** notices. The rule does not impose any new regulatory requirements on affected parties. This action is editorial in nature and is intended to improve the accuracy of the Agency's regulations.

DATES: This rule is effective April 1, 2020.

FOR FURTHER INFORMATION CONTACT: Ryan Lubert, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 3574, Silver Spring, MD 20993–0002, 240–402–6357.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with sections 510(l)(2) and 510(m)(1)(A) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360(l)(2) and 360(m)(1)(A)), FDA issued two separate notices of final determination exempting a list of class I and II devices from section 510(k) of the FD&C Act, respectively, subject to certain limitations published in the **Federal Register** April 13, 2017 (82 FR 17841) and July 11, 2017 (82 FR 31976). The devices included in these lists were exempt upon publication of the final determination notices in the **Federal Register** notices (see sections 510(l)(2)(A) and 510(m)(3) of the FD&C Act). On December 30, 2019 (84 FR 71794), FDA issued an amendment, final order, which amended the codified for the classification regulations implicated in the **Federal Register** notices to reflect the exemptions and limitations on exemptions in those notices. This Final Order incorrectly amended the codified for three device types such that the exemption in the current codified is inconsistent with the scope of the device exemptions described in the **Federal Register** notices. Specifically, for the three implicated device types, FDA indicated in the **Federal Register** notices that a device with a particular intended use was exempt from the premarket notification requirements in section 510(k) of the FD&C Act; however, the codified currently indicates that the entire device type is exempt from section 510(k) of the FD&C Act, which is not the case.

As such, FDA is amending the codified for §§ 862.1345, 862.1775, and 866.2900 (21 CFR 862.1345, 862.1775, and 866.2900) to be consistent with the exemptions as stated in the **Federal Register** notices. These amendments are not substantive changes because the **Federal Register** notices exempted the affected devices from the section 510(k) of the FD&C Act, but are intended to correct the codified and to clarify which devices under those classification regulations are exempt from the premarket notification requirements in section 510(k) of the FD&C Act and which device types remain subject to such requirements.

II. Description of the Technical Amendments

The regulations specified in this rule have been revised to correct and clarify the codified language of the regulations specified in this technical amendment, specifically §§ 862.1345, 862.1775, and 866.2900, to be consistent with the exemptions as stated in the **Federal Register** notices. FDA is making no substantive changes to the following regulations:

1. FDA is revising § 862.1345(b) by replacing ''The device is exempt from the premarket notification procedures in subpart E of part 807 of this chapter subject to the limitations in § 862.9''

with ''The device, when it is solely intended for use as a drink to test glucose tolerance, is exempt from the premarket notification procedures in subpart E of part 807 of this chapter subject to the limitations in § 862.9.''

2. FDA is revising § 862.1775 by replacing ''The device is exempt from the premarket notification procedures in subpart E of part 807 of this chapter subject to the limitations in § 862.9'' with ''The device, when it is solely intended for use as an acid reduction of ferric ion test, a phosphotungstate reduction test, a gasometric uricase test, an ultraviolet uricase test, or an oxygen rate uricase test, is exempt from the premarket notification procedures in subpart E of part 807 of this chapter subject to the limitations in § 862.9.''

3. FDA is revising § 866.2900 by replacing ''The device is exempt from the premarket notification procedures in subpart E of part 807 of this chapter subject to the limitations in § 866.9'' with ''The device, when solely intended for use in the collection of concentrated parasites from specimens and transport, is exempt from the premarket notification procedures in subpart E of part 807 of this chapter subject to the limitations in § 866.9.''

III. Notice and Public Comment

Publication of this document constitutes final action of these changes under the Administrative Procedure Act (APA) (5 U.S.C. 553). Section 553 of the APA exempts ''rules of agency organization, procedure, or practice'' from proposed rulemaking (*i.e.,* notice and comment rulemaking). 5 U.S.C. 553(b)(3)(A). Rules are also exempt when an Agency finds ''good cause'' that notice and comment rulemaking procedures would be ''impracticable, unnecessary, or contrary to the public interest.'' 5 U.S.C. 553(b)(3)(B).

FDA has determined that this rulemaking meets the notice and comment exemption requirements in 5 U.S.C. 553(b)(3)(A) and (b)(3)(B). FDA's revisions make technical or non-substantive changes that pertain solely to ensuring that the regulations accurately reflect the exemptions made by the **Federal Register** notices and do not alter any substantive standard. FDA does not believe public comment is necessary for these minor revisions.

The APA allows an effective date less than 30 days after publication as ''provided by the agency for good cause found and published with the rule'' (5 U.S.C. 553(d)(3)). A delayed effective date is unnecessary in this case because the amendments do not impose any new regulatory requirements on affected parties. As a result, affected parties do not need time to prepare before the rule takes effect. Therefore, FDA finds good cause for the amendments to become effective on the date of publication of this action.

List of Subjects

21 CFR Part 862

Medical devices.

21 CFR Part 866

Biologics, Laboratories, Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR parts 862 and 866 are amended as follows:

PART 862—CLINICAL CHEMISTRY AND CLINICAL TOXIOLOGY DEVICES

■ 1. The authority citation for part 862 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 360*l,* 371.

■ 2. In § 862.1345, revise paragraph (b) to read as follows:

§ 862.1345 Glucose test system.

* * * * *

(b) *Classification.* Class II (special controls). The device, when it is solely intended for use as a drink to test glucose tolerance, is exempt from the premarket notification procedures in subpart E of part 807 of this chapter subject to the limitations in § 862.9.

■ 3. In § 862.1775, revise paragraph (b) to read as follows:

§ 862.1775 Uric acid test system.

* * * * *

(b) *Classification.* Class I (general controls). The device, when it is solely intended for use as an acid reduction of ferric ion test, a phosphotungstate reduction test, a gasometric uricase test, an ultraviolet uricase test, or an oxygen rate uricase test, is exempt from the premarket notification procedures in subpart E of part 807 of this chapter subject to the limitations in § 862.9.

PART 866—IMMUNOLOGY AND MICROBIOLOGY DEVICES

■ 4. The authority citation for part 866 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 360*l,* 371.

■ 5. In § 866.2900, revise paragraph (b) to read as follows:

§ 866.2900 Microbiological specimen collection and transport device.

* * * * *

(b) *Classification.* Class I (general controls). The device, when solely intended for use in the collection of concentrated parasites from specimens and transport, is exempt from the premarket notification procedures in subpart E of part 807 of this chapter subject to the limitations in § 866.9.

Dated: March 20, 2020.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2020–06278 Filed 4–1–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF STATE

22 CFR Parts 121, 123, 124, 126, and 129

[Public Notice 11078]

International Traffic in Arms Regulations: U.S. Munitions List Categories; Preliminary Injunction Ordered by a Federal District Court

AGENCY: Department of State.

ACTION: Notification of preliminary injunction.

SUMMARY: The U.S. Department of State (the Department) is issuing this document to inform the public of a preliminary injunction ordered by a Federal district court on March 6, 2020, affecting the Department.

DATES: The court order was effective March 6, 2020.

FOR FURTHER INFORMATION CONTACT: For technical questions only: Sarah Heidema, Office of Defense Trade Controls Policy, Department of State, telephone (202) 663–2809; email *DDTCPublicComments@state.gov.*

SUPPLEMENTARY INFORMATION: On January 23, 2020, the Department published a final rule in the **Federal Register** at 85 FR 3819 that amends the International Traffic in Arms Regulations (ITAR) to revise Categories I, II, and III of the U.S. Munitions List (USML) and removes certain items that no longer warrant control. On the same date, the Department of Commerce published a companion final rule in the **Federal Register** at 85 FR 4136 that makes conforming changes to the Export Administration Regulations (EAR) to control the items removed from the USML. The final rules were to be effective March 9, 2020.

On January 23, 2020, several U.S. States filed a lawsuit in the United States District Court for the Western District of Washington (Civil Action No. 2:20–cv–00111) seeking a court order to prohibit the Departments of State and Commerce from implementing or enforcing the final rules described

above. Plaintiff States subsequently filed a motion for a preliminary injunction.

On March 6, 2020, the District Court issued an ''Order Granting in Part Plaintiff States' Motion for Preliminary Injunction.'' This order states that the Department of State is enjoined ''from implementing or enforcing the regulation entitled International Traffic in Arms Regulations: U.S. Munitions List Categories I, II, and III, 85 FR 3819 (Jan. 23, 2020) insofar as it alters the status quo restrictions on technical data and software directly related to the production of firearms or firearm parts using a 3D-printer or similar equipment.''

The Department of State is complying with the terms of this order. All persons engaged in manufacturing, exporting, temporarily importing, brokering, or furnishing defense services related to ''technical data and software directly related to the production of firearms or firearm parts using a 3D-printer or similar equipment'' must continue to treat such technical data and software as subject to control on the USML. All other items addressed in the final rules were transferred from the jurisdiction of the Department and the USML to the Department of Commerce and the Commerce Control List (CCL) on March 9, 2020.

Any further guidance and updates regarding the subject litigation will be posted on the DDTC website (*pmddtc.state.gov*) on an ongoing basis.

Michael F. Miller,

Deputy Assistant Secretary of State for Defense Trade Controls.

[FR Doc. 2020–05933 Filed 4–1–20; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2020–0058]

RIN 1625–AA00

Safety Zone; Monongahela River Mile 23.8 to Mile 26.0, Pittsburgh, PA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for all navigable waters of the Monongahela River from mile 23.8 to mile 26.0. This action is necessary to protect persons, vessels, and the marine environment from potential hazards associated with power line work across the river near Elrama Power Plant, Pittsburgh, PA, during an electrical conductor pull from March 23, 2020 through April 6, 2020. Entry of persons or vessels into this zone is prohibited unless authorized by the Captain of the Port Marine Safety Unit Pittsburgh or a designated representative.

DATES: This action is effective without actual notice from March 23, 2020 until April 2, 2020. For purposes of enforcement, actual notice will be used from April 2, 2020 until April 6, 2020.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2020–0058 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email MST2 Trevor Vannatta, Waterways Management U.S. Coast Guard; telephone 412–221–0807, email *Trevor.J.Vannatta@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port Marine Safety Unit Pittsburgh
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

On November 12, 2019, the Duquesne Light Company notified the Coast Guard that it will be conducting an electrical conductor pull on March 23, 2020, in order to replace existing electrical conductor with new higher ampacity electrical conductor. The conductor pull will take place between mile 23.8 and mile 26 on the Elrama Power Plant side of the Monongahela River. In response, on February 3, 2020, the Coast Guard published a notice of proposed rulemaking (NPRM) titled USCG–2020–0058_NPRM_D8 (85 FR 5909). There we stated why we issued the NPRM, and invited comments on our proposed regulatory action related to this conductor pull project. During the comment period that ended March 4, 2020, we received no comments.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231). The Captain of the Port Pittsburgh (COTP) has determined that potential hazards from the conductor pull include danger to the navigability of the waterway due to obstruction by equipment. The Captain of the Port (COTP) Marine Safety Unit Pittsburgh has determined that potential hazards associated with ongoing work would be a safety concern for anyone transiting the river during the maintenance activity. Possible hazards include risks of injury or death from near or actual contact among working vessels and mariners traversing through the safety zone.

IV. Discussion of Comments, Changes, and the Rule

As noted above, we received no comments on our NPRM published February 3, 2020. There are no changes in the regulatory text of this rule from the proposed rule in the NPRM.

This rule establishes a safety zone from March 23, 2020 through April 6, 2020. The safety zone would cover all navigable waters from mile 23.8 to mile 26.0 on the Monongahela River near Pittsburgh, PA. The duration of the zone is intended to ensure the safety of vessels and these navigable waters before, during, and after a scheduled maintenance activity at the Elrama Power Plant. No vessel or person would be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative. A designated representative is a commissioned, warrant, or petty officer of the U.S. Coast Guard assigned to units under the operational control of USCG Marine Safety Unit Pittsburgh. They may be contacted on VHF-FM Channel 16 or by telephone at (412) 221–0807. Persons and vessels permitted to enter this safety zone must transit at their slowest safe speed and comply with all lawful instructions of the COTP or a designated representative. Breaks in the conductor pull will occur during the enforcement periods, which will allow vessels to pass through the safety zone. The COTP or a designated representative will inform the public of the enforcement period for the safety zone as well as any changes in the schedule through Broadcast Notices to Mariners (BNMs), Local Notices to Mariners (LNMs), and/or Marine Safety Information Bulletins (MSIBs) as appropriate.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the size, location, and duration of the safety zone. The zone will impact a 2.2 mile stretch of the Monongahela River and only be enforced during active maintenance periods, and vessel traffic would be able to safely transit around the safety zone. Moreover, the Coast Guard would issue a Broadcast Notice to Mariners via VHF-FM marine channel 16 about the zone, and the rule would allow vessels to seek permission to enter the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received 0 comments from the Small Business Administration on this rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone from mile 23.8 to mile 26.0 on the Monongahela River near Pittsburgh, PA from March 23, 2020 through April 6, 2020. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T08–0058 to read as follows:

§ 165.T08–0058 Safety Zone; Monongahela, Mile 23.8 to Mile 26.0, Pittsburgh, PA

(a) *Location.* The following area is a safety zone: All navigable waters of the Monongahela River from mile 23.8 to mile 26.

(b) *Effective period.* This section is effective from March 23, 2020 through April 6, 2020.

(c) *Regulations.* (1) In accordance with the general regulations in § 165.23, entry of persons and vessels into this zone is prohibited unless authorized by the Captain of the Port Marine Safety Unit Pittsburgh (COTP) or a designated representative.

(2) Persons or vessels requiring entry into or passage through the zone must request permission from the COTP or a designated representative. The COTP's representative may be contacted at (412) 221–0807 or on VHF-FM Channel 16.

(3) All persons and vessels shall comply with the instructions of the COTP or a designated representative. Designated COTP representatives include United States Coast Guard commissioned, warrant, and petty officer.

(d) *Information broadcasts.* The COTP or a designated representative will inform the public through Local Notice to Mariners (LNMs), Broadcast Notices to Mariners (BNMs), and/or Marine Safety Information Bulletins (MSIBs), as appropriate.

Dated: March 24, 2020.

A.W. Demo,

Commander, U.S. Coast Guard, Captain of the Port Marine Safety Unit Pittsburgh.

[FR Doc. 2020–06450 Filed 4–1–20; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA–HQ–OAR–2018–0195: FRL–10006–75–OAR]

RIN 2060–AU00

Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In this final action, the U.S. Environmental Protection Agency (EPA) is amending the 2015 New Source Performance Standards (NSPS) for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces. This final action removes certain requirements from the rule for pellet fuel to meet certain specifications regarding density, size, and content, while retaining a provision in the rule that requires EPA-approved third-party organizations to specify minimum requirements as part of the pellet fuel certification process. Also, in this final action, the EPA is deciding not to make changes that it had proposed that would have allowed a sell-through period for Step 1-certified residential wood heating devices that are manufactured before the May 2020 compliance date to be sold at retail after that date. Finally, this preamble provides a clarification of how the ''prohibited fuels'' provision applies to pallets.

DATES: The final rule is effective on April 2, 2020.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2018–0195. All documents in the docket are listed on the *https://www.regulations.gov/* website. Although listed, some information is not publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *https://www.regulations.gov/,* or in hard copy at the EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Eastern Standard Time (EST), Monday through Friday. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: For questions about this final action, contact Rochelle Boyd, Sector Policies and Programs Division (Mail Code D243–02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–1390; fax number: (919) 541–4991; and email address: *boyd.rochelle@epa.gov.* For information about the applicability of the NSPS to a particular entity, contact Rafael Sanchez, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, WJC South Building (Mail Code 2227A), 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 564–7028; and email address: *sanchez.rafael@epa.gov.*

SUPPLEMENTARY INFORMATION:

Preamble acronyms and abbreviations. We use multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

CAA Clean Air Act
CFR Code of Federal Regulations
CRA Congressional Review Act
EPA Environmental Protection Agency
NAICS North American Industry Classification System
NPRM notice of proposed rulemaking
NSPS New Source Performance Standards
NTTAA National Technology Transfer and Advancement Act
OMB Office of Management and Budget
PFI Pellet Fuels Institute
PRA Paperwork Reduction Act
RFA Regulatory Flexibility Act
RTC Response to Comment
RWH Residential Wood Heater
UMRA Unfunded Mandates Reform Act
U.S.C. United States Code

Organization of this document. The information in this preamble is organized as follows:

I. General Information
A. Does this action apply to me?
B. Where can I get a copy of this document and other related information?
C. Judicial Review
II. Background
III. Public Comments
IV. What is included in the final rule?
A. Pellet Fuel Minimum Requirements
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A. What are the affected facilities?
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D. What are the benefits?
VI. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
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E. Unfunded Mandates Reform Act (UMRA)
F. Executive Order 13132: Federalism
G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
H. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
J. National Technology Transfer and Advancement Act (NTTAA)
K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
L. Congressional Review Act (CRA)

I. General Information

A. Does this action apply to me?

Regulated entities. Categories and entities potentially regulated by this action are shown in Table 1 of this preamble.

TABLE 1—SOURCE CATEGORIES AFFECTED BY THIS FINAL ACTION

Source category	NAICS code [1]	Examples of regulated entities
Residential Wood Heating	333414	Manufacturers, owners, and operators of wood heaters, pellet heaters/stoves, and hydronic heaters.
	333415	Manufacturers, owners, and operators of forced-air furnaces.
Testing Laboratories	541380	Testers of wood heaters, pellet heaters/stoves, and hydronic heaters.
Retailers	423730	Warm air heating and air-conditioning equipment and supplies merchant wholesalers.

[1] North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this final action for the source category listed. This table lists the types of entities that the EPA is now aware could potentially be affected by this action. Other types of entities not listed in the table could also be regulated. To determine whether you are regulated by this action, you should carefully examine the applicability criteria found in the final rule. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this preamble, your delegated authority, or your EPA Regional representative listed in the General Provisions at 40 CFR 60.4.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this final action is available on the internet. Following signature by the EPA Administrator, the EPA will post a copy of this final action at *https://www.epa.gov/residential-wood-heaters.* Following publication in the **Federal Register**, the EPA will post the **Federal Register** version of the final action and key technical documents at this same website.

C. Judicial Review

Under section 307(b)(1) of the Clean Air Act (CAA), judicial review of this final rule is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit by June 1, 2020. Moreover, under section 307(b)(2) of the CAA, the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by the EPA to enforce these requirements. Section 307(d)(7)(B) of the CAA further provides that ''[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review.'' This section also provides a mechanism for the EPA to convene a proceeding for reconsideration, ''[i]f the person raising an objection can demonstrate to the EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.'' Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, Room 3000, WJC South Building, 1200 Pennsylvania Ave. NW, Washington, DC 20460, with a copy to both the person(s) listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. EPA, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

II. Background

The statutory background for the Residential Wood Heaters (RWH) source category is provided in the proposed rule for this final action (83 FR 61577, November 30, 2018) and will not be repeated here. Residential wood heaters were originally listed under CAA section 111(b) on February 18, 1987 (52 FR 5065). Under section 111 of the CAA,''Standards of Performance for New Stationary Sources,'' the EPA lists categories of sources that, in the EPA's judgment, cause or contribute significantly to air pollution, which may reasonably be anticipated to endanger public health or welfare pursuant to CAA section 111(b)(1)(A), and then promulgates federal standards of performance for new sources within such categories under CAA section 111(b)(1)(B). The original NSPS for RWH (40 CFR part 60, subpart AAA) was proposed on February 18, 1987 (52 FR 4994), and promulgated on February 26, 1988 (53 FR 5859) (1988 RWH NSPS). The 1988 RWH NSPS focused on adjustable burn rate wood heaters, including cord wood heaters and some pellet fuel heaters. The NSPS was amended in 1998 to address an issue related to certification testing (63 FR 64869).

On February 3, 2014, the EPA proposed revisions to the NSPS (79 FR 6330) and promulgated revisions on March 16, 2015 (80 FR 13672) (2015 RWH NSPS). The final 2015 RWH NSPS updated the 1988 RWH NSPS emission limits, eliminated exemptions over a broad suite of wood heating devices,[1] and updated test methods and the certification process. The 2015 RWH NSPS broadened the applicability of the 1988 RWH NSPS to specifically include all single burn rate wood heaters and all pellet fuel heaters. The 2015 RWH NSPS also added a new subpart (40 CFR part 60, subpart QQQQ) that covers new wood burning hydronic heaters and new forced-air furnaces. Hydronic heaters and forced-air furnaces represent a small portion of total U.S. wood heating device manufactured output in recent years. The market share for each of the categories considered in this final rule are as follows: Wood and pellet stoves were 96 percent, hydronic heaters were less than 1 percent and forced air furnaces were 3 percent of the total

[1] As used in this preamble, the term ''wood heaters'' refers to all appliances covered in 40 CFR part 60, subpart AAA, and the terms ''hydronic heaters'' and ''forced-air furnaces'' refer to appliances covered in 40 CFR part 60, subpart QQQQ. Also, in this action, the term ''wood heating device(s)'' refers to all units regulated by the 2015 RWH NSPS (40 CFR part 60, subparts AAA and QQQQ).

market in 2017–2019 in terms of units sold.[2]

The 2015 RWH NSPS also directs owners of pellet fuel or wood chip heaters to burn only fuel that meet certain minimum requirements. In the 2015 final rule preamble (80 FR 13682), the EPA stated: ''For pellet-fueled appliances, operation according to the owner's manual includes operation only with pellet fuels that are specified in the owner's manual. Manufacturers must only specify graded and licensed pellets that meet certain minimum requirements.''

The RWH source category is different from most NSPS source categories in that it regulates mass-produced residential consumer appliance products, rather than industrial facilities. Thus, important elements in determining the best system of emission reduction as specified in CAA section 111(a)(1) include the costs and environmental impacts on consumers of delaying production while wood heating devices with those systems are designed, tested, field evaluated, and certified. Section 111(b)(1)(B) of the CAA requires that the standards be effective upon the effective date of the NSPS. Considering these factors, in the 2015 RWH NSPS final rule, the EPA took a two-step compliance approach, in which certain Step 1 standards became effective in May 2015 and more stringent Step 2 standards would become effective 5 years later, in May 2020.

As the May 15, 2020, Step 2 compliance date approached, representatives from the manufacturing and retail industry expressed concern that a substantial number of retailers have either limited or stopped their purchases of Step 1-certified wood heating devices from the manufacturers due to concerns they may not be able to sell these devices before the May 2020 Step 2 compliance date and would, therefore, be left with unsalable inventory. Manufacturers also expressed concern that these reductions in sales would result in reduced earnings needed to develop Step 2-compliant model lines.

On November 30, 2018, the EPA proposed (83 FR 61574) to amend 40 CFR part 60, subpart QQQQ, by allowing a ''sell-through'' provision to give retailers additional time after the May 2020 effective date of the Step 2 standard to sell Step 1-compliant hydronic heaters and forced-air furnaces remaining in their inventory. The EPA also took comment on whether to amend 40 CFR part 60, subpart AAA for wood heaters and pellet fuel heaters to provide a similar sell-through period. In addition, the EPA took comment on whether the minimum pellet fuel requirements in the 2015 RWH NSPS should be retained or revised.

III. Public Comments

Public comments on the 2018 proposed rule and the EPA's responses to these comments are addressed in a separate Response to Comment (RTC) document, available in the docket for this action at Docket ID No. EPA–HQ–OAR–2018–0195.

IV. What is included in the final rule?

A. Pellet Fuel Minimum Requirements

This section explains the final actions being taken and the rationale for these actions.

1. Final Requirements for Pellet Fuel Burned in Residential Wood Heating Devices

Certification tests for pellet-burning wood heating devices require that pellet fuels be made of wood with certain minimum quality requirements to ensure consistent operation for every certification test. These requirements have the added benefit to manufacturers of minimizing emissions during certification testing.

The 2015 RWH NSPS requires owners of wood heating devices that are certified to burn pellet fuels to burn only pellets that have been specified in the owner's manual and graded under a licensing agreement with a third-party organization approved by the EPA. The Pellet Fuels Institute (PFI), ENplus, and CANplus are the current EPA-approved third-party organizations for this purpose (additional organizations may apply to the Administrator for approval). See the pellet fuel requirements stated in 40 CFR 60.532(e) and 40 CFR 60.5474(e). Based on these requirements, the EPA concluded that a certified pellet fuel heater's performance in a consumer's home would be consistent with the heater's performance in the laboratory using the EPA's certification test methods. Under the provisions of the 2015 RWH NSPS, a pellet manufacturer is not obligated to produce pellets that meet the pellet fuel requirements, but operators and manufacturers of pellet fuel heaters in the United States are prohibited from using pellets that do not meet the pellet fuel requirements. The pellet fuel requirements, in addition to ensuring consistency with certification testing, were intended to safeguard against emissions hazardous to human health and the environment when the pellets are burned in pellet fuel heaters operated in the home by consumers.

Since publication of the 2015 RWH NSPS, interested parties have raised issues concerning the pellet fuel requirements. First, these parties have questioned the EPA's authority to promulgate the pellet fuel requirements. The comments and issues related to the EPA's authority to promulgate the pellet fuel requirements are summarized and addressed in the RTC document available at Docket ID No. EPA–HQ–OAR–2018–0195. The EPA has considered these comments and concluded that the Agency has the authority to set pellet fuel requirements for the reasons discussed in the RTC.

Second, interested parties have questioned the need for the pellet fuel requirements (because they are already part of the requirements imposed by the third-party organizations that must grade pellets under 40 CFR 60.532(e) and 40 CFR 60.5474(e)) and commented that the specific minimum fuel requirements will inhibit innovations that may improve pellet fuel heater operation and decrease emissions.

After reviewing public comments on these issues, the EPA has determined 40 CFR part 60, subparts AAA and QQQQ, should be revised to delete the following seven pellet fuel minimum requirements which are currently found at 40 CFR 60.532(e) and 40 CFR 60.5474(e):

1. Density: Consistent hardness and energy content with a minimum density of 38 pounds/cubic foot;
2. Dimensions: Maximum length of 1.5 inches and diameter between 0.230 and 0.285 inches;
3. Inorganic fines: Less than or equal to 1 percent;
4. Chlorides: Less than or equal to 300 parts per million by weight;
5. Ash content: No more than 2 percent;
6. Contains no demolition or construction waste; and
7. Trace metals: Less than 100 milligrams per kilogram.

The EPA is retaining the prohibition that was stated in the eighth pellet fuel minimum requirement that stated pellet fuel must not contain any of the prohibited fuels in 40 CFR 60.532(f) and 40 CFR 60.5474(f). Sections 40 CFR 60.532(f) and 40 CFR 60.5474(f) state that no person is permitted to burn any of the following materials in an affected wood heating device:

1. Residential or commercial garbage;
2. Lawn clippings or yard waste;

[2] *Wood Appliance Sales Summary,* dated March 10, 2020, is available in the docket for this final action (*https://www.regulations.gov/docket?D=EPA-HQ-OAR-2018-0195*).

3. Materials containing rubber, including tires;
4. Materials containing plastic;
5. Waste petroleum products, paints or paint thinners, or asphalt products;
6. Materials containing asbestos;
7. Construction or demolition debris;
8. Paper products, cardboard, plywood, or particleboard. The prohibition against burning these materials does not prohibit the use of fire starters made from paper, cardboard, sawdust, wax, and similar substances for the purpose of starting a fire in an affected wood heater;
9. Railroad ties, pressure-treated wood or pallets (40 CFR 60.532(f)(9)) and Railroad ties or pressure-treated lumber (40 CFR 60.5474(f)(9));
10. Manure or animal remains;
11. Salt water driftwood or other previously salt water saturated materials;
12. Unseasoned wood;
13. Any materials that are not included in the warranty and owner's manual for the subject wood heater; or
14. Any materials that were not included in the certification tests for the subject wood heater.

The EPA has decided to leave the prohibited fuels list in the regulation for clarity and continuity as these materials are referred to in the provisions regarding ''prohibited fuel types'' in 40 CFR 60.532(f) and 60.5474(f). Unlike the requirements in 40 CFR 60.532(e)(1) through (7) and 60.5474(e)(1) through (7) that we are removing, which regulated the characteristics of the pellet fuel, this prohibited fuels list impacts all fuel types used in all wood heating devices. Retaining this provision assures that these specified materials will be not be used as a source of fuel and prevents the burning of trash, plastics, yard waste, and other unsuitable materials. For most of the items on the prohibited fuels list, it is widely-recognized and widely-accepted that the burning of such material increases emissions regardless of the type of wood heating device. Moreover, the burning of anything not included in the warranty and owner's manual can damage a stove and thereby cause increased emissions, as well as potential safety issues, because the stove is unable to perform as designed. It should also be noted that the PFI's Quality Assurance/Quality Control Handbook recognizes that the 2015 RWH NSPS ''. . . contain provisions regarding ''prohibited fuel types'' in 40 CFR 60.532(f) and 60.5474(f). To the extent that these requirements apply to pellet fuel manufacturers, these materials are considered prohibited for the purpose of the PFI Residential/Commercial Densified Fuel Standards Program.''[3] Finally, as discussed above, one purpose that is served in removing the seven minimum requirements discussed above is to provide flexibility for innovation. Keeping the requirement that pellets not contain any of the prohibited fuels does not inhibit innovation and ensures that these materials are not included in pellets.

The EPA is implementing this prohibition in 40 CFR 60.532(e) and 40 CFR 60.5474(e) by including the requirement that the grading done by third-party organizations include a certification by the third-party organization that the pellets do not contain and are not manufactured from any of the prohibited fuels listed in 40 CFR 60.532(f) and 40 CFR 60.5474(f).

Finally, interested persons have asked questions about how the prohibitions in 40 CFR 60.532(f)(12) and 40 CFR 60.5474(f)(12) against ''unseasoned wood'' (which is defined in 40 CFR 60.531 and 40 CFR 60.5473 as wood with an average moisture content at or above 20 percent) applies to pellet fuel. The EPA is clarifying that the determination of moisture content is made at the end of the manufacturing process, and the prohibition on unseasoned wood in 40 CFR 60.532(f)(12) and 40 CFR 60.5474(f)(12) does not prohibit the use of unseasoned wood earlier in the pellet fuel manufacturing process. The EPA notes that the approved third-party organizations determine moisture content as part of their examination and grading of the pellet fuels. For example, PFI's current *Standard Specification for Residential/Commercial Densified Fuel* requires a limit of ≤8.0 percent moisture for a premium pellet.[4]

2. Rationale for the Final Pellet Fuel Requirements

As explained in the EPA's November 2016 *Supplemental Response to Pellet Fuels Institute's Comments for Remand of the Record Based on Existing Docket for Residential Wood Heaters New Source Performance Standards,*[5] the EPA has the authority to impose minimum pellet fuel requirements. As such, for the reasons stated above, the Agency has decided to retain the list of prohibited fuels in 40 CFR 60.532(f) and 40 CFR 60.5474(f), which applies not only to pellets, but to all wood fuels burned in residential wood heating devices subject to this rule. However, the EPA has decided to remove the first seven requirements currently listed in 40 CFR 60.532(e)(1) through (7) and in 40 CFR 60.5474(e)(1)–(7). The Agency has made this determination for the following reasons.

First, minimum requirements/specifications are already part of PFI's and other third-parties' requirements and will, therefore, be imposed by the retained rule requirement that the pellets be certified by PFI or another EPA-approved third-party. For example, PFI's current *Standard Specifications for Residential/Commercial Densified Fuel* includes requirements on density, dimensions, fines, chlorides, ash, and trace metals that are similar to those of the 2015 RWH NSPS.[6] The remaining requirement—that the pellets contain no demolition or construction waste—is already contained in the list of prohibited fuels in 40 CFR 60.532(f) and 40 CFR 60.5474(f), which the Agency is not altering in this action. The EPA recognizes that PFI and the other approved third-party organizations might revise their current specifications to alter or remove these requirements. On that point, the EPA notes that, first, the third-party organizations had pellet fuel specifications prior to the EPA's 2015 promulgation of the minimum pellet fuel requirements (and, in fact, the EPA's 2015 minimum requirements relied heavily on the third-party specifications). Further, the third-party organizations' specifications now are as protective as the pellet fuel specifications that the EPA promulgated in 2015 and, although the EPA recognizes that the third-party organizations may revise their specifications to reflect innovations (as discussed below), there is no reason to conclude that revisions by the third-party organizations will make their specifications less protective because of the EPA's action to remove the minimum requirements in 40 CFR 60.532(e) and 40 CFR 60.5474(e).[7]

[3] *Pellet Fuels Institute Residential/Commercial Densified Fuel QA/QC Handbook,* Section 6.7, Status November 9, 2018.

[4] PFI's November 2018 pellet fuel specifications are available in the docket for this final action (*https://www.regulations.gov/docket?D=EPA-HQ-OAR-2018-0195*) and at *https://www.pelletheat.org/assets/docs/2018/2018_PFI_Standard%20Specification.pdf.*

[5] The EPA's November 2016 *Supplemental Response to Pellet Fuel Institute's Comments for Remand of the Record Based on Existing Docket for Residential Wood Heaters New Source Performance Standards* is available on *Regulations.gov* in the docket for the 2015 RWH NSPS at *https://www.regulations.gov/document?D=EPA-HQ-OAR-2009-0734-1805.*

[6] PFI's November 2018 pellet specifications are available in the docket for this final action (*https://www.regulations.gov/docket?D=EPA-HQ-OAR-2018-0195*) and at *https://www.pelletheat.org/assets/docs/2018/2018_PFI_Standard%20Specification.pdf.*

[7] The EPA acknowledges that it previously held the view that having the minimum requirements

Continued

Furthermore, if one or more of the third-party organizations were to revise their specifications in a way that could lead to increases in emissions, the EPA could conduct a rulemaking to re-impose some or all of the minimum requirements that we are taking out in this final rule (and could add additional minimum requirements that are not currently in the rule).

Second, as noted by multiple commenters, the minimum pellet fuel requirements serve to codify a static list of requirements, until an updated rule is promulgated. Innovations may occur in the interim regarding pellet fuel heater technology, which may require an update to the list of pellet specifications, prior to when a revised rule is promulgated. The removal of the minimum requirements from 40 CFR 60.532(e)(1) through (7) and 40 CFR 60.5474(e)(1) through (7) will allow third-party organizations to update their pellet fuel specifications in step with developments in pellet fuel heater technology, so as to not delay or preclude innovation that may improve pellet fuel heater operation and decrease emissions. Thus, this final action will ensure that the RWH regulations are protective, and at the same time do not unnecessarily preclude, inhibit, or delay technological innovation.

3. Clarification Concerning the Burning of Pallets and the Use of Pallets in Manufacturing Pellet Fuel

Interested parties have asked the EPA to clarify the scope of the prohibition on ''pallets'' in 40 CFR 60.532(f)(9). Although the EPA, in this final action, is not making any change to the regulatory text concerning pallets, in this preamble, we are clarifying two aspects of how the prohibited fuels list applies to: (a) The burning of pallets; and (b) the use of pallets in the manufacture of pellet fuel.

First, the prohibition on ''pallets'' in 40 CFR 60.532(f)(9) bans only the use of *pressure-treated* pallets, because ''pallets'' is part of the phrase ''pressure-treated wood or pallets'' and the term ''pressure-treated'' is intended to apply both to ''wood'' and to ''pallets.''

Second, pallets that are contaminated with any of the materials listed as a prohibited fuel type in 40 CFR 60.532(f) may not be burned or used to manufacture pellets because such burning or use is barred by the specific subsection that bans the contaminating material. For example, manufacturing pellets from pallets contaminated with ''waste petroleum products, paint or paint thinners, or asphalt products'' (*i.e.,* the language in 40 CFR 60.532(f)(5)) is prohibited by 40 CFR 60.532(f)(5). As a second example, pallets that are contaminated with asbestos may not be used to make pellets, due to the prohibition against ''materials containing asbestos'' in 40 CFR 60.532(f)(6).

B. Decision Regarding Promulgating New Sell-Through Provisions

Based on the comments and data received on the November 30, 2018, proposal (83 FR 61574), the EPA has decided to take final action on the proposed sell-through provisions by not promulgating such provisions. To justify a sell-through, the Agency first requires sufficient data from manufacturers and retailers demonstrating why a sell-through is needed. Insufficient data were provided by manufacturers and retailers to justify a sell-through, especially in light of the fact that in every residential wood heating device category, there are model lines certified to meet the Step 2 standards that are already available, and have been available for considerable time, which supports the conclusion that the Step 2 standards were achievable. For example, the record shows that, as of March 2018 (over 2 years before the May 2020 Step 2 deadline), there were Step 2-certified model lines available for each category of wood heating device (83 FR 61578). According to the EPA Certified Wood Heater Database,[8] as of March 5 2020, there were 196 Step 2-certified wood heater model lines and pellet fuel heater model lines compared with 405 Step 1-certified model lines. This means that Step 2 model lines represented 33 percent of all certified wood heater and pellet fuel heater model lines. Likewise, as of March 5, 2020, there were 13 Step 2-certified hydronic heater model lines compared with 99 Step 1-certified hydronic heater model lines (or 12 percent). An additional 12 of the 99 Step 1-certified hydronic heater model lines would meet the Step 2 limit, but need to re-test to be certified. Assuming all these model lines are certified, Step 2 hydronic heater model lines will represent 22 percent of all certified model lines. Finally, as of March 5, 2020, there were two Step 2-certified forced-air furnace model lines compared with 18 Step 1-certified model lines (or 10 percent).

By contrast, manufacturers did not provide the Agency with information showing that any manufacturers have tried but failed to develop Step 2 model lines. Thus, there is no support in the record showing that manufacturers could not develop Step 2 models in time to: (1) Have Step 2 models for sale as retailers reduced or discontinued their purchase of Step 1 models; and (2) allow for manufacturers and retailers to replace their inventories of Step 1 models with Step 2 models in advance of the May 2020 deadline. In short, the record shows that some manufacturers have tried and succeeded in developing Step 2 model lines but contains no adequately supported examples of manufacturers that have tried and failed to develop Step 2 model lines.

Finally, it is important to note that manufacturers have had since May 2015 to develop Step 2-compliant wood heating devices, and that retailers have had since May 2015 to manage their inventory of Step 1-compliant wood heating devices and replace them with Step 2-compliant wood heating devices ahead of the May 2020 deadline. The record shows that Step 2-compliant model lines have been available to retailers for a considerable amount of time. For example, there were wood heater, pellet fuel heater, hydronic heater, and forced-air furnace models that were Step 2-certified starting in 2017[9] and, as of March 20, 2018, more than 2 years before the May 2020 compliance deadline, there were 78 wood heater model lines (44 pellet fuel heaters and 34 wood heaters), nine hydronic heater model lines and one forced-air furnace model line certified to Step 2 (83 FR 61578). Further, some model lines have emissions significantly below the Step 2 standard, showing not only that it is possible to achieve the Step 2 standard but also that manufacturers can develop models well below the Step 2 standard.[10] Based on this record, the Agency has insufficient grounds to conclude that a sell-through period is needed and to change the established NSPS and allow a sell-through.

Regarding the data necessary to justify a sell-through, the EPA solicited this information in the notice of proposed rulemaking (NPRM) by posing multiple

stated in the regulatory text was needed to prevent them from changing without EPA action. See EPA's November 2016 *Supplemental Response to Pellet Fuel Institute's Comments for Remand of the Record Based on Existing Docket for Residential Wood Heaters New Source Performance Standards* (Docket ID Item No. EPA–HQ–OAR–2009–0734–1805), at 8. For the reasons discussed above in section IV.A, the EPA's policy view on this matter has changed.

[8] The EPA Certified Wood Heater Database is available at *https://www.epa.gov/compliance/epa-certified-wood-heater-database.*

[9] See the EPA list of certified room heaters and central heaters at *https://cfpub.epa.gov/oarweb/woodstove/index.cfm?fuseaction=app.about.*

[10] See *id.,* which shows a significant number of Step 2-certified models with emission rates well below the Step 2 standard for both room heaters and central heaters.

questions to stakeholders while requesting comment on the proposed 2-year sell-through, including, but not limited to, the following queries:

- Whether retailers are currently declining to purchase Step 1-compliant wood heating devices and how widespread is this reduction in purchases;
- The cost or other impacts that retailers could have on manufacturers if they decline to purchase Step 1-compliant wood heating devices;
- The typical period of time between when a retailer purchases a wood heating device and when the device is sold to the consumer;
- What period of time would be sufficient for retailers to sell their inventory of Step 1-compliant heaters;
- The number of Step 1-compliant wood heating devices that are currently in production and the number that are being designed for Step 2 compliance that have not yet been EPA-certified;
- The number of Step 2 wood heating devices that are currently Step 2-certified; and
- How far in advance of the current May 2020 Step 2 compliance date manufacturers will need to submit their EPA certification applications to meet the standard as well as manufacture, market, and distribute their products without disruption to their business.

While manufacturers and retailers made qualitative statements asserting economic harm from stranded inventory if a retail sell-through was not allowed, these statements were not supported by contextual data. In fact, commenters did not submit sufficient data to the Agency in response to the NPRM's solicitations, and in particular, provided insufficient data showing a percentage decrease in sales approaching 2020 relative to previous years and/or the percentage of Step 1 inventory that would be stranded without a sell-through since the promulgation of the 2015 RWH NSPS.

As we explained previously, as of March 5, 2020, there were two Step 2-certified forced-air furnace model lines. Because both model lines tested for certification using an (Agency-approved) alternative test method, the Agency undertook a separate action making this alternative method broadly applicable to model lines that are electronically or thermostatically controlled.[11] This means that forced-air furnace manufacturers may use this test method without submitting a model-specific rationale to the EPA requesting permission to use the method. We expect that this broadly applicable alternative test method for electronically or thermostatically controlled model lines will allow more forced-air furnaces—both small and large model lines—to certify to the Step 2 standard and become available to consumers in the near term.

In addition, we note that, as mentioned by several commenters, the estimated monetized forgone benefits of the proposed sell-through exceed the estimated cost savings to manufacturers and retailers by a factor of 10 to 20. As shown in the supplemental Regulatory Impact Analysis for the proposal, the annual monetized fine particulate matter-related forgone health benefits of the proposed amendments, from 2019–2022, were $100 million to $230 million (2016 dollars) at a 3-percent discount rate as compared to annual cost savings to manufacturers and retailers estimated at $8.3 million (2016 dollars). These large net forgone benefits (forgone benefits − cost savings) were another consideration in our decision to not change the 2015 RWH NSPS to allow a sell-through period with respect to Step 2. Additional information and assessment regarding potential impacts are provided in a support document titled: *A Qualitative Assessment of Impacts of Not Including a Sell-Through for Wood Heating Devices, Wood Heaters NSPS—Draft Support Document*—by EPA/OAQPS technical staff dated. March 10, 2020.

V. Summary of Cost, Environmental, and Economic Impacts

A. What are the affected facilities?

The baseline for measuring quantifiable impacts to affected facilities is the 2015 RWH NSPS (80 FR 13672). No impacts are anticipated against this baseline because we are not changing the compliance deadline required by the 2015 RWH NSPS. We also do not anticipate any quantifiable impacts from eliminating the seven pellet fuel requirements in 40 CFR 60.532(e) and 40 CFR 60.5474(e) because minimum requirements/specifications are already part of third-parties' requirements and will, therefore, be imposed by the retained rule requirement that the pellets be certified by an EPA-approved third-party. However, the change to the pellet fuel minimum requirements will revise the regulatory requirements to which manufacturers, testing labs, owners, and operators of pellet-burning wood heaters, pellet-burning hydronic heaters, and pellet-burning forced air furnaces are subject.

B. What are the air quality impacts?

This final action makes a clarification to the prohibited fuel types, removes from the rule requirements for pellet fuel to meet certain minimum requirements regarding density, size, and content, and instead relies on EPA-approved third-party organizations to specify minimum requirements as part of the pellet fuel certification process. As discussed in section IV.A.2 of this preamble, we anticipate that the EPA-approved third-party organizations will continue to specify the same or similar minimum requirements as required in the 2015 RWH NSPS. The EPA will continue to monitor these requirements to determine if any changes to the regulations are needed. In addition to our review of these requirements, as part of our ongoing collaborations with many stakeholders (including states, citizen groups, wood heater manufacturers, and other industry groups), we expect that any concerns related to third-party requirements would be brought promptly to the EPA's attention. Also, in this final action, the EPA is deciding not to finalize changes that would have allowed a sell-through period for Step 1-certified residential wood heating devices that are manufactured before the May 2020 compliance date to be sold at retail after that date. In this final action, the Agency is not making any change or otherwise taking any final action with respect to the original compliance schedule for both manufacturers and retailers set forth in the 2015 RWH NSPS (80 FR 13672). Accordingly, there are no air quality impacts associated with this final action. The air quality impacts associated with the RWH NSPS were discussed in detail in the March 16, 2015, final RWH NSPS and supporting documentation.

C. What are the cost and economic impacts?

We did not estimate the cost and economic impacts of the change in pellet fuel requirements, because we do not anticipate any quantifiable cost or economic impacts to affected facilities. Manufacturers, testing labs, owners, and operators of pellet-burning wood heaters, pellet-burning hydronic heaters, and pellet-burning forced air furnaces will still be required to burn only pellets graded under a licensing agreement with an EPA-approved third-party.

D. What are the benefits?

We did not estimate the benefits of the change in pellet fuel requirements, because we expect the benefits, forgone or otherwise, to be minimal. Such

[11] See *https://www.epa.gov/emc/broadly-applicable-approved-alternative-test-methods#ATLs* for ALT–134, available at: *https://www.epa.gov/sites/production/files/2019-08/documents/l.s._bilodeau_steel_product_manufacturing_8-19-2019_0.pdf.*

benefits are dependent on emissions reduction changes associated with this final action and, as discussed in section V.B of this preamble, we do not anticipate emissions reduction changes relative to the 2015 RWH NSPS (80 FR 13672).

VI. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at: *https://www.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review because it raises novel legal and policy issues. Any changes made in response to OMB recommendations have been documented in the docket.

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

This action is not expected to be subject to Executive Order 13771 because this final rule is expected to result in no more than *de minimis* costs or savings.

C. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities in the existing regulations and has assigned OMB control number 2060–0161 for 40 CFR part 60, subpart AAA, and OMB control number 2060–0693 for 40 CFR part 60, subpart QQQQ. This action is believed to result in no changes to the information collection requirements of the 2015 RWH NSPS, so that the information collection estimate of project cost and hour burden from the 2015 final rule have not been revised.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden, or otherwise has a positive economic effect on the small entities subject to the rule. This final rule will not impose any new requirements on any entities because it does not impose any additional regulatory requirements relative to those specified in the 2015 RWH NSPS. We have, therefore, concluded that this action will have no net regulatory burden for all directly regulated small entities.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538. The action imposes no enforceable duty on any state, local, or tribal governments or the private sector.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. This rule will not impose any requirements on tribal governments. Thus, Executive Order 13175 does not apply to this action. Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes, the EPA will provide outreach through the National Tribal Air Association and will offer consultation to tribal officials.

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

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because the EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. Because this final action will not result in air quality impacts relative to the 2015 RWH NSPS, as noted in section V.B of this preamble, we do not anticipate a change in risk to anyone, including children. Further, as noted in the preamble to the 2015 RWH NSPS, the EPA does not believe that the environmental health risks or safety risks addressed by the 2015 RWH NSPS presents a disproportionate risk to children based on distributional assessments of effects from residential wood smoke emissions (see 80 FR 13700).

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

This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

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

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). As noted in the preamble to the 2015 RWH NSPS, the EPA believes that the human health or environmental risk addressed by the 2015 RWH NSPS will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income, or indigenous populations from residential wood smoke emissions (see 80 FR 13701). Because this final action does not have air quality impacts relative to the 2015 RWH NSPS, as discussed in section V.B of this preamble, it will not alter the EPA's prior findings that, on a nationwide basis, cancer risks due to residential wood smoke emissions among disadvantaged population groups generally are lower than the risks for the general population due to residential wood smoke emissions.

L. Congressional Review Act (CRA)

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

List of Subjects in 40 CFR Part 60

Environmental protection, Administrative Practice and Procedure.

Dated: March 11, 2020.

Andrew R. Wheeler,

Administrator.

For the reasons set forth in the preamble, the EPA amends 40 CFR part 60 as follows:

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

■ 1. The authority citation for part 60 continues to read as follows:

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

Subpart AAA—Standards of Performance for New Residential Wood Heaters

■ 2. Section 60.532 is amended by revising paragraph (e) to read as follows:

§ 60.532 What standards and associated requirements must I meet and by when?

* * * * *

(e) *Pellet fuel requirements.* Operators of wood heaters that are certified to burn pellet fuels may burn only pellets that have been specified in the owner's manual and graded under a licensing agreement with a third-party organization approved by the EPA (including a certification by the third-party organization that the pellets do not contain, and are not manufactured from, any of the prohibited fuels in paragraph (f) of this section). The Pellet Fuels Institute, ENplus, and CANplus are initially deemed to be approved third-party organizations for this purpose, and additional organizations may apply to the Administrator for approval.

* * * * *

Subpart QQQQ—Standards of Performance for New Residential Hydronic Heaters and Forced-Air Furnaces

■ 3. Section 60.5474 is amended by revising paragraph (e) to read as follows:

§ 60.5474 What standards and requirements must I meet and by when?

* * * * *

(e) *Pellet fuel requirements.* Operators of wood central heaters, including outdoor residential hydronic heaters, indoor residential hydronic heaters, and residential forced-air furnaces, that are certified to burn pellet fuels may burn only pellets that have been specified in the owner's manual and graded under a licensing agreement with a third-party organization approved by the EPA (including a certification by the third-party organization that the pellets do not contain, and are not manufactured from, any of the prohibited fuels in paragraph (f) of this section). The Pellet Fuels Institute, ENplus, and CANplus are initially deemed to be approved third-party organizations for this purpose, and additional organizations may apply to the Administrator for approval.

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[FR Doc. 2020–05961 Filed 4–1–20; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 92

[Docket No. FWS–R7–MB–2020–0008; FXMB12610700000–201–FF07M01000]

RIN 1018–BE24

Migratory Bird Subsistence Harvest in Alaska; Region-Specific Regulations

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Interim rule.

SUMMARY: The U.S. Fish and Wildlife Service (Service or we) is establishing regulations for the subsistence harvest of migratory birds in Alaska for the 2020 season and beyond. These regulations allow for the continuation of customary and traditional subsistence uses of migratory birds in Alaska and prescribe regional information on when and where the harvesting of birds may occur. These regulations were developed under a co-management process involving the Service, the Alaska Department of Fish and Game, and Alaska Native representatives and are subject to public review. Based on any comments received, we may revise this interim rule. The Alaska subsistence harvest season begins on April 2, 2020.

DATES: This rule is effective April 2, 2020. We will accept comments received or postmarked on or before April 13, 2020.

ADDRESSES: You may submit comments on this interim rule by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments to Docket No. FWS–R7–MB–2020–0008.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS–R7–MB–2020–0008; U.S. Fish and Wildlife Service; 5275 Leesburg Pike, MS: JAO/1N; Falls Church, VA 22041–3803.

We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see Public Comments, below, for more information).

FOR FURTHER INFORMATION CONTACT: Cheryl A. Graves, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Mail Stop 201, Anchorage, AK 99503; (907) 786–3887.

SUPPLEMENTARY INFORMATION:

Public Comments

We solicit comments or suggestions from the public. To ensure that any action resulting from this interim rule will be as accurate and as effective as possible, we request that you send relevant information for our consideration. The comments that will be most useful and likely to influence our decisions are those that you support by quantitative information or studies and those that include citations to, and analyses of, the applicable laws and regulations. Please make your comments as specific as possible and explain the basis for them.

You must submit your comments and materials concerning this interim rule by one of the methods listed above in **ADDRESSES**. We will not accept comments sent by email or fax or to an address not listed in **ADDRESSES**. If you submit a comment via *http://www.regulations.gov,* your entire comment—including any personal identifying information, such as your address, telephone number, or email address—will be posted on the website. When you submit a comment, the system receives it immediately. However, the comment will not be publicly viewable until we post it, which might not occur until several days after submission.

If you mail or hand-carry a hardcopy comment directly to us that includes personal information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. All comments and materials we receive will be available for public inspection in two ways:

(1) Via *http://www.regulations.gov.* Search for FWS–R7–MB–2020–0008, which is the docket number for this rulemaking.

(2) In-person viewing by appointment, during normal business hours, at the Division of Migratory Bird Management, MS: MB, 5275 Leesburg Pike, Falls Church, VA 22041–3803; (703) 358–1714.

Background

The Migratory Bird Treaty Act of 1918 (MBTA, 16 U.S.C. 703 *et seq.*) was enacted to conserve certain species of migratory birds and gives the Secretary of the Interior the authority to regulate the harvest of these birds. The law further authorizes the Secretary to issue regulations to ensure that the

indigenous inhabitants of the State of Alaska may take migratory birds and collect their eggs for nutritional and other essential needs during seasons established by the Secretary ''so as to provide for the preservation and maintenance of stocks of migratory birds'' (16 U.S.C. 712(1)).

The take of migratory birds for subsistence uses in Alaska occurs during the spring and summer, during which timeframe the sport harvest of migratory birds is not allowed. Regulations governing the subsistence harvest of migratory birds in Alaska are located in title 50 of the Code of Federal Regulations (CFR) in part 92. These regulations allow for the continuation of customary and traditional subsistence uses of migratory birds and prescribe regional information on when and where the harvesting of birds in Alaska may occur.

The migratory bird subsistence harvest regulations are developed cooperatively. The Alaska Migratory Bird Co-Management Council consists of the U.S. Fish and Wildlife Service, the Alaska Department of Fish and Game, and representatives of Alaska's Native population. The Council's primary purpose is to develop recommendations pertaining to the subsistence harvest of migratory birds.

Need for Interim Rule

This rulemaking is necessary because the general regulations in 50 CFR part 92 state that the specific regulations pertaining to migratory bird season openings and closures by the Alaska region are subject to public review and approval. The regulations in 50 CFR part 92, subpart D, were last amended April 3, 2019 (84 FR 12946).

The provisions of this interim rule are the current regulations at § 92.31, with a minor administrative change discussed below. Because the public had the opportunity to comment on these regulations in three prior rulemaking actions, the public also had an opportunity to comment on the substance of the current rule. The public comments received on these rulemaking actions were addressed in the final rules:

Proposed Rule	Final Rule
February 10, 2017 (82 FR 10316)	April 4, 2017 (82 FR 16298).
February 1, 2018 (83 FR 4623)	March 30, 2018 (83 FR 13684).
Interim Rule	**Affirmation of Interim Rule**
April 3, 2019 (84 FR 12946)	July 30, 2019 (84 FR 36840).

The provisions proposed for § 92.31 in all of these prior rulemaking actions were the same, with two exceptions: (1) Each year we changed the year referenced in the introductory paragraph to reflect the current year, and (2) in the 2019 rule, we removed an obsolete reference to a hunting season closure for cackling Canada goose at § 92.31(b)(3). (We should have removed this reference in the 2017 rule, but the error was inadvertently retained in the 2017 and 2018 rules.) In this document, the only change we are making to the current regulations in § 92.31 is to remove the reference to ''2019'' in the introductory paragraph.

The retirements of two key Service employees and the inability to fill these positions in a timely manner resulted in unforeseen time constraints on the rulemaking process, thereby preventing publication of a proposed rule for this rulemaking. To respect the subsistence hunt of many rural Alaskans, either for their cultural or religious exercise, sustenance, and/or materials for cultural use (*e.g.,* handicrafts), the Department of the Interior finds that it is in the public interest to publish this interim rule. Without this rule, the subsistence hunting of migratory birds in Alaska during the normal season, which begins on April 2 each year, would be in violation of the MBTA.

The Administrative Procedure Act at 5 U.S.C. 553(b) allows an agency to make a rule effective without a proposed rule for good cause if notice and public procedure are ''contrary to the public interest.'' We find that the delay associated with public comment on a proposed rule to open the Alaska migratory bird subsistence harvest by April 2 is contrary to the public interest, and therefore the ''good cause'' exception under 5 U.S.C. 553(b) applies.

In addition, we have good cause to waive the standard 30-day effective date for this interim rule consistent with 5 U.S.C. 553(d)(3), and this rule will, therefore, take effect on the date specified above in **DATES**. This rule relieves restrictions on Alaskans seeking to conduct subsistence harvest during the season that begins April 2, 2020. Delaying the effective date for 30 days would have detrimental effects on them and on the businesses that support this activity.

While we are taking these steps to ensure Alaskan subsistence hunters do not violate the MBTA, we invite public comment as described above in **DATES** and **ADDRESSES**. After we consider any comments received, we may revise this interim rule.

Future Rulemaking

By removing any reference to a specific year, this rulemaking action will establish general provisions in § 92.31. Consequently, this action establishes ''baseline'' provisions for the region-specific regulations governing the subsistence harvest of migratory birds in Alaska. Our intent is that the regulations at § 92.31 will no longer need to be promulgated annually. Instead, in the future we will issue a proposed rule pertaining to § 92.31 only when we have determined that changes to specific provisions are appropriate and necessary. This change in process, consistent with the MBTA and the 1996 Protocol with Canada amending the 1916 Convention, will allow the Service to conserve resources in years when we expect no changes to § 92.31.

The Co-management Council recommended changes to the subsistence harvest regulations in 2018 and 2019. Therefore, following the conclusion of this rulemaking action, we will publish a proposed rule to seek public comment on revisions to § 92.31 recommended by the Co-management Council. However, in future years, if the Co-management Council does not recommend any changes to the region-specific regulations, then we will not engage in rulemaking pertaining to the Alaska subsistence harvest regulations.

Compliance With the MBTA and the Endangered Species Act

The Service has dual objectives and responsibilities for authorizing a subsistence harvest while protecting migratory birds and endangered and threatened species. Although these objectives continue to be challenging, they are not irreconcilable, provided that: (1) Regulations continue to protect endangered and threatened species; (2) measures to address documented threats are implemented; and (3) the

subsistence community and other conservation partners commit to working together.

Mortality, sickness, and poisoning from lead exposure have been documented in many waterfowl species, including threatened spectacled and Steller's eiders. While lead shot has been banned nationally for waterfowl hunting since 1991, Service staff have documented significant availability of lead shot in waterfowl rounds for sale in communities on the Yukon–Kuskokwim Delta and North Slope. The Service will work with partners to increase our education, outreach, and enforcement efforts to ensure that subsistence waterfowl hunting is conducted using nontoxic shot.

Conservation Under the MBTA

We have monitored subsistence harvest for more than 25 years through the use of household surveys in the most heavily used subsistence harvest areas, such as the Yukon–Kuskokwim Delta. Based on our monitoring of the migratory bird species and populations taken for subsistence, we find that this rule will provide for the preservation and maintenance of migratory bird stocks as required by the MBTA. Communication and coordination between the Service, the Co-management Council, and the Pacific Flyway Council have allowed us to set harvest regulations to ensure the long-term viability of the migratory bird stocks. In addition, Alaska migratory bird subsistence harvest rates have continued to decline since the inception of the subsistence-harvest program, reducing concerns about the program's consistency with the preservation and maintenance of stocks of migratory birds.

Endangered Species Act Consideration

Spectacled eiders (*Somateria fischeri*) and the Alaska-breeding population of Steller's eiders (*Polysticta stelleri*) are listed as threatened species under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*). Their migration and breeding distribution overlap with areas where the spring and summer subsistence migratory bird hunt is open in Alaska. Neither species is included in the list of subsistence migratory bird species at 50 CFR 92.22; therefore, both species are closed to subsistence harvest. The Service notes that progress is being made with other eider conservation measures, including partnering with the North Slope Migratory Bird Task Force, for increased waterfowl-hunter awareness, continued enforcement of the regulations, and in-season verification of the harvest. Moreover, under 50 CFR 92.21 and 92.32, the Service may implement emergency closures, if necessary, to protect Steller's eiders or any other endangered or threatened species or migratory bird population.

Section 7 of the ESA requires the Secretary of the Interior to review other programs administered by the Department of the Interior and utilize such programs in furtherance of the purposes of the ESA. The Secretary is further required to insure that any action authorized, funded, or carried out by the Department of the Interior is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of critical habitat.

The Alaska Division of Migratory Bird Management conducted an intra-agency consultation with the Service's Fairbanks Fish and Wildlife Field Office on this interim rule. The consultation was completed with a biological opinion that concluded the interim rule and conservation measures are not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. Therefore, we have determined that this rule complies with the ESA.

Required Determinations

Executive Order 13771—Reducing Regulation and Controlling Regulatory Costs

This rule is not subject to the requirements of Executive Order 13771 (82 FR 9339, February 3, 2017) because this rule establishes harvest limits related to routine hunting or fishing.

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). A regulatory flexibility analysis is not required. Accordingly, a Small Entity Compliance Guide is not required. This rule legalizes a pre-existing subsistence activity, and the resources harvested will be consumed.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

(a) Will not have an annual effect on the economy of $100 million or more. It legalizes and regulates a traditional subsistence activity. It will not result in a substantial increase in subsistence harvest or a significant change in harvesting patterns. The commodities that will be regulated under this rule are migratory birds. This rule deals with legalizing the subsistence harvest of migratory birds and, as such, does not involve commodities traded in the marketplace. A small economic benefit from this rule derives from the sale of equipment and ammunition to carry out subsistence hunting. Most, if not all, businesses that sell hunting equipment in rural Alaska qualify as small businesses. We have no reason to believe that this rule will lead to a disproportionate distribution of benefits.

(b) Will not cause a major increase in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions. This rule does not deal with traded commodities and, therefore, will not have an impact on prices for consumers.

(c) Will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This rule deals with the harvesting of wildlife for personal consumption. It will not regulate the marketplace in any way to generate substantial effects on

the economy or the ability of businesses to compete.

Unfunded Mandates Reform Act

We have determined and certified under the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*) that this rule will not impose a cost of $100 million or more in any given year on local, State, or tribal governments or private entities. The rule will not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act is not required.

Participation on regional management bodies and the Co-management Council requires travel expenses for some Alaska Native organizations and local governments. In addition, they assume some expenses related to coordinating involvement of village councils in the regulatory process. Total coordination and travel expenses for all Alaska Native organizations are estimated to be less than $300,000 per year. In a notice of decision (65 FR 16405; March 28, 2000), we identified 7 to 12 partner organizations (Alaska Native nonprofits and local governments) to administer the regional programs. The Alaska Department of Fish and Game also incurs expenses for travel to Co-management Council and regional management body meetings. In addition, the State of Alaska would be required to provide technical staff support to each of the regional management bodies and to the Co-management Council. Expenses for the State's involvement may exceed $100,000 per year, but should not exceed $150,000 per year. When funding permits, we make annual grant agreements available to the partner organizations and the Alaska Department of Fish and Game to help offset their expenses.

Takings (Executive Order 12630)

Under the criteria in Executive Order 12630, this rule will not have significant takings implications. This rule is not specific to particular land ownership, but applies to the harvesting of migratory bird resources throughout Alaska. A takings implication assessment is not required.

Federalism (Executive Order 13132)

Under the criteria in Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. We discuss effects of this rule on the State of Alaska in the *Unfunded Mandates Reform Act* section, above. We worked with the State of Alaska to develop these regulations. Therefore, a federalism summary impact statement is not required.

Civil Justice Reform (Executive Order 12988)

The Department, in promulgating this rule, has determined that it will not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of Executive Order 12988.

Government-to-Government Relations With Native American Tribal Governments

We implemented the amended treaty with Canada with a focus on local involvement. The treaty calls for the creation of management bodies to ensure an effective and meaningful role for Alaska's indigenous inhabitants in the conservation of migratory birds. According to the Letter of Submittal, management bodies are to include Alaska Native, Federal, and State of Alaska representatives as equals. They develop recommendations for, among other things: seasons and bag limits, methods and means of take, law enforcement policies, population and harvest monitoring, education programs, research and use of traditional knowledge, and habitat protection. The management bodies involve village councils to the maximum extent possible in all aspects of management. To ensure maximum input at the village level, we required each of the 12 participating regions to create regional management bodies consisting of at least one representative from the participating villages. The regional management bodies meet twice annually to review and/or submit proposals to the Statewide body.

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), E.O. 13175, and 512 DM 2, we are evaluating possible effects on Federally recognized Indian tribes. The provisions in this interim rule are the same as those set forth in the last 3 years' rulemaking actions, during which we consulted with the tribes. This rulemaking process is collaborative with the Tribes, and we will continue to consult with the Tribes as we revise or affirm the interim rule.

Paperwork Reduction Act of 1995 (PRA)

This rule does not contain any new collections of information that require Office of Management and Budget (OMB) approval under the PRA (44 U.S.C. 3501 *et seq.*). OMB has previously approved the information collection requirements associated with voluntary annual household surveys used to determine levels of subsistence take and assigned OMB Control Number 1018—0124, (expires August 31, 2022). You may view the information collection requirements at *http://www.reginfo.gov/public/do/PRAMain.* 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 Consideration (42 U.S.C. 4321 et seq.)

The regulations and options are considered in a February 2020 environmental assessment, ''Managing Migratory Bird Subsistence Hunting in Alaska: Hunting Regulations for the 2020 Spring/Summer Harvest.'' Copies are available from the person listed under **FOR FURTHER INFORMATION CONTACT** or at *http://www.regulations.gov.*

Energy Supply, Distribution, or Use (Executive Order 13211)

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This is not a significant regulatory action under this Executive order; it allows only for traditional subsistence harvest and improves conservation of migratory birds by allowing effective regulation of this harvest. Further, this rule is not expected to significantly affect energy supplies, distribution, or use. Therefore, a Statement of Energy Effects is not required.

List of Subjects in 50 CFR Part 92

Hunting, Treaties, Wildlife.

Regulation Promulgation

For the reasons set out in the preamble, we amend title 50, chapter I, subchapter G, of the Code of Federal Regulations as follows:

PART 92—MIGRATORY BIRD SUBSISTENCE HARVEST IN ALASKA

■ 1. The authority citation for part 92 continues to read as follows:

Authority: 16 U.S.C. 703–712.

§ 92.31 [Amended]

■ 2. Amend § 92.31 introductory text by removing ''2019''.

George Wallace,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2020–07034 Filed 4–1–20; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 217

[Docket No. 200323–0085]

RIN 0648–BJ37

Take of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Rocky Intertidal Monitoring Surveys Along the Oregon and California Coasts

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

ACTION: Final rule, notification of issuance.

SUMMARY: NMFS Office of Protected Resources, upon request from the University of California Santa Cruz's Partnership for Interdisciplinary Studies of Coastal Oceans (UCSC/PISCO), hereby issues regulations and a Letter of Authorization to govern the unintentional taking of marine mammals incidental to rocky intertidal monitoring surveys along the Oregon and California coasts over the course of five years. These regulations, which allow for the issuance of Letters of Authorization (LOA) for the incidental take of marine mammals during the described activities and specified timeframes, prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, as well as requirements pertaining to the monitoring and reporting of such taking.

DATES: Effective from April 12, 2020 through April 11, 2021.

ADDRESSES: Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* In case of problems accessing these documents, please call the contact listed below.

FOR FURTHER INFORMATION CONTACT: Dwayne Meadows, Ph.D., Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Regulatory Action

NMFS received an application from the UCSC/PISCO requesting five-year regulations and authorization to take multiple species of marine mammals. Take would occur by Level B harassment incidental to visual disturbance of pinnipeds during research activities and use of research equipment. Please see Background below for definitions of harassment. These regulations establish a framework under the authority of the MMPA (16 U.S.C. 1361 *et seq.*) to allow for the issuance of a LOA for the take of marine mammals incidental to the UCSC/PISCO's rocky intertidal research activities in Oregon and California.

Legal Authority for the Proposed Action

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1371(a)(5)(A)) directs the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region for up to five years if, after notice and public comment, the agency makes certain findings and issues regulations that set forth permissible methods of taking pursuant to that activity and other means of effecting the ''least practicable adverse impact'' on the affected species or stocks and their habitat (see the discussion below in the Mitigation section), as well as monitoring and reporting requirements. Section 101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I, provide the legal basis for issuing this rule containing five-year regulations, and for any subsequent LOAs. As directed by this legal authority, this proposed rule contains mitigation, monitoring, and reporting requirements.

Summary of Major Provisions Within the Regulations

Following is a summary of the major provisions of these regulations regarding UCSC/PISCO's rocky intertidal research activities. These measures include:

- Required implementation of mitigation to minimize impact to pinnipeds and avoid disruption to dependent pups including several measures to approach haulouts cautiously to minimize disturbance, especially when pups are present; and
- Required monitoring of the research areas to detect the presence of marine mammals before initiating surveys.

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made, regulations are issued, and notice is provided to the public.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to, in shorthand, as ''mitigation''); and ensure that the requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth.

The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

Summary of Request

On August 12, 2019, NMFS received a request from UCSC/PISCO for a proposed rule and LOA to take marine mammals incidental to rocky intertidal monitoring surveys along the Oregon and California coasts. After a series of revisions, the application was deemed adequate and complete on October 8, 2019. UCSC/PISCO's request is for take of a small number of California sea lions (*Zalophus californianus*), Harbor seals (*Phoca vitulina richardii*), Northern elephant seals (*Mirounga angustirostris*), and Steller sea lions (*Eumetopias jubatus*), by Level B harassment only. Neither UCSC/PISCO nor NMFS expects serious injury or mortality, or Level A harassment, to result from this activity. On January 15, 2020 NMFS issued a notice of proposed rulemaking in the **Federal Register** (85 FR 2369) soliciting

public comments for 30 days. All public comments were considered in developing this final rule.

NMFS previously issued seven incidental harassment authorizations (IHAs) to UCSC/PISCO for this work (77 FR 72327, December 5, 2012; 78 FR 79403, December 30, 2013; 79 FR 73048, December 9, 2014; 81 FR 7319, February 11, 2016; 82 FR 12568, March 6, 2017; 83 FR 11696, March 16, 2018; 84 FR 17784, April 26, 2019). UCSC/PISCO complied with all the requirements (*e.g.,* mitigation, monitoring, and reporting) of the previous IHAs and information regarding their monitoring results may be found in the Potential Effects of the Specified Activities on Marine Mammals and Their Habitat and Estimated Take sections of the proposed rule (85 FR 2369, January 15, 2020).

Comments and Responses

We received no public comments pertaining to the proposed rule nor did we receive any recommendations from the Marine Mammal Commission.

Changes From Proposed to Final Rule

There are minor changes from the proposed rule to the final rule. While more detail can be found later in this document, we summarize the changes here.

In the ''Levels of Pinniped Behavioral Disturbance'' definition table (7) in the Monitoring and Reporting section and the parallel Table 1 within the regulations, we corrected a typographical error in the tables. Also in the Monitoring and Reporting section we neglected to include an existing requirement of UCSC/PISCO's current IHA, that project field biologists will function as marine mammal observers (MMO) which will remain as part of these regulations.

Description of Proposed Activity

Overview

UCSC/PISCO proposes to continue rocky intertidal monitoring work that has been ongoing for over 20 years. UCSC/PISCO focuses on understanding the nearshore ecosystems of the U.S. west coast through a number of interdisciplinary collaborations. The program integrates long-term monitoring of ecological and oceanographic processes at dozens of sites with experimental work in the lab and field. Research is conducted throughout the year along the California and Oregon coasts and will continue indefinitely. Researchers accessing and conducting research activities on the sites may occasionally cause behavioral disturbance (or Level B harassment) of four pinniped species. UCSC/PISCO expects that the disturbance to pinnipeds from the research activities will be minimal and will be limited to Level B harassment.

Dates and Duration

UCSC/PISCO's research is conducted throughout the year. Most sites are sampled one to two times per year over a 1 to 2-day period (4–6 hours per site) during a negative low tide series (when tides are lower than the average). Due to the large number of research sites, scheduling constraints, the necessity for negative low tides and favorable weather/ocean conditions, exact survey dates are variable and difficult to predict. Some sampling may occur in all months of the calendar year. Over the course of this five-year authorization, UCSC/PISCO expects approximately 300 days of survey effort. UCSC/PISCO's current IHA expires April 11, 2020.

Specific Geographic Region

Sampling sites occur along the California and Oregon coasts. Community Structure Monitoring survey sites range from Ecola State Park near Cannon Beach, Oregon to Government Point located northwest of Santa Barbara, California. Biodiversity survey sites extend from Ecola State Park south to Cabrillo National Monument in San Diego County, California. Exact locations of sampling sites can be found in Table 1 and the maps of UCSC/PISCO's application.

Detailed Description of Specific Activity

A detailed description of UCSC/PISCO's planned activities was provided in our notice of proposed rulemaking (85 FR 2369; January 15, 2020) and is not repeated here. No changes have been made to the specified activities described therein.

Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history, of the potentially affected species. Additional information regarding population trends and threats may be found in NMFS's Stock Assessment Reports (SARs; *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS's website (*https://www.fisheries.noaa.gov/find-species*).

Table 1 lists all species with expected potential for occurrence at survey sites in California and Oregon and summarizes information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known. For taxonomy, we follow Committee on Taxonomy (2018). PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS's SARs). While no mortality is anticipated or authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS's stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS's U.S. 2018 Pacific Marine Mammal SARs (Carretta *et al.* 2019). All values presented in Table 1 are the most recent available at the time of publication and are available in the 2018 SARs (available online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/draft-marine-mammal-stock-assessment-reports*).

TABLE 1—MARINE MAMMALS POTENTIALLY PRESENT IN THE VICINITY OF THE STUDY AREAS

Common name	Scientific name	Stock	ESA/MMPA status; strategic (Y/N)[1]	Stock abundance (CV, N_{min}, most recent abundance survey)[2]	PBR	Annual M/SI[3]
Order Carnivora—Superfamily Pinnipedia						
Family Otariidae (eared seals and sea lions):						
California sea lion	*Zalophus californianus*	U.S.	-; N	257,606 (n/a; 233,515; 2014).	14,011	>320
Steller sea lion	*Eumetopias jubatus*	Eastern U.S.	-; N	41,638 (n/a; 41,638; 2015).	2,498	108
Family Phocidae (earless seals):						
Harbor seal	*Phoca vitulina richardii*	California/Oregon/Washington.	-; N	30,968 (0.157; 27,348; 2012 [CA])/. UNK (n/a; n/a [OR/WA][4].	1,641	43
Northern elephant seal	*Mirounga angustirostris*	California	-; N	179,000 (n/a; 81,368; 2010).	4,882	8.8

[1] Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] NMFS marine mammal stock assessment reports online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments.* CV is coefficient of variation; Nmin is the minimum estimate of stock abundance. In some cases, CV is not applicable.

[3] These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

[4] The most recent abundance estimate is >8 years old, there is no current estimate of abundance available for this stock.

All species that could potentially occur in the proposed survey areas are included in Table 1. All four species temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur, and we have proposed authorizing it. Detailed descriptions of these species were provided in our notice of proposed rulemaking (85 FR 2369; January 15, 2020) and are not repeated here. No new information is available.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

We provided discussion of the potential effects of the specified activity on marine mammals and their habitat in our **Federal Register** notice of proposed rulemaking (85 FR 2369; January 15, 2020) and it is not repeated here. The proposed rule included a summary and discussion of the ways that components of the specified activity may impact marine mammals and their habitat. The Estimated Take section later in this final rule includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The Negligible Impact Analysis and Determination section considers the content of the Negligible Impact Analysis and Determination section and the material it references, the Estimated Take section, and the Mitigation section to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks.

Estimated Take

This section provides an estimate of the number of incidental takes proposed for authorization through this IHA, which will inform both NMFS' consideration of ''small numbers'' and the negligible impact determination.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would be by Level B harassment only, in the form of disruption of behavioral patterns for individual marine mammals resulting from exposure to researchers. Based on the nature of the activity, Level A harassment is neither anticipated nor authorized. As described previously, no mortality or serious injury is anticipated or authorized for this activity. Below we describe how the potential take is estimated.

Marine Mammal Occurrence

In this section we provide information about the presence, density, or group dynamics of marine mammals that will inform the take calculations. Take estimates are based on historical marine mammal observations from 2013–2018 at each site from previous UCSC/PISCO survey activities. Marine mammal observations are done as part of research site observations, which include notes on physical and biological conditions at the site, completed on each study day. From 2013–2018, observations were categorized on a four point scale:

- 0 = observation by researchers from a distance, no reaction by pinniped;
- 1 = pinniped reacted to presence of researchers with movement <1 meter;
- 2 = pinniped reacted to presence of researchers with short movement of 1–3 meters; and
- 3 = pinniped flushed to the water or moved >3 meters in retreat.

A marine mammal is counted as an ''encounter'' (at least level 0 on the above scale) if it is seen on access ways to the site, at the site, or immediately up-coast or down-coast of the site, regardless of whether that animal was considered a ''take'' under the MMPA. Marine mammals in the water immediately offshore are also recorded. Under the above scale, a ''take'' was only considered to occur during level 2 or 3 observations under the above scale. The maximum number of marine mammals, by species, seen at any given time throughout the sampling day (categories 0 through 4) is recorded at the conclusion of sampling. Any other relevant information, including the location of a marine mammal relevant to the site, any unusual behavior, and the presence of pups is also noted.

Take Calculation and Estimation

The observations described above formed the basis from which researchers with extensive knowledge and experience at each site estimated the actual number of marine mammals that may be subject to take. Take estimates for each species for which take would be authorized were based on the following equation:

Take estimate per survey site = number of expected animals per site * number of planned survey events per survey site.

For take estimates, UCSC/PISCO summed the total number of marine mammals, by species, ''encountered'' at each research site during the period from 2013 to 2018 (*i.e.,* all observations score 0 to 4 on the above scale). We then summed the number of sampling events where marine mammals were encountered at each site and calculated the average number of encounters per event (see Tables 2–5). These are the ''number of expected animals per site'' for the equation above. Note the number of these historical encounters that qualified as Level B take was less than 40 percent of all encounters (see application Section 6), so take estimates are expected to be conservative and consider potential temporal variation. The maximum number of planned survey events per survey site is listed in Tables 2–5. For Steller sea lions, the one sighting from 2009 was used in this analysis. The take estimate by species per survey site calculation results can also be found in Tables 2–5.

TABLE 2—DATA AND CALCULATIONS TO ESTIMATE PROPOSED TAKE OF HARBOR SEALS

Site	Encounters/event	Expected maximum # of survey events 2020–2024	Calculated take 2020–2024
Andrew Molera	1	10	10
Boat House	5	10	50
Bob Creek	1	5	5
Bodega	9	5	45
Cat Rock	2	1	2
Cayucos	6	10	60
Del Mar Landing	5	1	5
Eel Point	1	2	2
Enderts	1	5	5
False Klamath Cove	1	5	5
Fitzgerald Marine Reserve	46	1	46
Fogarty Creek	8	5	40
Franklin Point	6	5	30
Government Point	38	10	380
Hopkins	14	10	140
Horseshoe Cove	6	1	6
Kibesillah Hill	8	5	40
Launcher Beach	10	1	10
MacKerricher	2	1	2
Mal Coombs	5	1	5
Mill Creek	1	10	10
Occulto	3	10	30
Old Home Beach	10	1	10
Partington Cove	2	10	20
Pebble Beach	16	5	80
Piedras Blancas	3	10	30
Point Arena	2	1	2
Point Lobos	1	10	10
Point Pinos	7	5	35
Point Sierra Nevada	1	10	10
Sandhill Bluff	1	10	10
Scott Creek	1	10	10
Sea Ranch	2	5	10
Sea Ridge	10	1	10
Shell Beach	1	10	10
Shelter Cove	4	5	20
Soberanes	2	10	20
Stillwater	9	10	90
Stornetta	3	5	15
Terrace Point	1	10	10
Treasure Island	6	1	6
Vista del Mar	12	10	120
Waddell	1	10	10
Total	N/A	264	1466

TABLE 3—DATA AND CALCULATIONS TO ESTIMATE PROPOSED TAKE OF CALIFORNIA SEA LIONS

Site	Encounters/event	Expected maximum # of survey events 2020–2024	Calculated Take 2020–2024
Bodega	3	5	15
Cape Arago	21	5	105
Crook Point	3	1	3
Cuyler Harbor	1	1	1
Del Mar Landing	1	1	1
Eel Point	2	2	4
Enderts	3	5	15
False Klamath Cove	2	5	10
Franklin Point	2	5	10
Government Point	11	10	110
Kibesillah Hill	2	5	10
Old Stairs	2	1	2
Piedras Blancas	25	10	250
Point Lobos	1	10	10
Point Pinos	1	5	5
Point Sierra Nevada	1	10	10
Purisma	1	5	5
Shell Beach	1	10	10
Soberanes	3	10	30
Stairs	1	10	10
Stornetta	2	5	10
Terrace Point	1	10	10
Total	N/A	131	636

TABLE 4—DATA AND CALCULATIONS TO ESTIMATE PROPOSED TAKE OF ELEPHANT SEALS

Site	Encounters/event	Expected maximum # of survey events 2020–2024	Calculated take 2020–2024
Ano Nuevo	5	1	5
Chimney Rock	3	4	12
Crook Point	2	1	2
Cuyler Harbor	2	1	2
Government Point	3	10	30
Harmony Headlands	1	5	5
Mill Creek	1	10	10
Piedras Blancas	8	10	80
Point Sierra Nevada	1	10	10
Total	N/A	50	156

TABLE 5—DATA AND CALCULATIONS TO ESTIMATE PROPOSED TAKE OF STELLER SEA LIONS

Site	Encounters/event	Expected maximum # of survey events 2020–2024	Calculated take 2020–2024
Cape Arago	5	5	25
Total	N/A	5	25

Individual species' totals for each survey site were summed to arrive at a total estimated take number for the entire project. This is the take that is authorized here (Table 6).

TABLE 6—AUTHORIZED LEVEL B TAKE AND PERCENT OF MMPA STOCK TO BE TAKEN

Species	Proposed authorized take	
	Level B	% of population
Harbor Seal	1466	2.6

TABLE 6—AUTHORIZED LEVEL B TAKE AND PERCENT OF MMPA STOCK TO BE TAKEN—Continued

Species	Proposed authorized take	
	Level B	% of population
California sea lion	636	0.25
Northern elephant seal	156	0.09
Steller Sea Lion	25	0.06

Mitigation

In order to issue regulations and an LOA under Section 101(a)(5)(A) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), and the likelihood of effective implementation (probability implemented as planned), and;

(2) The practicability of the measures for applicant implementation, which may consider such things as cost and impact on operations.

UCSC/PISCO will implement several mitigation measures to reduce potential take by Level B (behavioral disturbance) harassment. Measures are listed below.

- Researchers will observe a site from a distance for at least five minutes, using binoculars if necessary, to detect any marine mammals prior to approach to determine if mitigation is required (*i.e.,* site surveys will not be conducted if other pinnipeds are present, researchers will approach with caution, walking slowly, quietly, and close to the ground to avoid surprising any hauled out individuals and to reduce flushing/stampeding of individuals).
- Researchers will avoid pinnipeds along access ways to sites by locating and taking a different access way. Researchers will keep a safe distance from and not approach any marine mammal while conducting research, unless it is absolutely necessary to flush a marine mammal in order to continue conducting research (*i.e.,* if a site cannot be accessed or sampled due to the presence of pinnipeds).
- Researchers will avoid making loud noises (*i.e.,* using hushed voices) and keep bodies low to the ground (crouched) in the visual presence of pinnipeds.
- Researchers will monitor the offshore area for predators (such as killer whales and white sharks) and avoid flushing of pinnipeds when predators are observed in nearshore waters. Note that UCSC/PISCO has never observed an offshore predator while researchers were present at any of the survey sites.
- Intentional approach will not occur if dependent pups are present to avoid mother/pup separation and trampling of pups. Staff shall reschedule work at sites where pups are present, unless other means of accomplishing the work can be done without causing disturbance to mothers and dependent pups.
- Researchers will promptly vacate sites at the conclusion of sampling.

The primary method of mitigating the risk of disturbance to pinnipeds, which will be in use at all times, is the selection of judicious routes of approach to study sites, avoiding close contact with pinnipeds hauled out on shore, and the use of extreme caution upon approach. Each visit to a given study site will last for approximately 4–6 hours, after which the site is vacated and can be re-occupied by any marine mammals that may have been disturbed by the presence of researchers. Also, by arriving before low tide, worker presence will tend to encourage pinnipeds to move to other areas for the day before they haul out and settle onto rocks at low tide.

Based on our evaluation of the applicant's proposed measures, NMFS has determined that these mitigation measures provide the means effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Monitoring and Reporting

In order to issue regulations and an LOA for an activity, Section 101(a)(5)(A) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area. Effective reporting is critical both to compliance as well as to ensure that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas);

• Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;

• How anticipated responses to stressors impact either: (1) Long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;

• Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and

• Mitigation and monitoring effectiveness.

UCSC/PISCO will contribute to the knowledge of pinnipeds in California and Oregon by noting observations of: (1) Unusual behaviors, numbers, or distributions of pinnipeds, such that any potential follow-up research can be conducted by the appropriate personnel; (2) tag-bearing carcasses of pinnipeds, allowing transmittal of the information to appropriate agencies and personnel; and (3) rare or unusual species of marine mammals for agency follow-up. Project field biologists will function as marine mammal observers (MMO). Minimum qualifications for MMOs include an undergraduate degree in biology.

Proposed monitoring requirements in relation to UCSC/PISCO's rocky intertidal monitoring will include observations made by the applicant. Information recorded will include species counts (with numbers of pups/juveniles) of animals present before approaching, numbers of observed disturbances (based on the scale below), and descriptions of the disturbance behaviors during the monitoring surveys, including location, date, and time of the event. For consistency, any reactions by pinnipeds to researchers will be recorded according to a three-point scale shown in Table 7. Note that only observations of disturbance Levels 2 and 3 should be recorded as takes.

TABLE 7—LEVELS OF PINNIPED BEHAVIORAL DISTURBANCE

Level	Type of response	Definition
1	Alert	Seal head orientation or brief movement in response to disturbance, which may include turning head towards the disturbance, craning head and neck while holding the body rigid in a u-shaped position, changing from a lying to a sitting position, or brief movement of less than twice the animal's body length.
2	Movement	Movements in response to the source of disturbance, ranging from short withdrawals at least twice the animal's body length to longer retreats over the beach, or if already moving a change of direction of greater than 90 degrees.
3	Flush	All retreats (flushes) to the water.

In addition, observations regarding the number and species of any marine mammals observed, either in the water or hauled out, at or adjacent to a site, are recorded as part of field observations during research activities. Information regarding physical and biological conditions pertaining to a site, as well as the date and time that research was conducted are also noted. This information will be incorporated into a monitoring report for NMFS and raw data will be provided.

If at any time the specified activity clearly causes the take of a marine mammal in a manner prohibited by these regulations or LOA, such as an injury (Level A harassment), serious injury, or mortality, UCSC/PISCO shall immediately cease the specified activities and report the incident to the Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinator, NMFS. The report must include the following information:

(1) Time and date of the incident;

(2) Description of the incident;

(3) Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, and visibility);

(4) Description of all marine mammal observations in the 24 hours preceding the incident;

(5) Species identification or description of the animal(s) involved;

(6) Fate of the animal(s); and

(7) Photographs or video footage of the animal(s) (if equipment is available).

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with UCSC/PISCO to determine what measures are necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. UCSC/PISCO may not resume the activities until notified by NMFS via letter, email, or telephone.

In the event that UCSC/PISCO discovers an injured or dead marine mammal and determines that the cause of the injury or death is unknown and the death is relatively recent (*e.g.,* in less than a moderate state of decomposition), UCSC/PISCO shall immediately report the incident to the Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinator, NMFS. The report must include the same information identified in the paragraph above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with UCSC/PISCO to determine whether additional mitigation measures or modifications to the activities are appropriate.

In the event that an injured or dead marine mammal is discovered and it is determined that the injury or death is not associated with or related to the activities authorized in the regulations and LOA (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), UCSC/PISCO shall report the incident to the Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinator, NMFS, within 24 hours of the discovery. UCSC/PISCO shall provide photographs, video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network. Activities may continue while NMFS reviews the circumstances of the incident.

A draft annual report shall be submitted to NMFS Office of Protected Resources within 90 days after the conclusion of each annual field season. The final annual report after year five may be included as part of the final report (see below). The report will include a summary of the information gathered pursuant to the monitoring requirements set forth above and in the LOA. A final annual report shall be submitted to the Director of the NMFS Office of Protected Resources within 30 days after receiving comments from NMFS on the draft annual report. If no comments are received from NMFS, the draft annual report will be considered the final report.

A draft final report shall be submitted to NMFS Office of Protected Resources within 60 days after the conclusion of

the fifth year. A final report shall be submitted to the Director of the NMFS Office of Protected Resources and to the NMFS West Coast Regional Administrator within 30 days after receiving comments from NMFS on the draft final report. If no comments are received from NMFS, the draft final report will be considered the final report.

Monitoring Results From Previously Authorized Activities

UCSC/PISCO complied with the mitigation and monitoring that were required under the prior IHAs issued from 2013 to 2019. In compliance with those IHAs, they submitted reports detailing the activities and marine mammal monitoring they conducted. The IHAs required UCSC/PISCO to conduct counts of pinnipeds present at study sites prior to approaching the sites and to record species counts and any observed reactions to the presence of the researchers. These monitoring results were discussed above in the Estimated Take section.

Based on the results from the monitoring reports, we conclude that these results support our original findings that the mitigation measures set forth in the recent IHAs effected the least practicable impact on the species or stocks. There were no stampede events during these years and most disturbances were Level 1 and 2 from the disturbance scale (Table 3), meaning the animal did not fully flush but observed or moved slightly in response to researchers. Those that did fully flush to the water did so slowly. Most of these animals tended to observe researchers from the water and then re-haul out farther up-coast or down-coast of the site within approximately 30 minutes of the disturbance.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through harassment, NMFS considers other factors, such as the likely nature of any responses (*e.g.,* intensity, duration), the context of any responses (*e.g.,* critical reproductive time or location, migration), the effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS's implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, the discussion of our analyses applies to all the species listed in Table 6, given that the anticipated effects of this activity on these different marine mammal stocks are expected to be similar. There is little information about the nature or severity of the impacts, or the size, status, or structure of any of these species or stocks that would lead to a different analysis for this activity. Research activities have the potential to disturb or displace marine mammals. Specifically, the project activities may result in take, in the form of Level B harassment from researchers' movements and equipment handling. Potential takes could occur if individuals of these species are present nearby when these activities are underway.

No injuries or mortalities are anticipated to occur as a result of UCSC/PISCO's rocky intertidal monitoring surveys and none are authorized. The risk of marine mammal injury, serious injury, or mortality associated with rocky intertidal monitoring increases somewhat if disturbances occur during breeding season. These situations present increased potential for mothers and dependent pups to become separated and, if separated pairs do not quickly reunite, the risk of mortality to pups (*e.g.,* through starvation) may increase. Separately, adult male elephant seals may trample elephant seal pups if disturbed, which could potentially result in the injury, serious injury, or mortality of the pups. Few pups are anticipated to be encountered during the proposed surveys. As shown in previous monitoring reports, however, limited numbers of harbor seal, northern elephant seal, and California sea lion pups have been observed at several sites during past years. Harbor seals are very precocious with only a short period of time in which separation of a mother from a pup could occur. Although elephant seal pups are occasionally present when researchers visit survey sites, risk of pup mortalities is very low because elephant seals are far less reactive to researcher presence compared to the other two species. Further, elephant seal pups are typically found on sand beaches, while study sites are located in the rocky intertidal zone, meaning that there is typically a buffer between researchers and pups. The caution used by researchers in approaching sites generally precludes the possibility of behavior, such as stampeding, that could result in extended separation of mothers and dependent pups or trampling of pups. Finally, UCSC/PISCO shall reschedule work at sites where pups are present, unless other means of accomplishing the work can be done without causing disturbance to mothers and dependent pups. The potential for harassment is further minimized through the approach method and the implementation of the planned mitigation measures (see Mitigation section).

Typically, even those reactions constituting Level B harassment would result in at most, temporary, short-term behavioral disturbance. In any given study season, researchers will visit select sites one to two times per year for 4–6 hours per visit. Therefore, disturbance of pinnipeds resulting from the presence of researchers lasts only for short periods. These short periods of disturbance, lasting less than a day are separated by months or years. Community Structure sites are visited at most twice per year and the visits occur in different seasons. Biodiversity surveys take place at a given location once every 3–5 years.

Of the marine mammal species anticipated to occur in the proposed activity areas, none are listed under the ESA. Taking into account the planned mitigation measures, effects to marine mammals are generally expected to be restricted to short-term changes in behavior or temporary abandonment of haulout sites. Pinnipeds are not expected to permanently abandon any area that is surveyed by researchers, as is evidenced by the continued presence of pinnipeds at the sites during annual monitoring counts. No adverse effects to prey species are anticipated and habitat impacts are limited and highly localized, consisting of the placement of permanent bolts and temporary research equipment in the intertidal zone. Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the

implementation of the mitigation and monitoring measures, NMFS finds that the total marine mammal take from UCSC/PISCO's rocky intertidal monitoring program will not adversely affect annual rates of recruitment or survival and, therefore, will have a negligible impact on the affected species or stocks.

In summary and as described above, the following factors primarily support our determination that the impacts resulting from this activity are not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival:

- No serious injury or mortality, or Level A harassment, is anticipated or authorized;
- Only a small number of pups are expected to be disturbed;
- Effects of the survey activities would be limited to short-term, localized behavioral changes;
- Nominal impacts to pinniped habitat are anticipated; and
- Mitigation measures are anticipated to be effective in minimizing the number and severity of takes by Level B harassment, which are expected to be of short duration.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the monitoring and mitigation measures, NMFS finds that the total marine mammal take from the proposed activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under section 101(a)(5)(A) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

The amount of take NMFS authorizes is 0.06 to 2.6 percent of any stock's best population estimate (Table 6). These are all likely conservative estimates because they assume all encounters result in take, which has not historically been the case. The Oregon/Washington stock of harbor seals has no official NMFS abundance estimate as the most recent estimate is greater than eight years old. Nevertheless, the most recent estimate was 27,348 animals and it is highly unlikely this number has drastically declined.

Based on the analysis contained herein of the proposed activity (including the mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action (*i.e.,* the promulgation of regulations and subsequent issuance of LOAs) with respect to potential impacts on the human environment. This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has determined that the issuance of the final rule qualifies to be categorically excluded from further NEPA review.

Endangered Species Act (ESA)

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat.

No incidental take of ESA-listed species is authorized or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

Classification

Pursuant to the procedures established to implement Executive Order 12866, the Office of Management and Budget has determined that this final rule is not significant.

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this final rule would not have a significant economic impact on a substantial number of small entities. UCSC/PISCO is the sole entity that would be subject to the requirements in these regulations, and UCSC/PISCO is not a small governmental jurisdiction, small organization, or small business, as defined by the RFA. Because of this certification, a regulatory flexibility analysis is not required and none has been prepared.

This final rule contains a collection-of-information requirement subject to the provisions of the Paperwork Reduction Act (PRA). Notwithstanding any other provision of law, no person is 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 PRA unless that collection of information displays a currently valid OMB control number. These requirements have been approved by OMB under control number 0648–0151 and include applications for regulations, subsequent LOAs, and reports.

List of Subjects in 50 CFR Part 217

Exports, Fish, Imports, Indians, Labeling, Marine mammals, Penalties, Reporting and recordkeeping requirements, Seafood, Transportation.

Dated: March 23, 2020.

Samuel D. Rauch III,

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

For reasons set forth in the preamble, 50 CFR part 217 is amended as follows:

PART 217—REGULATIONS GOVERNING THE TAKE OF MARINE MAMMALS INCIDENTAL TO SPECIFIED ACTIVITIES

■ 1. The authority citation for part 217 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.,* unless otherwise noted.

■ 2. Add subpart K to read as follows:

Subpart K—Taking Marine Mammals Incidental to Rocky Intertidal Monitoring Surveys Along the Oregon and California Coasts

Sec.
217.100 Specified activity and specified geographical region.
217.101 Effective dates.
217.102 Permissible methods of taking.
217.103 Prohibitions.
217.104 Mitigation requirements.
217.105 Requirements for monitoring and reporting.
217.106 Letters of Authorization.
217.107 Renewals and modifications of Letters of Authorization.
217.108—217.109 [Reserved]

Subpart K—Taking Marine Mammals Incidental to Rocky Intertidal Monitoring Surveys Along the Oregon and California Coasts

§ 217.100 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the University of California Santa Cruz's Partnership for Interdisciplinary Studies of Coastal Oceans (UCSC/PISCO) and those persons it authorizes or funds to conduct activities on its behalf for the taking of marine mammals that occurs in the areas outlined in paragraph (b) of this section and that occur incidental to rocky intertidal monitoring research surveys.

(b) The taking of marine mammals by UCSC/PISCO may be authorized in a Letter of Authorization (LOA) only if it occurs on the coasts of Oregon or California.

§ 217.101 Effective dates.

Regulations in this subpart are effective from April 12, 2020 through April 11, 2025.

§ 217.102 Permissible methods of taking.

Under LOAs issued pursuant to §§ 216.106 of this chapter and 217.106, the Holder of the LOA (hereinafter ''UCSC/PISCO'') may incidentally, but not intentionally, take marine mammals within the area described in § 217.100(b) by Level B harassment associated with rocky intertidal monitoring activities, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

§ 217.103 Prohibitions.

Notwithstanding takings contemplated in § 217.100 and authorized by a LOA issued under §§ 216.106 of this chapter and 217.106, no person in connection with the activities described in § 217.100 may:

(a) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a LOA issued under §§ 216.106 of this chapter and 217.106;

(b) Take any marine mammal not specified in such LOA;

(c) Take any marine mammal specified in such LOA in any manner other than as specified in § 217.102;

(d) Take a marine mammal specified in such LOA if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(e) Take a marine mammal specified in such LOA if NMFS determines such taking results in an unmitigable adverse impact on the species or stock of such marine mammal for taking for subsistence uses.

§ 217.104 Mitigation requirements.

When conducting the activities identified in § 217.100(a), the mitigation measures contained in any LOA issued under §§ 216.106 of this chapter and 217.106 must be implemented. These mitigation measures shall include but are not limited to:

(a) *General conditions.* (1) Researchers must observe a site from a distance for at least five minutes, using binoculars if necessary, to detect any marine mammals prior to approach to determine if mitigation is required (*i.e.,* site surveys will not be conducted if other species of pinnipeds are present, researchers will approach with caution, walking slowly, quietly, and close to the ground to avoid surprising any hauled-out individuals and to reduce flushing/stampeding of individuals).

(2) Researchers must avoid pinnipeds along access ways to sites by locating and taking a different access way. Researchers must keep a safe distance from and not approach any marine mammal while conducting research, unless it is absolutely necessary to approach a marine mammal in order to continue conducting research (*i.e.,* if a site cannot be accessed or sampled due to the presence of pinnipeds).

(3) Researchers must avoid making loud noises (*i.e.,* using hushed voices) and keep bodies low to the ground in the visual presence of pinnipeds.

(4) Researchers must monitor the offshore area for predators (such as killer whales and white sharks) and avoid flushing of pinnipeds when predators are observed in nearshore waters.

(5) Researchers must promptly vacate sites at the conclusion of sampling.

(b) *Pup protection measure.* Intentional approach must not occur if dependent pups are present to avoid mother/pup separation and trampling of pups. Staff shall reschedule work at sites where pups are present, unless other means of accomplishing the work can be done without causing disturbance to mothers and dependent pups.

§ 217.105 Requirements for monitoring and reporting.

(a) *Visual monitoring program.* (1) Standard information recorded must include species counts (with numbers of pups/juveniles when possible) of animals present before approaching, numbers of observed disturbances, and descriptions of the disturbance behaviors during the monitoring surveys, including location, date, and time of the event.

(2) UCSC/PISCO must note observations of:

(i) Unusual behaviors, numbers, or distributions of pinnipeds, such that any potential follow-up research can be conducted by the appropriate personnel;

(ii) Tag-bearing carcasses of pinnipeds, allowing transmittal of the information to appropriate agencies and personnel; and

(iii) Rare or unusual species of marine mammals for agency follow-up.

(3) For consistency, any reactions by pinnipeds to researchers will be recorded according to a three-point scale shown in Table 1 to this paragraph (a)(3). Only observations of disturbance Levels 2 and 3 should be recorded as takes.

TABLE 1 TO PARAGRAPH (a)(3)—LEVELS OF PINNIPED BEHAVIORAL DISTURBANCE

Level	Type of response	Definition
1	Alert	Seal head orientation or brief movement in response to disturbance, which may include turning head towards the disturbance, craning head and neck while holding the body rigid in a u-shaped position, changing from a lying to a sitting position, or brief movement of less than twice the animal's body length.

TABLE 1 TO PARAGRAPH (a)(3)—LEVELS OF PINNIPED BEHAVIORAL DISTURBANCE—Continued

Level	Type of response	Definition
2	Movement	Movements in response to the source of disturbance, ranging from short withdrawals at least twice the animal's body length to longer retreats over the beach, or if already moving a change of direction of greater than 90 degrees.
3	Flush	All retreats (flushes) to the water.

(4) Information regarding physical and biological conditions pertaining to a site, as well as the date and time that research was conducted are also noted.

(b) *Prohibited take.* (1) If at any time the specified activity clearly causes the take of a marine mammal in a manner prohibited by this subpart or LOA, such as an injury (Level A harassment), serious injury, or mortality, UCSC/PISCO shall immediately cease the specified activities and report the incident to the Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinator, NMFS. The report must include the following information:

(i) Time and date of the incident;

(ii) Description of the incident;

(iii) Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, and visibility);

(iv) Description of all marine mammal observations in the 24 hours preceding the incident;

(v) Species identification or description of the animal(s) involved;

(vi) Fate of the animal(s); and

(vii) Photographs or video footage of the animal(s) (if equipment is available).

(2) Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with UCSC/PISCO to determine what measures are necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. UCSC/PISCO may not resume the activities until notified by NMFS via letter, email, or telephone.

(c) *Notification of dead or injured marine mammals.* (1) In the event that UCSC/PISCO discovers an injured or dead marine mammal and determines that the cause of the injury or death is unknown and the death is relatively recent (*e.g.,* in less than a moderate state of decomposition), UCSC/PISCO shall immediately report the incident to the Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinator, NMFS. The report must include the information identified in paragraph (b)(1) of this section. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with UCSC/PISCO to determine whether additional mitigation measures or modifications to the activities are appropriate.

(2) In the event that an injured or dead marine mammal is discovered and it is determined that the injury or death is not associated with or related to the activities authorized in this subpart and LOA (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), UCSC/PISCO shall report the incident to the Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinator, NMFS, within 24 hours of the discovery. UCSC/PISCO shall provide photographs, video footage (if available), or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network. Activities may continue while NMFS reviews the circumstances of the incident.

(d) *Annual report.* (1) A draft annual report shall be submitted to NMFS Office of Protected Resources within 90 days after the conclusion of each annual field season. The final annual report after year five may be included as part of the final report (see paragraph (e) of this section). The report must include a summary of the information gathered pursuant to the monitoring requirements set forth in paragraph (a) of this section and in the LOA.

(2) A final annual report shall be submitted to the Director of the NMFS Office of Protected Resources within 30 days after receiving comments from NMFS on the draft annual report. If no comments are received from NMFS, the draft annual report will be considered the final report.

(e) *Final report.* A draft final report shall be submitted to NMFS Office of Protected Resources within 60 days after the conclusion of the fifth year. A final report shall be submitted to the Director of the NMFS Office of Protected Resources and to the NMFS West Coast Regional Administrator within 30 days after receiving comments from NMFS on the draft final report. If no comments are received from NMFS, the draft final report will be considered the final report.

§ 217.106 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to this subpart, UCSC/PISCO must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of this subpart.

(c) If an LOA expires prior to the expiration date of this subpart, UCSC/PISCO may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, UCSC/PISCO must apply for and obtain a modification of the LOA as described in § 217.107.

(e) The LOA shall set forth:

(1) Permissible methods and numbers of incidental taking;

(2) Means of effecting the least practicable adverse impact (*i.e.,* mitigation) on the species, its habitat, and on the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under this subpart.

(g) Notice of issuance or denial of an LOA shall be published in the **Federal Register** within 30 days of a determination.

§ 217.107 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under §§ 216.106 of this chapter and 217.106 for the activity identified in § 217.100(a) shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for this subpart (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section); and

(2) NMFS' Office of Protected Resources determines that the mitigation, monitoring, and reporting measures required by the previous LOA under this subpart were implemented.

(b) For an LOA modification or renewal requests by the applicant that

include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section) that do not change the findings made for this subpart or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS' Office of Protected Resources may publish a notice of proposed LOA in the **Federal Register**, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under §§ 216.106 of this chapter and 217.106 for the activity identified in § 217.100(a) may be modified by NMFS' Office of Protected Resources under the following circumstances:

(1) *Adaptive management.* NMFS' Office of Protected Resources may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with UCSC/PISCO regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in this subpart.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA:

(A) Results from UCSC/PISCO's monitoring from the previous year(s).

(B) Results from other marine mammal and/or sound research or studies.

(C) Any information that reveals marine mammals may have been taken in a manner, extent, or number not authorized by this subpart or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS' Office of Protected Resources will publish a notice of proposed LOA in the **Federal Register** and solicit public comment.

(2) *Emergencies.* If NMFS' Office of Protected Resources determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in LOAs issued pursuant to §§ 216.106 of this chapter and 217.106, an LOA may be modified without prior notice or opportunity for public comment. Notice would be published in the **Federal Register** within thirty days of the action.

§§ 217.108—217.109 [Reserved]

[FR Doc. 2020–06358 Filed 4–1–20; 8:45 am]

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Proposed Rules

Federal Register
Vol. 85, No. 64
Thursday, April 2, 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

Animal and Plant Health Inspection Service

9 CFR Parts 57 and 161

[Docket No. APHIS–2017–0002]

RIN 0579–AE39

National List of Reportable Animal Diseases

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend the animal disease regulations to provide for a National List of Reportable Animal Diseases, along with reporting responsibilities for animal health professionals that encounter or suspect cases of communicable animal diseases and disease agents. These proposed changes are necessary to streamline State and Federal cooperative animal disease detection, response, and control efforts. This action would consolidate and enhance current disease reporting mechanisms, and would complement and supplement existing animal disease tracking and reporting at the State level.

DATES: We will consider all comments that we receive on or before June 1, 2020.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!docket Detail;D=APHIS-2017-0002.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2017–0002, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments that we receive on this docket may be viewed at *http://www.regulations.gov/#!docket Detail;D=APHIS-2017-0002* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: Dr. Rebecca Jones, Strategy and Policy, Centers for Epidemiology and Animal Health, 2150 Centre Ave. Bldg. B, Fort Collins, CO 80526; (970) 494–7196.

SUPPLEMENTARY INFORMATION:

Background

Under the Animal Health Protection Act (AHPA, 7 U.S.C. 8301 *et seq.*), the Secretary of Agriculture has the authority to issue orders and promulgate regulations to prevent the introduction into the United States and the dissemination within the United States of any pest or disease of livestock. The Secretary has delegated authority to issue such orders and regulations to the Animal and Plant Health Inspection Service (APHIS).

The regulations in 9 CFR subchapter B (referred to below as the regulations) govern the cooperative control and eradication of livestock or poultry diseases within the United States. The regulations establish procedures through which Federal and State animal health authorities coordinate in their collective efforts to eradicate certain communicable animal diseases; included provisions govern the payment of indemnities, animal identification and testing, and specific disease containment procedures.

Accurate and timely reporting of diagnosed or suspected animal diseases and disease agents to State and Federal animal health authorities is vital to preventing disease spread and protecting American agriculture. Under the AHPA, the Secretary of Agriculture has authority to respond to diseases through movement control, surveillance, and other activities including disease reporting; however, at present, the United States lacks a comprehensive nationwide approach to animal disease reporting requirements.

Reporting requirements do exist for accredited veterinarians under 9 CFR 161.4(f): Accredited veterinarians are required to immediately report to APHIS and the State Animal Health official all diagnosed suspected cases of communicable disease for which APHIS has a control or eradication program in 9 CFR chapter I, and all diagnosed and suspected cases of animal diseases not known to exist in the United States as provided in 9 CFR 71.3. (Within § 71.3, paragraph (b) lists foreign animal diseases not known to exist in the United States, and prohibits the interstate movement of animals affected with such diseases, as well as any other communicable foreign diseases.)

However, these reporting obligations do not cover all animal diseases listed by the World Organization for Animal Health (OIE), leaving critical gaps in nationwide reporting for many diseases. Not having a consistent and uniform national system for reporting animal diseases and disease agents creates challenges for the United States when fulfilling its international reporting requirements. As a Member country of the OIE, the United States must submit to the OIE reports on the status of certain diseases of livestock, poultry, aquaculture, bees and, in some instances, wild terrestrial and aquatic species. Some of these reportable diseases have the potential for rapid spread, regardless of national borders, are of serious socioeconomic or public health consequence, and impact the international trade of animals and animal products. Moreover, a 2015 U.S. Government Accountability Office (GAO) report [1] noted the role that gaps in animal disease reporting played in recent disease outbreaks and recommended that the United States Department of Agriculture (USDA) clarify roles and responsibilities to facilitate how the Agency responds to emerging animal diseases.

In addition to the current required disease reporting from APHIS-accredited veterinarians, States voluntarily report occurrences of monitored diseases–*i.e.,* diseases or conditions where occurrence is routinely tracked by APHIS and data are used to monitor changes in a given population and its environment, or to report on disease occurrence—to APHIS on a monthly basis through the National Animal Health Reporting System (NAHRS), a web-based reporting system for animal disease-related transmissions. Such voluntary reporting of monitored diseases assists in national data collection for the diseases. This

[1] See *https://www.gao.gov/assets/680/674174.pdf.*

data is used to monitor changes in a given population and its environment, or to report on disease occurrence. However, States are not currently required to report occurrences of monitored diseases and some diseases (such as emerging diseases) to APHIS, nor is there a Federal requirement that laboratories must report detection of these diseases to States. The proposed disease reporting requirements would help State, Federal, and industry officials to document and monitor national and State disease trends, meet travel and movement requirements, and evaluate and implement management, control, response, and prevention activities for animal disease.

Finally, no standard reporting requirements, guidelines, or timeframes exist under current Federal regulations for animal health professionals other than accredited veterinarians who encounter or suspect cases of communicable animal diseases and disease agents. For purposes of this document as well as the proposed regulations, by *animal health professional,* we mean an individual, corporate entity, or animal health organization with formal training in the diagnosis or recognition of animal diseases and/or pests of livestock.[2] Examples of animal health professionals include, but are not limited to, veterinary medical professionals, diagnostic laboratorians, biomedical researchers, public health officials, animal health officials, trained technicians, zoo personnel, and wildlife personnel with such training.

In this document, we are proposing to add a new part to 9 CFR subchapter B that would provide for a new National List of Reportable Animal Diseases (NLRAD), as well as disease reporting requirements for animal health professionals identifying or suspecting NLRAD-listed diseases or conditions. The proposed amendments for disease listing and reporting would accomplish the following:

- *Establish the NLRAD with two categories:* Notifiable diseases and conditions, and monitored diseases. The notifiable diseases and conditions would be subdivided into emergency incidents, emerging disease incidents, and regulated disease incidents. Monitored diseases would be diseases or conditions where occurrence is routinely tracked by APHIS and data are used to monitor changes in a given population and its environment, or to report on disease occurrence.
- Specify reporting responsibilities for animal health professionals encountering animal diseases, disease agents, or conditions listed as monitored or notifiable.
- Indicate the existence of an NLRAD System Standards document, and provide procedures for its use.

The proposed amendments would address GAO recommendations by enhancing and clarifying national animal disease reporting guidelines for veterinarians, and by expanding reporting requirements to include other animal health professionals who may encounter such diseases—including veterinary medical professionals, diagnostic laboratorians, biomedical researchers, public health officials, animal health officials, trained technicians, zoo personnel, and wildlife personnel. While the vast majority of reporting of NLRAD-listed diseases and conditions is expected to be through accredited veterinarians and diagnostic laboratories, due to the serious nature of notifiable diseases and their potentially damaging impact on U.S. agriculture, immediate reporting would be required by any animal health professional with knowledge or suspicion of these diseases. To aid in identifying suspicion of disease, APHIS would maintain case definitions at the following website: *https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/monitoring-and-surveillance/nlrad/ct_national_list_reportable_animal_diseases.*

The process to report diseases listed as 'monitored' in the NLRAD would remain largely the same as in current practice, where States track and report information on monitored diseases to APHIS. The primary differences from current practice would be that such reporting from States would become mandatory, rather than voluntary, and that laboratories encountering confirmed cases of monitored diseases would be required to report occurrence information to the State where the animal is located. Reporting of additional follow-up information by States and laboratories to APHIS—such as the number of diagnostic tests conducted, number of detections, and epidemiological information—may be requested for some monitored diseases in response to a disease report or following consultation with stakeholders. Although the NAHRS is the current information technology system used for most monitored disease reporting from States, we are preparing to implement a new designated information technology system that would have enhanced capabilities for collecting animal disease-related data on a national scale. Once fully operational, this system would be available on the APHIS website at: *https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/monitoring-and-surveillance/sa_disease_reporting/ct_usda_aphis_animal_health.* The formal name for this system, once finalized, would be noted on the website and referenced in subsequent rulemakings.

Animal health professionals suspecting or diagnosing incidences of animal diseases or disease agents classified as ''notifiable'' in the NLRAD would be required to immediately report to both State and Federal officials. More detailed information regarding these proposed reporting requirements is included in the next section.

APHIS intends for the NLRAD to be codified as a single, nationally supported, standardized list of reportable animal diseases and disease agents that would allow for consistent disease reporting. The benefits of improving animal disease tracking and reporting on a national scale would extend to national, interstate, and international commerce, emergency disease response, and international reporting obligations to OIE as well as trading partners.

Our proposed animal disease list information and reporting requirements would be contained in a new 9 CFR part 57. Proposed § 57.1 would contain definitions related to animal health testing and diagnostics. Provisions for the NLRAD and reporting requirements would be included in proposed § 57.2. We also are proposing to amend the existing reporting requirements for APHIS-accredited veterinarians in § 161.4 to make these consistent with the new NLRAD provisions. We will address below the proposed changes in detail.

Definitions (§ 57.1)

We propose to incorporate standard definitions for terms that currently exist elsewhere in the regulations. We would define *Animal and Plant Health Inspection Service* (APHIS) as the Animal and Plant Health Inspection Service of the United States Department of Agriculture. We would define *livestock* to refer to all farm-raised animals. We also would define *State* to refer to any State, the District of Columbia, Puerto Rico, Guam, the Northern Mariana Islands, the Virgin Islands of the United States, and any other territory or possession of the United States. *United States* would refer to all of the States.

[2] Please note that the AHPA, as well as this proposed rule, defines *livestock* as: ''All farm-raised animals.'' This includes bees, farmed aquaculture, and animals maintained in captivity on a farm.

We propose to add new definitions for *animal health professional, monitored disease,* and *notifiable disease,* in accordance with their usage in the NLRAD and its provisions set forth in proposed § 57.2.

As noted earlier in this document, *animal health professional* would be defined as an individual, corporate entity, or animal health organization with formal training in the diagnosis or recognition of animal diseases and/or pests of livestock. The definition would further provide examples of types of professions that include *animal health professionals:* Veterinary medical professionals, diagnostic laboratorians, biomedical researchers, public health officials, animal health officials, trained technicians, zoo personnel, and wildlife personnel.

These examples would be illustrative, rather than exhaustive. The salient criterion in determining whether APHIS would consider the individual an animal health professional would be their formal training in the diagnosis or recognition of animal diseases and/or pests of livestock, not their profession. At a minimum, we would consider training programs administered by APHIS, a State department of agriculture, a State department of wildlife management and/or natural resources, or a licensed, accredited college or university to constitute *formal training.* We request specific public comment on the types of training that should constitute *formal training,* and whether adding a definition of *formal training* to our proposed regulations would be beneficial.

Monitored disease would be defined as a disease or condition where occurrence is routinely tracked by APHIS and data are used to monitor changes in a given population and its environment, or to report on disease occurrence. *Notifiable disease* would be defined as a disease or condition that requires immediate notification to Federal and State veterinary authorities. Notifiable diseases would be: (1) Emergency incidents (foreign animal diseases, exotic vectors, and high priority diseases); (2) emerging disease incidents (involving diseases, infections, or infestations with agents that are unknown, newly identified, or previously identified but epidemiologically changed); and (3) regulated disease incidents (involving diseases for which Federal regulations already are in place).

Finally, because we make frequent reference to the NLRAD System Standards Document—a document released with this proposed rule—we propose to include a definition for *NLRAD System Standards Document.* This document would provide specific details on the diseases and disease agents to be reported, standard operating procedures, and additional background and resources to support reporting efforts. The document would also be available on APHIS' website at *https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/monitoring-and-surveillance/nlrad/ct_national_list_reportable_animal_diseases.*

National List of Reportable Animal Diseases (§ 57.2)

Section 57.2 would describe the National List of Reportable Animal Diseases (NLRAD). This section would outline the organization, as well as maintenance, of the NLRAD, and would specify new reporting requirements for animal health professionals who encounter or suspect incidences of notifiable animal diseases and disease agents, and new reporting requirements for States and laboratories who encounter confirmed cases of monitored animal diseases.

Proposed paragraph (a) would note the location of the NLRAD on the APHIS website and specify appropriate contact information for interested parties to obtain paper copies of the list. Proposed paragraph (b) would outline the division of the NLRAD into two categories: Notifiable diseases and conditions, and monitored diseases. Notifiable diseases and conditions would be subdivided into emergency incidents (foreign animal diseases, exotic vectors, and high priority diseases), emerging disease incidents (involving diseases, infections, or infestations with agents that are unknown, newly identified, or previously identified but epidemiologically changed), and regulated disease incidents (involving diseases for which Federal regulations already are in place). Monitored diseases, as our proposed definition above indicates, are diseases where occurrence is routinely tracked by APHIS and data are used to monitor changes in a given population and its environment, or to report on disease occurrence. A disease or condition listed as notifiable would be reportable immediately in accordance with procedures specified in proposed § 57.2(d), with additional reporting resources provided in the NLRAD System Standards Document. Monitored diseases would be the subject of required periodic summary reports, in keeping with existing practices.

Proposed paragraph (c) would specify that any changes to the NLRAD would be announced via notice in the **Federal Register**, and that updates and edits to the list would be considered when: An emerging disease is identified; changes are made to OIE-Listed diseases, infections, and infestations; changes are made in VS regulations; changes are made on the National Veterinary Stockpile (NVS) list, USDA Select Agents and Toxins list, or Centers for Disease Control and Prevention's (CDC) Category A, B, or C Bioterrorism Agents/Diseases list (described below); or changes or additions are requested by stakeholders and adopted by APHIS. The NVS provides support to States, Tribes, and Territories responding to damaging animal disease outbreaks, and its list comprises damaging animal disease threats. The USDA Select Agents and Toxins list indicates biological agents and toxins determined to have the potential to pose a severe threat to human and animal health; and the CDC Category A, B, and C Bioterrorism Agents/Diseases list includes agents or diseases in the United States that pose a risk to national security due to ease of transmission and/or public health impact. Stakeholders who wish to request removals or additions to the NLRAD would need to submit their requests in writing in accordance with the contact information listed in proposed § 57.2(a). Written requests would require a justification for the proposed change, with examples of such justifications available in the NLRAD System Standards document.

Proposed paragraph (d) would specify reporting procedures for those who encounter or suspect notifiable or monitored diseases. For notifiable diseases, any animal health professional with knowledge of occurrence or suspected occurrence of an animal disease, disease agent, or condition listed as notifiable in the NLRAD would be required to immediately report such identification or suspicion to both APHIS and the State where the livestock is located. Animal health professionals would be required to report notifiable diseases and disease agents to APHIS as described on the NLRAD website, available at *https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/monitoring-and-surveillance/nlrad/ct_national_list_reportable_animal_diseases,* or by contacting their local APHIS office.[3] Reporting to the State would be to the State animal health official listed at *https://www.aphis.usda.gov/aphis/*

[3] Contact information for APHIS offices can be found on the APHIS website at *https://www.aphis.usda.gov/aphis/banner/contactus,* or in the local phone directory.

ourfocus/animalhealth/monitoring-and-surveillance/nlrad/ct_national_list_reportable_animal_diseases for the State in question.

We acknowledge that we would require dual reporting of notifiable diseases and disease agents: Once to APHIS, and again to the State where the animal is located. We explored alternative options that would have established a single point of contact: *i.e.,* either the State where the animal is located or APHIS. However, not all States have a single portal for receiving reports of all notifiable diseases, and divisions of animal health or animal industry have varying staffing levels. The lack of a standardized portal, coupled with staffing constraints, could result in delays receiving reports regarding notifiable diseases, and, consequently, delays relaying these reports to APHIS. Depending on the nature of the notifiable disease reported, such a delay could have not only animal health implications, but also implications related to public health or international trade. Delays in receiving reports can directly affect trade, insofar as APHIS is required as a member of the OIE to immediate report disease occurrence to the OIE and to international trading partners for many notifiable diseases.

Conversely, State animal health personnel often serve as first responders for epidemiological investigations in response to possible animal disease outbreaks. If APHIS were the sole point of contact for notifiable diseases, any delays in relaying the report to the State where the animal is located could directly adversely impact disease response and potentially contribute to disease spread. We also took into consideration that many State regulations require veterinarians and laboratories to report notifiable diseases to the State.

Based on these considerations, we have concluded that dual reporting of notifiable diseases is warranted for the notifiable diseases in the NLRAD. That being said, we will continue to explore means of establishing a single portal for both Federal and State personnel to receive notifiable disease reports. If this occurs, we would amend the regulations accordingly.

For monitored diseases, laboratories would be required to report occurrence information of confirmed cases of an animal disease or condition listed as monitored in the NLRAD on a monthly basis to the State where the animal is located by contacting the State animal health official listed at *https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/monitoring-and-surveillance/sa_disease_reporting/ct_usda_aphis_animal_health.* States would be required to report occurrence information of confirmed cases of monitored diseases to APHIS on a monthly basis through the new designated information technology system portal.

The animal diseases and disease agents to be reported, standard operating procedures, and additional background and resources to support reporting efforts would be located in the supplemental NLRAD System Standards Document, a draft of which is available as a supporting document for this proposed rule (see **ADDRESSES** above). Updates to this document would be announced as needed via notice in the **Federal Register**. The notice would provide for a public comment period.

Finally, while we intend the regulations to be the general framework for reporting known and suspect occurrences of notifiable and monitored diseases, it is possible that APHIS could issue regulations or a Federal Order that requires an alternative reporting structure based on, for example, the epidemiology of the disease. To account for discrepancies that could arise if we were to issue such regulations or such an order, we would state that the NLRAD regulations do not supersede such a reporting structure.

Standards for Accredited Veterinarian Duties (§ 161.4)

We propose to amend paragraph (f) of this section to clarify reporting requirements for APHIS-accredited veterinarians. The revised requirements for veterinarians would align with the new proposed reporting responsibilities as described under § 57.2, that require any accredited veterinarian with knowledge of occurrence or suspected occurrence of an animal disease, disease agent, or condition listed as notifiable in the NLRAD to immediately report such identification or suspicion to State and Federal authorities. As we mentioned earlier in this document, we expect the vast majority of the reporting of notifiable diseases to continue to be done by accredited veterinarians; therefore, it is important that accredited veterinarians follow the reporting requirements of the NLRAD regulations.

Reporting of Notifiable Diseases of Livestock in Wildlife

Several of the diseases on our proposed list of notifiable diseases could be transmitted from wildlife to livestock, and a few have known wildlife reservoirs. To account for this, we contemplated whether to propose that notifiable diseases would need to be reported whenever they are detected in wildlife.

While such reporting would clearly assist in the aims of the NLRAD, we also acknowledge factors that could adversely impact implementation of such a reporting requirement. First, as several commenters on a proposed rule to revise and consolidate our domestic brucellosis and bovine tuberculosis programs (80 FR 78462–78520, Docket No. APHIS–2011–0044) pointed out, a number of States limit the authority of State animal health officials to livestock within the State, and effectively preclude the officials from conducting epidemiological investigations of wildlife unless livestock within the State are already known or suspected to be infected with a disease of livestock. Second, as other commenters on that proposed rule pointed out, several States do not allow wildlife authorities to test for certain diseases of livestock, which would effectively limit reporting of disease occurrence in wildlife in those States to suspected occurrence. Finally, as several commenters on that proposed rule pointed out, wildlife populations are often itinerant, making it difficult to identify a particular infected animal within the population.

For these reasons, we elected not to propose to require reporting of notifiable diseases in wildlife within our proposed NLRAD regulations. However, we do request public comment regarding how the occurrence of notifiable diseases in wildlife should best be addressed within the NLRAD, especially when reservoirs of a notifiable disease are determined to exist in wildlife within a State.

Executive Orders 12866 and 13771 and Regulatory Flexibility Act

This proposed rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget. This proposed rule is not expected to be an Executive Order 13771 regulatory action because this proposed rule is not significant under Executive Order 12866.

In accordance with 5 U.S.C. 603, we have performed an initial regulatory flexibility analysis, which is summarized below, regarding the economic effects of this proposed rule on small entities. Copies of the full analysis are available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT** or on the *Regulations.gov* website (see **ADDRESSES** above for instructions for accessing *Regulations.gov*).

Based on the information we have, there is no reason to conclude that adoption of this proposed rule would result in any significant economic effect on a substantial number of small entities. However, we do not currently have all of the data necessary for a comprehensive analysis of the effects of this proposed rule on small entities. Therefore, we are inviting comments on potential effects. In particular, we are interested in determining the number and kind of small entities that may incur benefits or costs from the implementation of this proposed rule.

APHIS is proposing to amend the animal disease regulations to provide for a National List of Reportable Animal Diseases (NLRAD) along with animal disease reporting responsibilities, to streamline State and Federal cooperative animal disease eradication efforts. This action would enhance and consolidate current disease reporting mechanisms, and would complement and supplement existing animal disease tracking and reporting at the State level.

The Regulatory Flexibility Act requires agencies to consider whether a rule will have a significant economic impact on a substantial number of small entities. The size of a business may have a bearing on its ability to comply with a proposed regulation and there may be unintended or unforeseen adverse impacts. Using the North American Industry Classification System (NAICS), the Small Business Administration (SBA) defines small businesses in terms of a firm's annual receipts or number of employees. It is likely that most of the entities that may be affected by the proposed rule are small.

Although the process to report diseases listed as ''monitored'' in the NLRAD largely would remain the same, reporting requirements would change. Currently, States track and report information on monitored diseases to APHIS. However, under the proposed rule, reporting from States would become mandatory, rather than voluntary, and laboratories encountering cases of monitored diseases would be required to report occurrence information to the State where the animal is located. Also, reporting of additional information by States and laboratories would be requested for some monitored diseases. The process to report diseases listed as ''notifiable'' in the NLRAD would for the most part be new. Animal health officials suspecting or diagnosing incidences of notifiable diseases would be responsible for reporting suspected or diagnosed cases of all animal diseases or disease agents classified as notifiable in the NLRAD to both State and Federal officials.

Based on estimates from the NLRAD program, the number of laboratory reports could increase from about 6,600 to between 59,400 and 66,000 reports per year, and increase the total processing time for monitored diseases from about 3,300 hours to between 18,150 and 18,700 hours per year. In addition, the NLRAD program anticipates reports of diseases newly added to the Notifiable list, thereby increasing the annual processing time for notifiable diseases from about 3,200 hours to between 3,400 and 3,700 hours. The NLRAD program estimates potential additional public and private sector costs that may result from the proposed rule would range from $353,000 to $373,000 per year. Increased Federal and State administrative workloads would be resolved by reallocating program resources.

Benefits of the proposed rule are less quantifiable. However, the losses associated with the detection of livestock diseases in the United States can be substantial. For example, the 2003 detection of bovine spongiform encephalopathy in the United States led beef exports to fall by about $3 billion in 1 year. The NLRAD is an important component of a comprehensive and integrated National-State foreign animal disease (FAD) surveillance system that provides key U.S. information used to complete reports about diseases as required by OIE. Early identification, detection, and control of FADs, particularly zoonotic diseases, helps maintain domestic production and export markets. FADs can result in productivity losses which may increase the cost of food products obtained from those animal sources. NLRAD information provides a historical database about occurrences of reportable diseases in the United States that informs decision-making related to animal health issues including emerging animal health situations. The proposed expansion of FAD reporting responsibilities will enhance the ability of Federal and State authorities to promptly and effectively manage reportable animal disease occurrences.

Based on our review of available information, APHIS does not expect the proposed rule to have a significant economic impact on small entities. We have prepared this initial regulatory flexibility analysis because our understanding of possible economic effects of the rule on small entities is incomplete. In the absence of apparent significant economic impacts, we have not identified alternatives that would minimize such impacts.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 2 CFR chapter IV.)

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. If this proposed rule is adopted: (1) All State and local laws and regulations that are in conflict with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings will not be required before parties may file suit in court challenging this rule.

Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB). Written comments and recommendations for the proposed information collection should be sent within 60 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.'' Please send a copy of your comments to: (1) Docket No. APHIS–2017–0002, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238, and (2) Clearance Officer, OCIO, USDA, room 404–W, 14th Street and Independence Avenue SW, Washington, DC 20250. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this proposed rule.

This rule would require the submission of *ad hoc* reports (for notifiable diseases) and recurring reports (for monitored diseases).

We are soliciting comments from the public (as well as affected agencies) concerning our proposed information collection and recordkeeping requirements. These comments will help us:

(1) Evaluate whether the proposed information collection is necessary for the proper performance of our agency's functions, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the proposed

information collection, 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 information collection on those who are to respond (such as 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).

Estimate of burden: Public reporting burden for this collection of information is estimated to average 0.37362 hours per response.

Respondents: Individuals, laboratories, and States.

Estimated annual number of respondents: 2,205.

Estimated annual number of responses per respondent: 33.236.

Estimated annual number of responses: 73,285.

Estimated total annual burden on respondents: 27,381 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

A copy of the information collection may be viewed on the *Regulations.gov* website or in our reading room. (A link to *Regulations.gov* and information on the location and hours of the reading room are provided under the heading **ADDRESSES** at the beginning of this proposed rule.) Copies can also be obtained from Mr. Joseph Moxey, APHIS' Information Collection Coordinator, at (301) 851–2483. APHIS will respond to any ICR-related comments in the final rule. All comments will also become a matter of public record.

E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this proposed rule, please contact Mr. Joseph Moxey, APHIS' Information Collection Coordinator, at (301) 851–2483.

Lists of Subjects

9 CFR Part 57

Animal diseases, Reporting and recordkeeping requirements.

9 CFR Part 161

Reporting and recordkeeping requirements, Veterinarians.

Accordingly, we propose to amend 9 CFR chapter I as follows:

■ 1. Part 57 is added to subchapter B to read as follows:

PART 57—ANIMAL HEALTH DIAGNOSTICS AND TESTING

Sec.
57.1 Definitions.
57.2 National List of Reportable Animal Diseases.

Authority: 7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

§ 57.1 Definitions.

As used in this part, the following terms shall have the meanings set forth in this section.

Animal and Plant Health Inspection Service. The Animal and Plant Health Inspection Service of the United States Department of Agriculture (APHIS).

Animal health professional. An individual, corporate entity, or animal health organization with formal training in the diagnosis or recognition of animal diseases and/or pests of livestock. Examples of animal health professionals include, but are not limited to, veterinary medical professionals, diagnostic laboratorians, biomedical researchers, public health officials, animal health officials, trained technicians, zoo personnel, and wildlife personnel with such training.

Livestock. All farm-raised animals.

Monitored disease. A disease or condition where occurrence is routinely tracked by APHIS and data are used to monitor changes in a given population and its environment, or to report on disease occurrence.

NLRAD. The list of monitored and notifiable diseases required to be reported.

NLRAD System Standards Document. A document that provides specific detail on the animal diseases to be reported, standard operating procedures, and additional background and resources to support reporting efforts. The document is available on the internet at *https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/monitoring-and-surveillance/nlrad/ct_national_list_reportable_animal_diseases.*

Notifiable disease. A disease or condition that requires immediate notification to Federal and State veterinary authorities. Notifiable diseases are: (1) Emergency incidents (foreign animal diseases, exotic vectors, and high priority diseases), emerging disease incidents (involving diseases, infections, or infestations with agents that are unknown, newly identified, or previously identified but epidemiologically changed), and regulated disease incidents (involving diseases for which Federal regulations already are in place).

State. Any State, the District of Columbia, Puerto Rico, Guam, the Northern Mariana Islands, the Virgin Islands of the United States, and any other territory or possession of the United States.

United States. All of the States.

§ 57.2 National List of Reportable Animal Diseases.

(a) *National List of Reportable Animal Diseases.* A National List of Reportable Animal Diseases (NLRAD), along with disease reporting requirements, will be implemented per the provisions set forth in this section. The NLRAD will be maintained on the APHIS website at *https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/monitoring-and-surveillance/sa_disease_reporting/ct_usda_aphis_animal_health.* Copies of the list also will be available via postal mail or email upon request to the Center for Epidemiology and Animal Health, Veterinary Services, Animal and Plant Health Inspection Service, 2150 Centre Ave., Bldg. B, MS 2E6, Fort Collins, CO 80526. Email requests may be directed to *NLRAD.NAHRS@usda.gov.*

(b) *List organization.* Diseases and conditions in the NLRAD are categorized as either notifiable or monitored.

(1) Diseases and conditions categorized as notifiable are further subdivided into:

(i) Emergency incidents (foreign animal diseases, exotic vectors, and high priority diseases);

(ii) Emerging disease incidents (involving diseases, infections, or infestations with agents that are unknown, newly identified, or previously identified but epidemiologically changed); and

(iii) Regulated disease incidents (involving diseases for which Federal regulations already are in place).

(2) Diseases and conditions categorized as monitored are diseases where occurrence is routinely tracked by APHIS and data are used to monitor changes in a given population and its environment, or to report on disease occurrence.

(c) *Updates and edits.* Changes to the NLRAD will be announced via the publication of a notice in the **Federal Register**. Updates and edits to the NLRAD will be considered when:

(1) An emerging disease is identified.

(2) Changes are made to the World Organization for Animal Health (OIE)-

Listed diseases, infections, and infestations.

(3) Changes are made in Veterinary Services (VS) regulations.

(4) Changes are made on the National Veterinary Stockpile (NVS) list, USDA Select Agents and Toxins List, or Centers for Disease Control and Prevention (CDC) Category A, B, or C Bioterrorism Agents/Diseases list.

(5) Changes or additions are requested by stakeholders. Stakeholders must submit change requests in writing via postal mail or email using the contact information provided in paragraph (a) of this section. Written requests must include a justification for the proposed change. Examples of justifications can be found in the NLRAD System Standards Document, available on the APHIS website at *https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/monitoring-and-surveillance/nlrad/ct_national_list_reportable_animal_diseases.*

(d) *Reporting.* The following reporting procedures will be required:

(1) *Notifiable diseases.* Any animal health professional with knowledge of occurrence or suspected occurrence of an animal disease, disease agent, or condition listed as notifiable in the NLRAD must immediately report such identification or suspicion to both APHIS and the State where the livestock is located. Reporting to APHIS may be accomplished as described on the NLRAD website available at: *https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/monitoring-and-surveillance/nlrad/ct_national_list_reportable_animal_diseases,* or by contacting a local APHIS office.[1] Reporting to the State should be to the State animal health official listed at *https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/monitoring-and-surveillance/sa_disease_reporting/ct_usda_aphis_animal_health* for the State in question.

(2) *Monitored diseases.* (i) Laboratories must report occurrence information of confirmed cases of an animal disease or condition listed as monitored in the NLRAD on a monthly basis to the State where the animal is located by contacting the State animal health official listed at *https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/monitoring-and-surveillance/sa_disease_reporting/ct_usda_aphis_animal_health.*

(ii) States must report information of confirmed cases of an animal disease or condition listed as monitored in the NLRAD on a monthly basis to APHIS through the Designated Information Technology System available on the APHIS website at: *https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/monitoring-and-surveillance/sa_disease_reporting/ct_usda_aphis_animal_health.*

(3) *Additional guidance.* Additional reporting information, including background and resources to support reporting efforts, can be found in the NLRAD System Standards Document available on the APHIS website at: *https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/monitoring-and-surveillance/nlrad/ct_national_list_reportable_animal_diseases.* Revisions to the NLRAD System Standards Document, other than updates to the NLRAD described in paragraph (c) of this section, will be announced to the public as needed through the publication of a notice in the **Federal Register**. The notice will also provide for a public comment period.

(4) *Alternative reporting structures.* The regulations in this paragraph (d) do not supersede any alternative reporting structure that APHIS may require through issuance of a general regulation or Federal Order.

PART 161—REQUIREMENTS AND STANDARDS FOR ACCREDITED VETERINARIANS AND SUSPENSION OR REVOCATION OF SUCH ACCREDITATION

■ 2. The authority for part 161 continues to read as follows:

Authority: 7 U.S.C. 8301–8317; 15 U.S.C. 1828; 7 CFR 2.22, 2.80, and 371.4.

■ 3. In § 161.4, paragraph (f) is revised to read as follows:

§ 161.4 Standards for accredited veterinarian duties.

* * * * *

(f) An accredited veterinarian shall immediately report all diagnosed or suspected cases of any animal disease, disease agent, or condition classified as notifiable in the National List of Reportable Animal Diseases (NLRAD) in accordance with reporting provisions set forth in § 57.2 of this chapter. The NLRAD can be viewed on the APHIS website at: *https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/monitoring-andsurveillance/sa_disease_reporting/ct_usda_aphis_animal_health.*

* * * * *

Done in Washington, DC, this 26th day of March 2020.

Mark Davidson,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2020–06697 Filed 4–1–20; 8:45 am]

BILLING CODE 3410–34–P

[1] Contact information for APHIS offices can be found on the APHIS website at *https://www.aphis.usda.gov/aphis/banner/contactus,* or in the local phone directory (listed under Animal and Plant Health Inspection Service (APHIS), Veterinary Services).

NUCLEAR REGULATORY COMMISSION

10 CFR Chapter I

[NRC–2017–0214]

Retrospective Review of Administrative Requirements

AGENCY: Nuclear Regulatory Commission.

ACTION: Request for comment; extension of comment period.

SUMMARY: On February 4, 2020, the U.S. Nuclear Regulatory Commission (NRC) requested input from its licensees and members of the public to identify outdated or duplicative administrative requirements that may be eliminated without an adverse effect on public health or safety, common defense and security, protection of the environment, or regulatory efficiency and effectiveness. The public comment period originally was scheduled to close on April 6, 2020. The NRC has decided to extend the public comment period to allow more time for members of the public to develop and submit their comments.

DATES: The comment period for the document published on February 4, 2020 (85 FR 6103) is extended. Comments should be filed no later than May 6, 2020. Comments received after this date will be considered, if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date.

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

- *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2017–0214. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Email comments to: Rulemaking.Comments@nrc.gov.* If you do not receive an automatic email reply confirming receipt, then contact us at 301–415–1677.

• *Fax comments to:* Secretary, U.S. Nuclear Regulatory Commission at 301–415–1101.

• *Mail comments to:* Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.

• *Hand deliver comments to:* 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. (Eastern Time) Federal workdays; telephone: 301–415–1677.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Andrew G. Carrera, telephone: 301–415–1078; email: *Andrew.Carrera@nrc.gov;* or Pamela Noto, telephone: 301–415–6795; email: *Pamela.Noto@nrc.gov.* Both are staff of the Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2017–0214 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

• Federal Rulemaking website: Go to *https://www.regulations.gov* and search for Docket ID NRC–2017–0214.

• NRC's Agencywide Documents Access and Management System (ADAMS): You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.*

• NRC's PDR: You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2017–0214 in your comment submission. When preparing and submitting your comments, see ''Tips for Submitting Effective Comments'' (ADAMS Accession No. ML20014E720).

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Discussion

On February 4, 2020, the NRC published a document in the **Federal Register** (85 FR 6103) requesting input from its licensees and members of the public to identify outdated or duplicative administrative requirements that may be eliminated without an adverse effect on public health or safety, common defense and security, protection of the environment, or regulatory efficiency and effectiveness. The public comment period was originally scheduled to close on April 6, 2020. By letter dated March 12, 2020 (ADAMS Accession No. ML20084Q158), the Nuclear Energy Institute requested that the NRC extend the comment period by 30 days. The NRC is granting this request and will extend the public comment period until May 6, 2020, to allow more time for members of the public to submit their comments.

Dated at Rockville, Maryland, this 26th day of March 2020.

For the Nuclear Regulatory Commission.

John R. Tappert,

Director, Division of Rulemaking, Environmental, and Financial Support, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2020–06682 Filed 4–1–20; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0293; Project Identifier MCAI–2019–00122–E]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce Deutschland Ltd & Co KG (Type Certificate Previously Held by Rolls-Royce plc) Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Rolls-Royce Deutschland Ltd & Co KG Trent 1000–AE3, Trent 1000–CE3, Trent 1000–D3, Trent 1000–G3, Trent 1000–H3, Trent 1000–J3, Trent 1000–K3, Trent 1000–L3, Trent 1000–M3, Trent 1000–N3, Trent 1000–P3, Trent 1000–Q3, Trent 1000–R3, Trent 7000–72, and Trent 7000–72C model turbofan engines. This proposed AD was prompted by a report of a crack finding of the front air seal on the intermediate-pressure compressor (IPC) shaft assembly during the stripping of a flight test engine. This proposed AD would require initial and repetitive borescope inspections (BSIs) of the IPC shaft assembly and, depending on the results of the inspection, replacement of the IPC shaft assembly with a part eligible for installation. 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 May 18, 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 Rolls-Royce Deutschland Ltd. & Co KG, Eschenweg 11, 15827 Blankenfelde-Mahlow, Germany; phone: +49 (0) 33 708 6 0; email: *https://www.rolls-royce.com/*

contact-us.aspx. You may view this service information at the FAA, Engine and Propeller Standards Branch, 1200 District Avenue, Burlington, MA, 01803. For information on the availability of this material at the FAA, call 781–238–7759.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0293; 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 mandatory continuing airworthiness information (MCAI), 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: Stephen Elwin, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA, 01803; phone: 781–238–7236; fax: 781–238–7199; email: *stephen.l.elwin@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–2020–0293; Project Identifier MCAI–2019–00122–E'' at the beginning of your comments. The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. The FAA will consider all comments received by the closing date and may amend this NPRM because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *https://www.regulations.gov,* including any personal information you provide. The FAA will also post a report summarizing each substantive verbal contact received about this final rule.

Confidential Business Information

Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Stephen Elwin, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA, 01803. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Discussion

The European Union Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA AD 2019–0282, dated November 20, 2019 (referred to after this as ''the MCAI''), to address the unsafe condition on these products. The MCAI states:

> An occurrence was reported of finding cracks in the front air seal of the IPC shaft assembly during stripping of a flight test engine. Follow-up inspections of other in-shop engines revealed two more cracked front air seals of IPC shaft assemblies.
>
> This condition, if not detected and corrected, could lead to IPC shaft failure, possibly resulting in engine in-flight shut-down and consequent reduced control of the aeroplane.
>
> To address this potential unsafe condition, Rolls-Royce developed an inspection method and issued the NMSB, providing those inspection instructions.
>
> For the reason described above, this [EASA] AD requires repetitive on-wing inspections of the front air seal of the affected part at a specific area between the fourth (rearmost) seal fin of the IPC shaft assembly front air seal and the IPC Stage 1 disc and, depending on findings, removal from service of the engine for corrective action(s).

You may obtain further information by examining the MCAI in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0293.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Rolls-Royce Trent 1000 Alert Non-Modification Service Bulletin (NMSB) 72–AK451, Initial Issue, dated November 14, 2019. The Alert NMSB describes procedures for initial and repetitive BSIs of the IPC shaft assembly. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination

This product has been approved by EASA and is approved for operation in the United States. Pursuant to our bilateral agreement with the European Community, EASA has notified us of the unsafe condition described in the MCAI and service information referenced above. The FAA is proposing this AD because we evaluated all the relevant information provided by EASA and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require initial and repetitive BSIs of the IPC shaft assembly and, depending on the results of the inspection, replacement of the IPC shaft assembly with a part eligible for installation.

Costs of Compliance

The FAA estimates that this proposed AD affects 14 engines installed on airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
BSI IPC shaft assembly	3.5 work-hours × $85 per hour = $297.50	$0	$297.50	$4,165

The FAA estimates the following costs to do any necessary replacement that would be required based on the results of the proposed inspection. The FAA has no way of determining the

number of engines that might need this replacement:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replace IPC shaft assembly	1,080 work-hours × $85 per hour = $91,800	$1,365,219	$1,457,019

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Rolls-Royce Deutschland Ltd & Co KG (Type Certificate Previously Held by Rolls-Royce plc): Docket No. FAA–2020–0293; Project Identifier MCAI–2019–00122–E.

(a) Comments Due Date

The FAA must receive comments by May 18, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to:

(1) Rolls-Royce Deutschland Ltd & Co KG (RRD) (Type Certificate previously held by Rolls-Royce plc) Trent 1000–AE3, Trent 1000–CE3, Trent 1000–D3, Trent 1000–G3, Trent 1000–H3, Trent 1000–J3, Trent 1000–K3, Trent 1000–L3, Trent 1000–M3, Trent 1000–N3, Trent 1000–P3, Trent 1000–Q3, and Trent 1000–R3 model turbofan engines.

(2) RRD Trent 7000–72 and Trent 7000–72C model turbofan engines.

(d) Subject

Joint Aircraft System Component (JASC) Code 7230, Turbine Engine Compressor Section.

(e) Unsafe Condition

This AD was prompted by a report of a crack finding of the front air seal on the intermediate-pressure compressor (IPC) shaft assembly during the stripping of a flight test engine. The FAA is proposing this AD to prevent failure of the IPC shaft assembly. The unsafe condition, if not addressed, could result in loss of thrust control and reduced control of the airplane.

(f) Compliance

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

(g) Required Actions

(1) Within the compliance times specified in Table 1 to paragraph (g)(1) of this AD, and thereafter, at intervals not to exceed 200 flight cycles (FCs), perform a borescope inspection (BSI) of the IPC shaft assembly, part number KH18436, in accordance with the Accomplishment Instructions, paragraph 3.B., of Rolls-Royce (RR) Trent 1000 Alert Non-Modification Service Bulletin (NMSB) 72–AK451, Initial Issue, dated November 14, 2019.

Table 1 to Paragraph (g)(1) – Initial Inspection of Affected Part

FCs Accumulated (since new)	Compliance Time
700 FCs or less.	Before exceeding 500 FCs, or within 100 FCs after the effective date of this AD, whichever occurs later
More than 700 FCs up to 1,000 FCs (inclusive).	Within 50 FCs after the effective date of this AD
1,001 FCs or greater.	Within 25 FCs or 30 calendar days, whichever occurs first after the effective date of this AD

(2) An in-shop BSI in accordance with Accomplishment Instructions, paragraph 3.A, of RR Trent 1000 Alert NMSB 72–AK451, Initial Issue, dated November 14, 2019, may be substituted for any on-wing BSI, provided the compliance time specified in Table 1 to paragraph (g)(1) of this AD is not exceeded.

(3) If, during any initial or repetitive BSI of the IPC shaft assembly required by paragraph (g)(1) or (2) of this AD, any crack is detected, before further flight, remove the IPC shaft assembly and replace it with a part eligible for installation.

(h) Definitions

For the purpose of this AD, a ''part eligible for installation'' is:

(1) An IPC shaft assembly that is new (not previously installed on an engine);

(2) An IPC shaft assembly that, before (re)installation, has passed an inspection (no crack detected) in accordance with Accomplishment Instructions, paragraph 3.B., of RR Trent 1000 Alert NMSB 72–AK451, Initial Issue, dated November 14, 2019.

(i) No Reporting Requirement

The reporting requirements in the Accomplishment Instructions, paragraphs 3.A. and 3.B., of RR Trent 1000 Alert NMSB 72–AK451, Initial Issue, dated November 14, 2019, are not required by this AD.

(j) Credit for Previous Actions

You may take credit for the initial BSI of the IPC shaft assembly that is required by paragraph (g)(1) of this AD if you performed the BSI before the effective date of this AD using RR Trent 1000 NMSB 72–K452, Initial Issue, dated October 21, 2019.

(k) Alternative Methods of Compliance (AMOCs)

(1) The Manager, ECO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ECO Branch, send it to the attention of the person identified in paragraph (l)(1) of this AD. You may email your request to: *ANE-AD-AMOC@faa.gov.*

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

(l) Related Information

(1) For more information about this AD, contact Stephen Elwin, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA, 01803; phone: 781–238–7236; fax: 781–238–7199; email: *stephen.l.elwin@faa.gov.*

(2) Refer to European Union Aviation Safety Agency (EASA) AD 2019–0282, dated November 20, 2019, for more information. You may examine the EASA AD in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating it in Docket No. FAA–2020–0293.

(3) For service information identified in this AD, contact Rolls-Royce Deutschland Ltd & Co KG, Eschenweg 11, 15827 Blankenfelde-Mahlow, Germany; phone: +49 (0) 33 708 6 0; email: *https://www.rolls-royce.com/contact-us.aspx.* You may view this referenced service information at the FAA, Engine and Propeller Standards Branch, 1200 District Avenue, Burlington, MA, 01803. For information on the availability of this material at the FAA, call 781–238–7759.

Issued on March 26, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–06736 Filed 4–1–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Office of the Secretary

15 CFR Part 4

[Docket No. 200117–0024]

RIN 0605–AA49

Social Security Number Fraud Prevention Act of 2017 Implementation

AGENCY: Office of the Secretary, Department of Commerce.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule would revise the Department of Commerce (Department) regulations under the Freedom of Information Act (FOIA) and the Privacy Act. The revisions would clarify and update the language of procedural requirements pertaining to the inclusion of Social Security account numbers (SSNs) on documents that the Department sends by mail. These revisions are necessary to implement the Social Security Number Fraud Prevention Act of 2017, which restricts the inclusion of Social Security Numbers (SSNs) on documents sent by mail by the Federal Government.

DATES: Submit comments on or before April 24, 2020. Comments received by mail will be considered timely if they are postmarked on or before that date. The electronic Federal Docket Management System (FDMS) will accept comments until Midnight Eastern Time at the end of that day.

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 0605–AA49, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Departmental Privacy Act Officer, Office of Privacy and Open

Government, Department of Commerce, 1401 Constitution Ave. NW, Mail Stop 61025, Washington, DC 20230.

Instructions: All submissions received must include the agency name and docket number or RIN for this rulemaking. All comments received will be posted without change to regulations.gov, including any personal information provided. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by the Department.

FOR FURTHER INFORMATION CONTACT: Departmental Privacy Act Officer, Office of Privacy and Open Government, United States Department of Commerce, (202) 482–1190.

SUPPLEMENTARY INFORMATION: The Social Security Number Fraud Prevention Act of 2017 (the Act) (Pub. L. 115–59; 42 U.S.C. 405 note), which was signed on September 15, 2017, restricts Federal agencies from including individuals' SSNs on documents sent by mail, unless the head of the agency determines that the inclusion of the SSN on the document is necessary (section 2(a) of the Act). The Act requires agency heads to issue regulations specifying the circumstances under which inclusion of a SSN on a document sent by mail is necessary. These regulations, which must be issued not later than five years after the date of enactment, shall include instructions for the partial redaction of SSNs where feasible, and shall require that SSNs not be visible on the outside of any package sent by mail (section 2(b) of the Act). This proposed rule would revise the Department regulations under the Freedom of Information Act (FOIA) (subpart A, 15 CFR part 4) and the Privacy Act (subpart B, 15 CFR part 4), consistent with these requirements in the Act. The proposed revisions would clarify the language of procedural requirements pertaining to the inclusion of SSNs on documents that the Department sends by mail. The proposed rule also makes clarifying updates by changing the term ''Privacy Officer'' to ''Privacy Act Officer'' where it occurs in Subpart B of 15 CFR part 4, and by changing the term ''FOI Officer'' to ''FOIA Officer'' in several places in Appendix B, The proposed rule also updates an office name by changing the phrase ''Assistant General Counsel for Employment, Litigation, and Oversight'' to ''Assistant General Counsel for Employment, Litigation, and Information'' where it occurs in part 4.

Classification

This proposed rule has been determined to be significant for purposes of review under Executive Order 12866. This proposed rule is not subject to the requirements of Executive Order 13771 because it is expected to result in no more than *de minimis* costs to citizens and residents of the United States. In accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Chief Counsel for Regulation has reviewed this rule and certifies that this regulation, if implemented, will not have a significant economic impact on a substantial number of small entities. This rule is largely procedural in nature, and, therefore, will not affect requesters. This regulation does not contain a collection of information as defined by the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*

List of Subjects in 15 CFR Part 4

Appeals, Freedom of Information Act, Information, Privacy, Privacy Act.

Catrina D. Purvis,

Chief Privacy Officer, and Director of Open Government.

For the reasons stated in the preamble, the Department of Commerce proposes to amend Subpart B of 15 CFR part 4 as follows:

PART 4—DISCLOSURE OF GOVERNMENT INFORMATION

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

Authority: 5 U.S.C. 301; 5 U.S.C. 552; 5 U.S.C. 552a; 5 U.SC. 553; 31 U.S.C. 3717; 44 U.S.C. 3101; Reorganization Plan No. 5 of 1950; Pub. L. 115–59, 131 Stat. 1152 (42 U.S.C. 405, note).

Subpart A—Freedom of Information Act

■ 2. In § 4.7, revise paragraph (d) to read as follows:

§ 4.7 Responses to Requests.

* * * * *

(d) All responses shall be made subject to the provisions of § 4.25(b)(2)(iv).

* * * * *

Subpart B [Amended]

■ 3. Amend subpart B by removing the words ''Privacy Officer'' wherever they appear and adding in their place the words ''Privacy Act Officer''.

■ 4. Amend § 4.22:

■ a. In paragraph (b)(7), emoving the words ''Privacy Officer'' and adding, in their place, the words ''Privacy Act Officer''; and

■ b. Adding new paragraph (b)(10).

The addition reads as follows:

§ 4.22 Definitions

* * * * *

(b) * * *

(10) *Un-redacted SSN Mailed Documents Listing (USMDL)* means the Department approved list, as posted at *www.commerce.gov/privacy,* designating those_documents for which the inclusion of the Social Security number (SSN) is determined to be necessary to fulfill a compelling Department business need when the documents are requested by individuals outside the Department or other Federal agencies, as determined jointly by the Senior Agency Official for Privacy and the Departmental Privacy Act Officer.

■ 5. Amend § 4.25 by:

■ a. Adding paragraphs (a)(3) and (4); and

■ b. Revising paragraph (b)(2)(iii), and adding paragraphs (b)(2)(iv) and (v).

The additions and revisions read as follows:

§ 4.25 Disclosure of requested records to individuals [Amended]

(a) * * *

(3) Inclusion of Social Security Numbers (SSNs) on responsive documents.

The Department shall redact SSNs from responsive documents provided to requesters where feasible. Where full redaction is not feasible, partial redaction to create a truncated SSN shall be preferred to no redaction.: The following conditions must be met for the inclusion of an unredacted (full) SSN or partially redacted (truncated) SSN on a responsive document:

(i) The inclusion of the full SSN or truncated SSN of an individual must be required or authorized by law,

(ii) The inclusion of the full SSN or truncated SSN of an individual must be determined by the Senior Agency Official for Privacy and Departmental Privacy Act Officer to be necessary to fulfill a compelling Department business need; and

(iii) The full SSN of an individual may be included only on documents listed on the USMDL.

(4) The following requirements apply when the Department mails or delivers responsive documents containing SSNs or truncated SSNs:

(i) The full SSN of an individual may be included only on documents listed on the USMDL.

(ii) For documents that are listed on the USMDL and that include the full SSN of an individual, the signature of the recipient is required upon delivery.

(iii) For documents that include the truncated form of the SSN of an individual, the signature of the recipient is required upon delivery.

(iv) The full SSN, the truncated SSN, any part of the SSN of an individual must not be visible from the outside of the envelope or package.

(b) * * *

(2) * * *

(iii) Copies of documents may be mailed at the request of the individual, and may be subject to payment of the fees prescribed in §§ 4.25(a)(3) and 4.31. In the event that the Department, at its own initiative, elects to provide a copy by mail, no fee will be charged to the individual.

(iv) Copies of documents listed on the USMDL, include full SSNs, and are requested by an individual are subject to payment of the fees prescribed in § 4.31.

(v) Documents containing SSNs or truncated SSNs that are required to be returned by the individual to the Department will be mailed or delivered along with a prepaid mail or delivery service envelope at the expense of the Department.

* * * * *

Appendix B to Part 4 [Amended]

■ 6. Amend Appendix B to part 4 by adding the word ''Act'' after the phrase ''Departmental Freedom of Information'' wherever it appears, after the phrase ''Executive Secretary; Freedom of Information'', and before the phrase ''Officer for the Office of the Secretary''.

[FR Doc. 2020–06490 Filed 4–1–20; 8:45 am]

BILLING CODE 3510–17–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 866

[Docket No. FDA–2020–N–1088]

Microbiology Devices; Reclassification of Nucleic Acid-Based Hepatitis C Virus Ribonucleic Acid Assay Devices, To Be Renamed Nucleic Acid-Based Hepatitis C Virus Ribonucleic Acid Tests

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed amendment; proposed order; request for comments.

SUMMARY: The Food and Drug Administration (FDA or Agency) is proposing to reclassify nucleic acid-based hepatitis C virus (HCV) ribonucleic acid (RNA) devices intended for the qualitative or quantitative detection or genotyping of HCV RNA, postamendments class III devices (product codes MZP and OBF), into class II (general controls and special controls), subject to premarket notification. FDA is also proposing a new device classification regulation with the name ''nucleic acid-based Hepatitis C virus (HCV) ribonucleic acid tests'' along with the special controls that the Agency believes are necessary to provide a reasonable assurance of safety and effectiveness for these devices. FDA is proposing this reclassification on its own initiative. If finalized, this order will reclassify these types of devices from class III (general controls and premarket approval) to class II (general controls and special controls) and reduce the regulatory burdens associated with these devices, as these types of devices will no longer be required to submit a premarket approval application (PMA), but can instead submit a premarket notification (510(k)) and obtain clearance before marketing their device.

DATES: Submit either electronic or written comments on the proposed order by June 1, 2020. Please see section XI of this document for the proposed effective date when the new requirements apply and for the proposed effective date of a final order based on this proposed order.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before June 1, 2020. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of June 1, 2020. Comments received by Mail/Hand Delivery/Courier (for written/paper submissions) will be considered timely.

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 below (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–1088 for ''Reclassification of Nucleic Acid-Based Hepatitis C Virus Ribonucleic Acid Assay Devices, To Be Renamed Nucleic Acid-Based Hepatitis C Virus Ribonucleic Tests.'' Received comments, those filed in a timely manner (see **ADDRESSES**) will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

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

and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at:*https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Silke Schlottmann, Division of Microbiology Devices, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 3258, Silver Spring, MD 20993–0002, 301–796–9551, *silke.schlottmann@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background—Regulatory Authorities

The FD&C Act, as amended by the Medical Device Amendments of 1976 (the 1976 amendments) (Pub. L. 94–295), the Safe Medical Devices Act of 1990 (Pub. L. 101–629), Food and Drug Administration Modernization Act of 1997 (Pub. L. 105–115), the Medical Device User Fee and Modernization Act of 2002 (Pub. L. 107–250), the Medical Devices Technical Corrections Act (Pub. L. 108–214), the Food and Drug Administration Amendments Act of 2007 (Pub. L. 110–85), and the Food and Drug Administration Safety and Innovation Act (Pub. L. 112–144), among other amendments, establishes a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the FD&C Act (21 U.S.C. 360c) established three categories (classes) of devices, reflecting the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three categories of devices are class I (general controls), class II (general controls and special controls), and class III (general controls and premarket approval).

Section 513(a)(1) of the FD&C Act defines the three classes of devices. Class I devices are those devices for which the general controls of the FD&C Act (controls authorized by or under sections 501, 502, 510, 516, 518, 519, or 520 (21 U.S.C. 351, 352, 360, 360f, 360h, 360i, or 360j) or any combination of such sections) are sufficient to provide reasonable assurance of safety and effectiveness; or those devices for which insufficient information exists to determine that general controls are sufficient to provide reasonable assurance of safety and effectiveness or to establish special controls to provide such assurance, but because the devices are not purported or represented to be for a use in supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health, and do not present a potential unreasonable risk of illness or injury, are to be regulated by general controls (section 513(a)(1)(A) of the FD&C Act). Class II devices are those devices for which general controls by themselves are insufficient to provide reasonable assurance of safety and effectiveness, and for which there is sufficient information to establish special controls to provide such assurance, including the promulgation of performance standards, postmarket surveillance, patient registries, development and dissemination of guidelines, recommendations, and other appropriate actions the Agency deems necessary to provide such assurance (section 513(a)(1)(B) of the FD&C Act). Class III devices are those devices for which insufficient information exists to determine that general controls and special controls would provide a reasonable assurance of safety and effectiveness, and are purported or represented to be for a use in supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health, or present a potential unreasonable risk of illness or injury (section 513(a)(1)(C) of the FD&C Act).

Devices that were not in commercial distribution prior to May 28, 1976 (generally referred to as postamendments devices) are automatically classified by section 513(f)(1) of the FD&C Act into class III without any FDA rulemaking process. Those devices remain in class III and require premarket approval unless, and until, (1) FDA reclassifies the device into class I or class II, or (2) FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the FD&C Act, to a predicate device that does not require premarket approval. FDA determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures in section 510(k) of the FD&C Act and part 807 (21 CFR part 807), subpart E, of the regulations.

A postamendments device that has been initially classified in class III under section 513(f)(1) of the FD&C Act may be reclassified into class I or II under section 513(f)(3) of the FD&C Act. Section 513(f)(3) of the FD&C Act provides that FDA, acting by administrative order, can reclassify the device into class I or class II on its own initiative, or in response to a petition from the manufacturer or importer of the device. To change the classification of the device, the proposed new class must have sufficient regulatory controls to provide a reasonable assurance of the safety and effectiveness of the device for its intended use.

FDA relies upon ''valid scientific evidence,'' as defined in section 513(a)(3) and 21 CFR 860.7(c)(2), in the classification process to determine the level of regulation for devices. To be considered in the reclassification process, the ''valid scientific evidence'' upon which the Agency relies must be publicly available (see section 520(c) of the FD&C Act). Publicly available information excludes trade secret and/or confidential commercial information, *e.g.,* the contents of a pending PMA (see section 520(c) of the FD&C Act).

In accordance with section 513(f)(3) of the FD&C Act, the Agency is issuing this proposed order to reclassify nucleic acid-based HCV RNA devices intended for the qualitative or quantitative detection or genotyping of HCV RNA, postamendment class III devices, into class II (general controls and special controls), subject to premarket notification because the Agency believes the standard in section 513(a)(1)(B) of the FD&C Act is met as there is sufficient information to establish special controls, which, in addition to general controls, will provide reasonable assurance of the safety and effectiveness of the device.[1]

Section 510(m) of the FD&C Act provides that a class II device may be exempted from the premarket notification requirements under section 510(k) of the FD&C Act if the Agency determines that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the device. FDA has determined that premarket notification is necessary to reasonably assure the safety and effectiveness nucleic acid-based HCV RNA devices intended for the qualitative or quantitative detection or genotyping of HCV RNA. Therefore, the

[1] In December 2019, FDA began adding the term ''Proposed amendment'' to the ''ACTION'' caption for these documents, typically styled ''Proposed order,'' to indicate that they ''propose to amend'' the Code of Federal Regulations. This editorial change was made in accordance with the Office of **Federal Register's** interpretations of the **Federal Register** Act (44 U.S.C. chapter 15), its implementing regulations (1 CFR 5.9 and parts 21 and 22), and the Document Drafting Handbook.

Agency does not intend to exempt these proposed class II devices from premarket notification requirements. If this proposed order is finalized, persons who intend to market this type of device must submit to FDA a premarket notification under section 510(k) of the FD&C Act prior to marketing the device.

II. Regulatory History of the Devices

This proposed order applies to nucleic acid-based HCV RNA devices intended for the qualitative or quantitative detection or genotyping of HCV RNA. These are prescription devices assigned product codes MZP (for qualitative and quantitative HCV RNA tests) and OBF (for HCV RNA genotyping tests) and are collectively referred to as ''nucleic acid-based HCV RNA tests.'' On July 3, 2001, FDA approved its first nucleic acid-based qualitative HCV RNA test for use as a prescription device as an aid in the diagnosis of active HCV infection in HCV antibody positive individuals (Roche Molecular Systems, Inc.'s COBAS AMPLICOR Hepatitis C Virus (HCV) Test, version 2.0) through its PMA process under section 515 of the FD&C Act (21 U.S.C. 360e). In a July 17, 2002, **Federal Register** notice (67 FR 46990), FDA announced the PMA approval order and the availability of the Summary of Safety and Effectiveness Data (SSED) for this device. Since the first approval order, FDA has approved two additional original PMAs for nucleic-acid based qualitative HCV RNA tests that are prescription devices intended for use as an aid in the diagnosis of active HCV infection in HCV antibody positive individuals by a qualified licensed healthcare professional in conjunction with other relevant clinical and laboratory findings (hereafter referred to as ''qualitative HCV RNA tests'').

On March 28, 2003, FDA approved its first quantitative nucleic acid-based HCV RNA test for use as a prescription device in the management of chronic HCV-infected patients undergoing antiviral therapy (Bayer Healthcare, LLC's Bayer VERSANT HCV RNA 3.0 Assay (bDNA)) through its PMA process under section 515 of the FD&C Act. In a March 10, 2005, **Federal Register** notice (70 FR 11986), FDA announced the PMA approval order and the availability of the SSED for this device. Since the first approval order, FDA has approved four additional original PMAs for quantitative nucleic acid-based HCV RNA tests that are prescription devices intended for management of chronic HCV-infected patients undergoing anti-viral therapy by a qualified licensed healthcare professional in conjunction with other relevant clinical and laboratory findings (hereafter referred to as ''quantitative HCV RNA tests''). Three of these tests are approved for both the qualitative detection of HCV RNA as an aid in the diagnosis of active HCV infection and for the quantitation of HCV RNA in the management of chronic HCV-infected patients undergoing antiviral therapy.

On June 20, 2013, CDRH approved its first nucleic acid-based HCV genotyping test for use as a prescription device in the qualitative identification of certain HCV genotypes (Abbott Molecular Inc.'s Abbott RealTime HCV Genotype II) through its PMA process under section 515 of the FD&C Act. In an August 19, 2013, **Federal Register** notice (78 FR 50422), FDA announced the approval order and the availability of the SSED for this device. Since the first approval order, FDA has approved one additional original PMA for nucleic acid-based HCV genotyping test that is a prescription device intended for the qualitative identification of certain HCV genotypes by a qualified licensed healthcare professional in conjunction with other relevant clinical and laboratory findings (hereafter referred to as ''HCV genotyping tests'').

A review of the medical device reporting databases indicates that there is a low number of reported events for nucleic acid-based HCV RNA tests relative to the number of tests conducted using these devices. As of the date of this proposed order, FDA is aware of three class II recalls for these devices and no class I recalls.[2] The class II recalls occurred between 2004 and 2011 and were related to: (1) An increased frequency of the interfering background due to the conjugate used for detection, (2) underquantitation of a subset of genotype 4 patient specimens, and (3) a software discrepancy between the onboard reagent stability information and that in the package insert. All recalls have been resolved and no patient harm has been identified. These facts, coupled with the low number of reported events, indicate a good safety record for this device class. These recall events reflect the risks to health identified in section V below, and FDA believes the special controls proposed herein, in addition to general controls, can effectively mitigate the risks identified in these recalls.

III. Device Descriptions

Nucleic acid-based HCV RNA tests are postamendments prescription in vitro diagnostic devices classified into class III under section 513(f)(1) of the FD&C Act. Qualitative and quantitative HCV RNA tests are described in FDA's SSEDs and product code database (assigned product code MZP) as a hybridization and/or nucleic acid amplification assay for the detection and/or quantification of HCV RNA. HCV RNA, when present in samples, are first amplified by qualitative and quantitative HCV RNA tests and then detected by labeled probes that produce a qualitative or quantitative signal indicating either the presence/absence of HCV or the amount of HCV in the sample, respectively.

FDA is proposing to reclassify qualitative HCV tests, which are prescription in vitro diagnostic devices intended to determine the presence of HCV RNA in human serum and/or plasma and are intended for use as an aid in the diagnosis of active HCV infection in patients with serological evidence of HCV infection, or other limited circumstances when active HCV infection of the patient is suspected. FDA is also proposing to reclassify quantitative HCV tests that are prescription in vitro diagnostic devices intended to measure the amount of HCV RNA in human serum and/or plasma and are intended as an aid in the diagnosis of active HCV infection, as an aid in the management of chronic HCV-infected patients undergoing or having completed antiviral therapy, or both. These devices are not intended for screening blood, plasma, cell, or tissue donors.

HCV genotyping tests are described in FDA's SSEDs and the product code database (assigned product code OBF) as an in vitro diagnostic device for qualitative identification of eight clinically relevant HCV RNA genotypes. FDA is proposing to reclassify HCV genotyping tests that are nucleic acid-based in vitro diagnostic tests, which are prescription in vitro diagnostic devices intended to identify HCV genotypes in patients with active HCV infection. The tests are intended to be used as an aid in the management of patients with chronic HCV infection to guide the selection of antiviral treatment.

FDA is proposing to reclassify nucleic acid-based HCV RNA tests from class III (general controls and premarket approval) to class II (general controls and special controls) and to establish a new name for the device type that will be within the classification regulation; *i.e.,* nucleic acid-based HCV RNA tests. FDA believes that this name and proposed identification language most accurately describes these devices. A nucleic acid-based HCV RNA test is tentatively identified as a device intended for prescription use with

[2] Class II recalls are defined in 21 CFR 7.3(m)(2).

human serum or plasma from individuals with evidence of HCV antibodies. The test is intended as an aid in the diagnosis of HCV infection in specified populations, and/or as an aid in the management of HCV-infected patients including guiding the selection of genotype-specific treatment in individuals with chronic HCV infection.

Based upon our review experience and consistent with the FD&C Act and FDA's regulations in 21 CFR 860.134, FDA believes that these devices should be reclassified from class III into class II with special controls because there is sufficient information to establish special controls that, along with general controls, can provide reasonable assurance of the devices' safety and effectiveness.

IV. Proposed Reclassification

FDA is proposing to reclassify nucleic acid-based HCV RNA tests. On March 22, 2018, the Microbiology Devices Panel (Panel) of the Medical Devices Advisory Committee convened to discuss and make recommendations regarding the reclassification of nucleic acid-based HCV RNA tests from class III (general controls and premarket approval) into class II (general controls and special controls) (Ref. 1). Panel members unanimously agreed that special controls, in addition to general controls, are necessary and sufficient to mitigate the risks to the health of patients presented by these devices and to provide reasonable assurance of the safety and effectiveness of these devices (Ref. 2). In addition, Panel members generally agreed with the development of special controls as presented by FDA.

FDA agrees and believes that at this time, sufficient data and information exist such that the risks identified in section V below can be mitigated by establishing special controls that, together with general controls, can provide a reasonable assurance of the safety and effectiveness of these devices and therefore proposes these devices to be reclassified from class III (general controls and premarket approval) to class II (general controls and special controls).

In accordance with section 513(f)(3) of the FD&C Act and part 860, subpart C, FDA is proposing to reclassify postamendments nucleic acid-based HCV RNA tests, to be renamed ''nucleic acid-based Hepatitis C virus (HCV) ribonucleic acid (RNA) tests,'' from class III into class II. FDA believes that, at this time, there are sufficient data and information available to FDA through FDA's accumulated experience with these devices from review submissions and from published peer-reviewed literature, as well as the recommendations provided by the Panel, to demonstrate that the proposed special controls, along with general controls, would effectively mitigate the risks to health identified in section V below and provide a reasonable assurance of the safety and effectiveness of these devices. Absent the special controls identified in this proposed order, general controls applicable to the device type are insufficient to provide reasonable assurance of the safety and effectiveness of these devices. FDA expects that the reclassification of these devices would enable more manufacturers to develop nucleic acid-based HCV RNA tests such that patients would benefit from increased access to safe and effective tests.

FDA is proposing to create a classification regulation for nucleic acid-based HCV RNA tests that will be reclassified from class III to class II. Under this proposed order, if finalized, nucleic acid-based HCV RNA tests will be identified as prescription devices. As such, the prescription device must satisfy prescription labeling requirements for in vitro diagnostic products (see 21 CFR 809.10(a)(4) and (b)(5)(ii)). In this proposed order, if finalized, the Agency has identified the special controls under section 513(a)(1)(B) of the FD&C Act that, together with general controls, will provide a reasonable assurance of the safety and effectiveness for nucleic acid-based HCV RNA tests.

Section 510(m) of the FD&C Act provides that FDA may exempt a class II device from the premarket notification requirements under section 510(k) of the FD&C Act if FDA determines that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the device. For these nucleic acid-based HCV RNA tests, FDA has determined that premarket notification is necessary to provide reasonable assurance of the safety and effectiveness of the devices. Therefore, FDA does not intend to exempt these proposed class II devices from the 510(k) requirements. If this proposed order is finalized, persons who intend to market this type of device must submit a 510(k) to FDA and receive clearance prior to marketing the device.

This proposed order, if finalized, will decrease regulatory burden on industry, as manufacturers will no longer have to submit a PMA for these types of devices but can instead submit a 510(k) to the Agency for review prior to marketing their device. A 510(k) typically results in a shorter premarket review timeline compared to a PMA, which ultimately provides more timely access of these types of devices to patients.

In addition, the Agency believes that certain changes could be made to nucleic acid-based HCV RNA tests that could significantly affect the safety and effectiveness of those devices and for which a new 510(k) is likely required.[3] Based on FDA's accumulated experience with these devices, changes that likely could significantly affect the safety and effectiveness of these devices include, but are not limited to: Changes to critical reagents, changes to final release specifications, and changes in shelf life of the device. For more information about when to submit a new 510(k), manufacturers should refer to FDA's guidance entitled ''Deciding When to Submit at 510(k) for a Change to an Existing Device'' (Ref. 3).

V. Risks to Health

It is estimated by the Centers for Disease Control and Prevention that chronic HCV infection in the United States affects at least between 2.7 and 3.9 million people (Ref. 4). HCV infection can be asymptomatic, and accordingly, many HCV-infected individuals are unaware of their HCV infection. Between 20 percent and 30 percent of patients with acute infection, defined as the first 6 months after infection, clear the virus spontaneously while the other 70 percent to 80 percent of individuals become chronically infected with HCV (Ref. 5). Later diagnosis can lead to a more severe disease outcome, and premature death among those who are chronically infected (Ref. 6). Patients who are tested and become aware that they are HCV infected may modify risk behaviors to prevent transmission to others and can be referred for treatment.

If left untreated, patients with chronic HCV infection have a significant risk of developing severe liver disease and/or hepatocellular cancer. Treatment of chronic HCV is highly effective, resulting in a sustained virological response (SVR) considered synonymous with cure. SVR is associated with improved clinical outcome, and a decrease in HCV-associated mortality (Ref. 7). Therefore, diagnosis of HCV infection through devices such as nucleic acid-based HCV RNA tests is essential to ensure that patients are linked to the appropriate care (Ref. 6).

After consideration of FDA's accumulated experience with these devices from review of previous submissions, recommendations of the Panel for the classification of these devices (Ref. 2), and published

[3] See 21 CFR 807.81(a)(3)(i).

literature, FDA has identified the following probable risks to health associated with nucleic acid-based HCV RNA tests:

• *Inaccurate interpretation of test results.* Inaccurate interpretation of results by clinicians may negatively influence patient management decisions. Such decisions may include the administration of unnecessary treatment and potential adverse effects, the withholding of treatment, or the choice of an inappropriate treatment, and could lead to adverse effects on patient health such as progressive liver disease, cirrhosis and/or hepatocellular cancer, all of which are known to contribute to patient morbidity and mortality (Ref. 6). Patients with active HCV infection also risk spreading the virus to others

• *Failure of the device to perform as indicated (e.g., inaccurately low or high results, false negative, false positive test results, and inaccurate genotyping results).* Inaccurately low results, false negative results, or inaccurate test results from nucleic acid-based HCV RNA genotyping tests (*i.e.,* the test result is for a genotype that is not the one that the patient is actually infected with) due to failure of the device to perform as indicated may negatively influence patient management decisions. Such decisions may include the withholding of treatment or the choice of an inappropriate treatment, and could lead to adverse effects on patient health such as progressive liver disease, cirrhosis and/or hepatocellular cancer, all of which are known to contribute to patient morbidity and mortality (Ref. 6). Patients with active HCV infection also risk spreading the virus to others. Inaccurately high or false positive test results due to failure of the device to perform may contribute to the unnecessary initiation of treatment. In addition, these results may contribute to potential adverse effects from HCV antiviral drug therapy in the following groups: (1) Successfully treated patients who are incorrectly considered treatment failures, (2) in patients who have spontaneously cleared HCV, or (3) in patients previously treated but suspected of reinfection.

• *Decreased test sensitivity and/or an increased rate of false negative test reporting.* This may occur with patient samples that contain different genotypes, rare de novo mutations in genomic regions of HCV targeted by the device, or that are taken during the time that the patient transitions from acute to chronic infection, which is when HCV viral load can transiently decrease and/or become undetectable in samples before the virus enters into chronic replication.

VI. Summary of the Reasons for Reclassification

FDA believes that nucleic acid-based HCV RNA tests should be reclassified from class III (general controls and premarket approval) into class II (general controls and special controls) because special controls, in addition to general controls, can be established to mitigate the risks to health identified in section V and provide a reasonable assurance of the safety and effectiveness of these devices. The proposed special controls are identified by FDA in section VII.

Taking into account the probable health benefits of the use of these devices and the nature and known incidence of the risks of the devices, FDA, on its own initiative, is proposing to reclassify these postamendments class III devices into class II. FDA believes that, when used as indicated, nucleic acid-based HCV RNA tests can provide significant benefits to clinicians and patients.

FDA's reasons for reclassification are based on the substantial scientific and medical information available regarding the nature, complexity, and risks associated with nucleic acid-based HCV RNA tests in the identified intended use populations (Ref. 1). The safety and effectiveness of this device type has become well established since the initial approval of the first qualitative HCV RNA test in 2001 (for the detection of HCV RNA in anti-HCV positive individuals), of the first quantitative HCV RNA test in 2003 (for quantitation of HCV RNA in anti-HCV positive individuals), and of the first HCV genotyping test in 2013 (for genotyping of HCV RNA).

VII. Proposed Special Controls

FDA believes that these devices can be classified into class II with the establishment of special controls. FDA believes that the following special controls, together with general controls, will provide a reasonable assurance of the safety and effectiveness of nucleic acid-based HCV RNA tests. Table 1 demonstrates how these proposed special controls will mitigate each of the identified risks to health in section V.

The risk of inaccurate interpretation of test results can be mitigated by special controls requiring certain labeling, including providing clearly stated warnings and limitations, device description information, and detailed instructions in the device labeling regarding the interpretation of test results and principles of operation and procedure in performing the test. In addition, when intended for Point of Care use, special controls requiring clinical testing performed in appropriate settings and additional labeling to provide a brief summary of the instructions for use can also mitigate the risk of inaccurate interpretation of test results.

Risks associated with the failure of the device to perform as indicated (*e.g.,* inaccurately low or high results, false negative, false positive test results, and inaccurate genotyping results) can be mitigated through a combination of special controls related to certain labeling requirements, design verification and validation activities, and performance studies. Examples of verification and validation information to be included in the design of the device includes documentation of a complete device description, calibrators, critical reagents, traceability, and lot release criteria. In addition, design verification and validation must include documentation of performance specifications including analytical and clinical performance criteria. Required statements in labeling can aid in mitigating the occurrence of inaccurate results (for example, a statement that test results are intended to be interpreted by qualified individuals in conjunction with other relevant clinical and laboratory findings). For purposes of clarity, certain proposed special controls apply only to those types of nucleic acid-based HCV tests identified (*i.e.,* HCV RNA tests, qualitative HCV RNA tests, and/or HCV genotyping tests) because, due to differences in the results provided by the different tests, those special controls would not apply to the other types of nucleic acid-based HCV tests. The risks of decreased test sensitivity or an increased rate of false negative test reporting can be mitigated by special controls related to certain labeling, design verification and validation activities, failure mode analysis, and performance studies.

TABLE 1—RISKS TO HEALTH AND MITIGATION MEASURES FOR NUCLEIC ACID-BASED HCV RNA TESTS

Identified risks to health	Mitigation measures
Inaccurate interpretation of test results	Certain labeling warnings, limitations, results interpretation information, and explanation of procedures.
Failure of the device to perform as indicated	Certain labeling warnings, limitations, results interpretation information, and explanation of procedures in labeling. Certain design verification and validation information including device description, calibrators, critical reagents, traceability, and, lot release criteria. Performance criteria including analytical and# clinical performance criteria.
Decreased test sensitivity and/or an increased rate of false negative test reporting.	Certain labeling warnings, limitations, results interpretation information, and explanation of procedures in labeling. Certain design verification and validation information including device description, calibrators, critical reagents, traceability, and lot release criteria. Performance criteria including analytical and clinical performance criteria.

If this proposed order is finalized, nucleic acid-based HCV RNA tests will be reclassified into class II (general controls and special controls) and would be subject premarket notification requirements under section 510(k) of the FD&C Act. As discussed below, the reclassification will be codified in § 866.3170 (21 CFR 866.3170). Firms submitting a premarket notification under section 510(k) of the FD&C Act for nucleic acid-based HCV RNA tests will be required to comply with the particular mitigation measures set forth in the special controls. Adherence to the special controls, in addition to the general controls, is necessary to provide a reasonable assurance of the safety and effectiveness of these devices.

VIII. Analysis of Environmental Impact

The Agency has determined under 21 CFR 25.34(b) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

IX. Paperwork Reduction Act of 1995

FDA tentatively concludes that this proposed order contains no new collection of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required. This proposed order refers to previously approved FDA collections of information. These collections of information are subject to review by OMB under the PRA. The collections of information in 21 CFR part 820 have been approved under OMB control number 0910–0073; the collections of information in part 807, subpart E, have been approved under OMB control number 0910–0120; and the collections of information in 21 CFR parts 801 and 809 have been approved under OMB control number 0910–0485.

X. Codification of Orders

Under section 513(f)(3) of the FD&C Act, FDA may issue final orders to reclassify devices. FDA will continue to codify classifications and reclassifications in the Code of Federal Regulations (CFR). Changes resulting from final orders will appear in the CFR as newly codified orders. Therefore, under section 513(f)(3), in the proposed order, we are proposing to codify nucleic acid-based HCV RNA tests in the new § 866.3170, under which nucleic acid-based HCV RNA tests would be reclassified from class III to class II.

XI. Proposed Effective Date

FDA proposes that any final order based on this proposed order become effective 30 days after its date of publication in the **Federal Register**.

XII. References

The following references marked with an asterisk (*) are on display at 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 also are available electronically at *https://www.regulations.gov.* References without asterisks are not on public display at *https://www.regulations.gov* because they have copyright restriction. Some may be available at the website address, if listed. References without asterisks are available for viewing only at the Dockets Management Staff. 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. Executive Summary of the FDA Microbiology Devices Panel Meeting, March 22, 2018. Available at *https://www.fda.gov/media/111502/download.*
* 2. Transcript of the FDA Microbiology Devices Panel Meeting, March 22, 2018. Available at *https://www.fda.gov/media/119966/download.*
* 3. ''Deciding When to Submit a 510(k) for a Change to an Existing Device—Guidance for Industry and Food and Drug Administration Staff,'' issued October 25, 2017. Available at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/deciding-when-submit-510k-change-existing-device.*
* 4. Department of Health and Human Services—Viral Hepatitis Action Plan for 2017–2020. Available at *https://www.hhs.gov/sites/default/files/National%20Viral%20Hepatitis%20Action%20Plan%202017-2020.pdf.*
5. Aisyah, D.N., L. Shallcross, A.J. Hully, et. al., ''Assessing Hepatitis C Spontaneous Clearance and Understanding Associated Factors—A Systematic Review and Meta-Analysis.'' *Journal of Viral Hepatitis,* 25(6): 680–698, 2018.
6. Moorman, A.C., J. Xing, S. Ko, et al., ''Late Diagnosis of Hepatitis C Virus Infection in the Chronic Hepatitis Cohort Study (CHeCS): Missed Opportunities for Intervention.'' *Hepatology,* 61(5): 1479–1484, 2015.
7. Ioannou, G.N., P.K. Green, and K. Berry, ''HCV Eradication Induced by Direct-Acting Antiviral Agents Reduces the Risk of Hepatocellular Carcinoma.'' *Journal of Hepatology,* 68(1): 25–33, 2018.

List of Subjects in 21 CFR Part 866

Biologics, Laboratories, Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR part 866 be amended as follows:

PART 866—IMMUNOLOGY AND MICROBIOLOGY DEVICES.

■ 1. The authority citation for part 866 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 360*l,* 371.

■ 2. Add § 866.3170 to subpart D to read as follows:

§ 866.3170 Nucleic acid-based hepatitis c virus ribonucleic acid tests.

(a) *Identification.* A nucleic acid-based hepatitis C virus (HCV) ribonucleic acid (RNA) test is identified as an in vitro diagnostic device intended for prescription use as an aid in the diagnosis of HCV infection in specified populations, and/or as an aid in the management of HCV-infected patients including guiding the selection of genotype-specific treatment in individuals with chronic HCV infection. The test is intended for use with human serum or plasma from individuals with evidence of HCV antibodies. The test is not intended for use as a donor screening test for the presence of HCV antibodies in blood, blood products, or tissue donors.

(b) *Classification.* Class II (special controls). The special controls for this device are:

(1) For all nucleic acid-based HCV RNA tests, the labeling required under 21 CFR 809.10(b) must include:

(i) A prominent statement that the test is not intended for use as a donor screening test for the presence of HCV RNA from human cells, tissues, and cellular and tissue-based products.

(ii) A detailed explanation of the principles of operation and procedures for performing the assay.

(iii) A detailed explanation of the interpretation of results.

(iv) Limitations, which must be updated to reflect current clinical practice and disease presentation and management. These limitations must include, but are not limited to, statements that indicate:

(A) The specimen types for which the device has been cleared and that use of this test kit with specimen types other than those specifically cleared for this device may result in inaccurate test results.

(B) When applicable, that assay performance characteristics have not been established in populations of immunocompromised or immunosuppressed patients or, other populations where test performance may be affected.

(C) Test results are to be interpreted by qualified licensed healthcare professionals in conjunction with the individual's clinical presentation, history, and other laboratory results.

(2) For all nucleic acid-based HCV RNA tests, the design verification and validation must include:

(i) Detailed device description, including the device components, ancillary reagents required but not provided, and an explanation of the device methodology. Additional information appropriate to the technology must be included such as design of primers and probes, rationale for the selected gene targets, specifications for amplicon size, and degree of nucleic acid sequence conservation.

(ii) For devices with assay calibrators, the design and nature of all primary, secondary, and subsequent quantitation standards used for calibration as well as their traceability to a standardized reference material that FDA has determined is appropriate (*e.g.,* a recognized consensus standard). In addition, analytical testing must be performed following the release of a new lot of the standard material that was used for device clearance or approval, or when there is a transition to a new calibration standard.

(iii) Documentation and characterization (*e.g.,* determination of the identity, supplier, purity, and stability) of all critical reagents (including nucleic acid sequences for primers and probes) and protocols for maintaining product integrity.

(iv) Detailed documentation of analytical performance studies conducted as appropriate to the technology, specimen types tested, and intended use of the device, including, but not limited to, limit of detection (LoD), upper and lower limits of quantitation (ULoQ and LLoQ, respectively), linearity, precision, endogenous and exogenous interferences, cross reactivity, carryover, matrix equivalency, and sample and reagent stability. Samples selected for use in analytical studies or used to prepare samples for use in analytical studies must be from subjects with clinically relevant circulating genotypes in the United States. Cross-reactivity studies must include samples from HCV RNA negative subjects with other causes of liver disease, including autoimmune hepatitis, alcoholic liver disease, chronic hepatitis b virus, primary biliary cirrhosis, and nonalcoholic steatohepatitis, when applicable. The effect of each claimed nucleic-acid isolation and purification procedure on detection must be evaluated.

(v) Risk analysis and management strategies, such as Failure Modes Effects Analysis and/or Hazard Analysis and Critical Control Points summaries and their impact on test performance.

(vi) Final release criteria to be used for manufactured test lots with appropriate evidence that lots released at the extremes of the specifications will meet the claimed analytical and clinical performance characteristics as well as the stability claims.

(vii) Multisite reproducibility study that includes the testing of three independent production lots.

(viii) All stability protocols, including acceptance criteria.

(ix) Final release test results for each lot used in clinical studies.

(x) Analytical sensitivity and specificity of the test must be the same or better than that of other cleared or approved tests.

(xi) Lot-to-lot precision studies, as appropriate.

(3) For devices intended for the qualitative detection of HCV RNA, in addition to the special controls listed in paragraphs (b)(1) and (2) of this section, the design verification and validation must include detailed documentation of performance from a multisite clinical study. Performance must be analyzed relative to an FDA cleared or approved qualitative HCV RNA test, or a comparator that FDA has determined is appropriate. This study must be conducted using appropriate patient samples, with appropriate numbers of HCV positive and negative samples in applicable risk categories. Additional genotypes must be validated using appropriate numbers and types of samples. The samples may be a combination of fresh and repository samples, sourced from within and outside the United States, as appropriate. The study designs, including number of samples tested, must be sufficient to meet the following criteria:

(i) Clinical sensitivity of the test must have a lower bound of the 95 percent confidence interval of greater than or equal to 95 percent.

(ii) Clinical specificity of the test must have a lower bound of the 95 percent confidence interval of greater than or equal to 96 percent.

(4) For devices intended for the quantitative detection of HCV RNA, the following special controls, in addition to those listed in paragraphs (b)(1) and (2) of this section, apply:

(i) Labeling required under 21 CFR 809.10(b) must include a prominent statement that the test is not intended as a diagnostic test to confirm the presence of active HCV infection, when applicable.

(ii) Design verification and validation must include the following:

(A) Detailed documentation of the following analytical performance studies conducted as appropriate to the technology, specimen types tested, and intended use of the device, including but not limited to: LoD, ULoQ and LLoQ. LoD, LLoQ, and linearity studies must demonstrate acceptable device

performance with all HCV genotypes detected by the device.

(B) Detailed documentation of clinical performance testing from either:

(*1*) A multisite clinical study with an appropriate number of clinical samples from chronically HCV infected patients in which the results are compared to an FDA-cleared or approved quantitative HCV RNA test, or a comparator that FDA has determined is appropriate. This study must include a sufficient number of HCV positive samples containing an analyte concentration near the LLoQ to describe performance at this level. Clinical samples must cover the full range of the device output and must be consistent with the distribution of these genotypes in the U.S. population. Clinical samples may be supplemented with diluted clinical samples for those viral load concentrations that are not sufficiently covered by natural clinical specimens, or

(*2*) A clinical study with prospectively collected samples demonstrating clinical validity of the device.

(C) Detailed documentation of a qualitative analysis near the lower end of the measuring range demonstrating acceptable performance when used as an aid in diagnosis.

(5) For devices intended for HCV RNA genotyping, in addition to the special controls listed in paragraphs (b)(1) and (2) of this section, design verification and validation must include the following:

(i) Detailed documentation of an analytical performance study demonstrating the LoD for all HCV genotypes detected by the device.

(ii) Detailed documentation, including results, of a multisite clinical study that assesses genotyping accuracy (*i.e.,* the proportion of interpretable results that match with the reference method result) and the genotyping rate (*i.e.,* the proportion of results that were interpretable).

(6) For any nucleic acid-based HCV RNA test intended for Point of Care (PoC) use, the following special controls, in addition to those listed in paragraphs (b)(1) and (2) of this section, apply:

(i) Clinical studies must be conducted at PoC sites.

(ii) Additional labeling must include a brief summary of the instructions for use that are appropriate for use in a PoC environment.

Dated: March 27, 2020.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2020–06820 Filed 4–1–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 866

[Docket No. FDA–2020–N–1082]

Microbiology Devices; Reclassification of Certain Hepatitis C Virus Antibody Assays Devices, To Be Renamed Hepatitis C Virus Antibody Tests

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed amendment; proposed order; request for comments.

SUMMARY: The Food and Drug Administration (FDA or Agency) is proposing to reclassify certain hepatitis C virus (HCV) antibody assay devices intended for the qualitative detection of HCV, postamendments class III devices (product code MZO) into class II (general controls and special controls), subject to premarket notification. FDA is also proposing a new device classification regulation with the name ''hepatitis C virus (HCV) antibody tests'' along with the special controls that the Agency believes are necessary to provide a reasonable assurance of safety and effectiveness for these devices. FDA is proposing this reclassification on its own initiative. If finalized, this order will reclassify these types of devices from class III (general controls and premarket approval) to class II (general controls and special controls) and reduce the regulatory burdens associated with these devices, as these types of devices will no longer be required to submit a premarket approval application (PMA), but can instead submit a premarket notification under the Federal Food, Drug, and Cosmetic Act (FD&C Act) and obtain clearance before marketing their device.

DATES: Submit either electronic or written comments on the proposed order by June 1, 2020. Please see section XI of this document for the proposed effective date when the new requirements apply and for the proposed effective date of a final order based on this proposed order.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before June 1, 2020. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of June 1, 2020. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed below (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–1082 for ''Reclassification of Certain Hepatitis C Virus Antibody Assay Devices, To Be Renamed Hepatitis C Virus Antibody Tests.'' Received comments, those filed in a timely manner (see **ADDRESSES**) will be placed in the docket and, except for

those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Maria Ines Garcia, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 3104, Silver Spring, MD 20993–0002, 301–796–7017, *Maria.Garcia@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background—Regulatory Authorities

The FD&C Act, as amended by the Medical Device Amendments of 1976 (Pub. L. 94–295), the Safe Medical Devices Act of 1990 (Pub. L. 101–629), Food and Drug Administration Modernization Act of 1997 (Pub. L. 105–115), the Medical Device User Fee and Modernization Act of 2002 (Pub. L. 107–250), the Medical Devices Technical Corrections Act (Pub. L. 108–214), the Food and Drug Administration Amendments Act of 2007 (Pub. L. 110–85), and the Food and Drug Administration Safety and Innovation Act (Pub. L. 112–144), among other amendments, establishes a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the FD&C Act (21 U.S.C. 360c) established three categories (classes) of devices, reflecting the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three categories of devices are class I (general controls), class II (general controls and special controls), and class III (general controls and premarket approval).

Section 513(a)(1) of the FD&C Act defines the three classes of devices. Class I devices are those devices for which the general controls of the FD&C Act (controls authorized by or under sections 501, 502, 510, 516, 518, 519, or 520 (21 U.S.C. 351, 352, 360, 360f, 360h, 360i, or 360j) or any combination of such sections) are sufficient to provide reasonable assurance of safety and effectiveness; or those devices for which insufficient information exists to determine that general controls are sufficient to provide reasonable assurance of safety and effectiveness or to establish special controls to provide such assurance, but because the devices are not purported or represented to be for a use in supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health, and do not present a potential unreasonable risk of illness or injury, are to be regulated by general controls (section 513(a)(1)(A) of the FD&C Act). Class II devices are those devices for which general controls by themselves are insufficient to provide reasonable assurance of safety and effectiveness, and for which there is sufficient information to establish special controls to provide such assurance, including the promulgation of performance standards, postmarket surveillance, patient registries, development and dissemination of guidelines, recommendations, and other appropriate actions the Agency deems necessary to provide such assurance (section 513(a)(1)(B) of the FD&C Act). Class III devices are those devices for which insufficient information exists to determine that general controls and special controls would provide a reasonable assurance of safety and effectiveness, and are purported or represented to be for a use in supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health, or present a potential unreasonable risk of illness or injury (section 513(a)(1)(C) of the FD&C Act).

Devices that were not in commercial distribution prior to May 28, 1976 (generally referred to as postamendments devices) are automatically classified by section 513(f)(1) of the FD&C Act into class III without any FDA rulemaking process. Those devices remain in class III and require premarket approval unless, and until, (1) FDA reclassifies the device into class I or class II, or (2) FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the FD&C Act, to a predicate device that does not require premarket approval. FDA determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures in section 510(k) of the FD&C Act and part 807 (21 CFR part 807), subpart E, of the regulations.

A postamendments device that has been initially classified in class III under section 513(f)(1) of the FD&C Act may be reclassified into class I or II under section 513(f)(3) of the FD&C Act. Section 513(f)(3) of the FD&C Act provides that FDA, acting by administrative order, can reclassify the device into class I or class II on its own initiative, or in response to a petition from the manufacturer or importer of the device. To change the classification of the device, the proposed new class must have sufficient regulatory controls to provide a reasonable assurance of the safety and effectiveness of the device for its intended use.

FDA relies upon ''valid scientific evidence,'' as defined in section 513(a)(3) and 21 CFR 860.7(c)(2), in the classification process to determine the level of regulation for devices. To be considered in the reclassification process, the ''valid scientific evidence'' upon which the Agency relies must be publicly available (see section 520(c) of the FD&C Act). Publicly available information excludes trade secret and/or confidential commercial information, *e.g.,* the contents of a pending PMA (see section 520(c) of the FD&C Act).

In accordance with section 513(f)(3) of the FD&C Act, the Agency is issuing this proposed order to reclassify hepatitis C virus (HCV) antibody tests intended for the qualitative detection of HCV, postamendment class III devices, into class II (general controls and special

controls), subject to premarket notification because the Agency believes the standard in section 513(a)(1)(B) of the FD&C Act is met as there is sufficient information to establish special controls, which, in addition to general controls, will provide reasonable assurance of the safety and effectiveness of the device.[1]

Section 510(m) of the FD&C Act provides that a class II device may be exempted from the premarket notification requirements under section 510(k) of the FD&C Act, if the Agency determines that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the device. FDA has determined that premarket notification is necessary to reasonably assure the safety and effectiveness of HCV antibody tests intended for the qualitative detection of HCV. Therefore, the Agency does not intend to exempt these proposed class II devices from premarket notification requirements. If this proposed order is finalized, persons who intend to market this type of device must submit to FDA a premarket notification under section 510(k) of the FD&C Act.

II. Regulatory History of the Devices

This proposed order applies to HCV antibody assay device for use as a prescription device as an aid in the diagnosis of HCV infection. These are prescription devices that are assigned product code MZO. On August 30, 2001, FDA approved its first HCV antibody test (Ortho-Clinical Diagnostics, Inc.'s VITROS IMMUNODIAGNOSTIC PRODUCTS ANTI–HCV REAGENT PACK AND CALIBRATOR) intended for use as a prescription device as an aid in the diagnosis of HCV infection by a qualified licensed healthcare professional in conjunction with other relevant clinical and laboratory findings through its PMA process under section 515 of the FD&C Act (21 U.S.C. 360e). In a May 22, 2002, **Federal Register** notice (67 FR 36009), FDA announced the PMA approval order and the availability of the Summary of Safety and Effectiveness Data (SSED) for this device.

Since the first approval order, FDA has approved nine additional original PMAs for HCV antibody tests that are prescription devices intended for use as an aid in the diagnosis of HCV infection by a qualified licensed healthcare professional in conjunction with other relevant clinical and laboratory findings (hereafter referred to as ''HCV antibody test'').

A review of the medical device reporting databases indicates that there is a low number of reported events for HCV antibody tests relative to the number of tests conducted using these devices. Events reported included false positive results, low test results, false negative results, unspecified incorrect or inadequate results, mechanical problems, and leak/splash. As of the date of this proposed order, FDA is aware of two class III recalls,[2] two class II recalls,[3] and no class I recalls for these devices.[4] The class II recalls occurred in 2007 and 2014, and were related to: (1) Sporadic lower than expected anti-HCV test results, and (2) failure of the instrument to open (actuate) some reagent packs from certain lots. All recalls have been resolved and no patient harm has been identified. These facts, coupled with the low number of reported events, indicate a good safety record for this device class. These recall events reflect the risks to health identified in section V below, and FDA believes the special controls proposed herein, in addition to general controls, can effectively mitigate the risks identified in these recalls.

III. Device Description

HCV antibody tests are postamendments prescription devices for the qualitative detection of HCV and are classified into class III under section 513(f)(1) of the FD&C Act. HCV antibody tests are described in FDA's SSEDs and product code database (assigned product code MZO) as devices for the qualitative detection of antibodies to HCV in human serum and plasma. HCV antibodies, when present in samples, bind to HCV antigens to form a complex that is bound to a solid phase (*e.g.* microparticles, microtiter plate or else). Detection of the complexes can be performed using different methods that measure the presence/absence of HCV antibodies in the sample. HCV antibody tests are intended for use as aids in the presumptive diagnosis of HCV infection in persons with signs and symptoms of hepatitis and in persons at risk of acquiring HCV infection. These devices are not intended for screening blood, plasma, cell or tissue donors. This proposed order does not apply to HCV antibody tests that are intended for home use or over-the-counter use.

FDA is proposing to reclassify HCV antibody tests from class III (general controls and premarket approval) to class II (general controls and special controls) and to establish a new name for the device type that will be within the classification regulation; *i.e.,* hepatitis C virus (HCV) antibody tests. FDA believes that this name and proposed identification language most accurately describes these devices. An HCV antibody test is tentatively identified as a device intended for use with human serum, plasma, or other matrices as a prescription device that aids in the diagnosis of HCV infection in persons with signs and symptoms of hepatitis and in persons at risk for hepatitis C infection. The test is intended as an aid in the diagnosis of HCV infection in specified populations, and/or as an aid in the management of HCV-infected patients including guiding the selection of genotype-specific treatment in individuals with chronic HCV infection. The test is not intended for screening blood, plasma, cell, or tissue donors.

Based upon our review experience and consistent with the FD&C Act and FDA's regulations in 21 CFR 860.134, FDA believes that these devices should be reclassified from class III into class II with special controls because there is sufficient information to establish special controls that, along with general controls, can provide reasonable assurance of the devices' safety and effectiveness.

IV. Proposed Reclassification

FDA is proposing to reclassify HCV antibody tests. On March 22, 2018, FDA held a public meeting of the Microbiology Devices Panel (Panel) of the Medical Devices Advisory Committee convened to discuss and make recommendations regarding the reclassification of HCV antibody tests from class III (general controls and premarket approval) into class II (general controls and special controls) (Ref. 1). Panel members unanimously agreed that special controls, in addition to general controls, are necessary and sufficient to mitigate the risks to health of patients presented by these devices and to provide reasonable assurance of the safety and effectiveness of these devices (Ref. 2). In addition, Panel members generally agreed with the development of special controls as presented by FDA.

FDA agrees and believes that at this time, sufficient data and information exist such that the risks identified in section V below can be mitigated by

[1] In December 2019, FDA began adding the term ''Proposed amendment'' to the ''ACTION'' caption for these documents, typically styled ''Proposed order'', to indicate that they ''propose to amend'' the Code of Federal Regulations. This editorial change was made in accordance with the Office of **Federal Register**'s (OFR) interpretations of the **Federal Register** Act (44 U.S.C. chapter 15), its implementing regulations (1 CFR 5.9 and parts 21 and 22), and the Document Drafting Handbook.

[2] Class III recalls are defined in 21 CFR 7.3(m)(3).

[3] Class II recalls are defined in 21 CFR 7.3(m)(2).

[4] Class I recalls are defined in 21 CFR 7.3(m)(1).

establishing special controls that, together with general controls, can provide a reasonable assurance of the safety and effectiveness of these devices and therefore proposes these devices to be reclassified from class III (general controls and premarket approval) to class II (general controls and special controls).

In accordance with section 513(f)(3) of the FD&C Act and 21 CFR part 860, subpart C, FDA is proposing to reclassify postamendments HCV antibody tests to be renamed ''hepatitis C virus (HCV) antibody tests,'' from class III into class II. FDA believes that, at this time, there are sufficient data and information available to FDA through FDA's accumulated experience with these devices from review submissions and from published peer-reviewed literature, as well as the recommendations provided by the Panel, to demonstrate that the proposed special controls, along with general controls, would effectively mitigate the risks to health identified in section V below and provide a reasonable assurance of the safety and effectiveness of these devices. Absent the special controls identified in this proposed order, general controls applicable to the device type are insufficient to provide reasonable assurance of the safety and effectiveness of these devices. FDA expects that the reclassification of these devices would enable more manufacturers to develop HCV antibody tests such that patients would benefit from increased access to safe and effective tests.

FDA is proposing to create a classification regulation for HCV antibody tests that will be reclassified from class III to class II. Under this proposed order, if finalized, HCV antibody tests will be identified as prescription devices. As such, the prescription device must satisfy prescription labeling requirements for in vitro diagnostic products (See 21 CFR 809.10(a)(4) and (b)(5)(ii)). In this proposed order, if finalized, the Agency has identified the special controls under section 513(a)(1)(B) of the FD&C Act that, together with general controls, will provide a reasonable assurance of the safety and effectiveness for HCV antibody tests.

Section 510(m) of the FD&C Act provides that FDA may exempt a class II device from the premarket notification requirements under section 510(k) of the FD&C Act if FDA determines that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the device. For HCV antibody tests, FDA has determined that premarket notification is necessary to provide reasonable assurance of the safety and effectiveness of these devices. Therefore, FDA does not intend to exempt this proposed class II devices from the 510(k) requirements. If this proposed order is finalized, persons who intend to market this type of device must submit a 510(k) to FDA and receive clearance prior to marketing the device.

This proposed order, if finalized, will decrease regulatory burden on industry, as manufacturers will no longer have to submit a PMA for these types of devices but can instead submit a 510(k) to the Agency for review prior to marketing their device. A 510(k) typically results in a shorter premarket review timeline compared to a PMA, which ultimately provides more timely access of these types of devices to patients.

In addition, the Agency believes that certain changes could be made to HCV antibody tests that could significantly affect the safety and effectiveness of those devices and for which a new 510(k) is likely required.[5] Based on FDA's accumulated experience with these devices, changes that likely could significantly affect the safety and effectiveness of these devices include, but are not limited to, changes to critical reagents, changes to final release specifications, and changes in shelf-life of the device. For more information about when to submit a new 510(k), manufacturers should refer to FDA's guidance entitled ''Deciding When to Submit at 510(k) for a Change to an Existing Device'' (Ref. 3).

V. Risks to Health

It is estimated by the Centers for Disease Control and Prevention that chronic HCV infection in the United States affects at least between 2.7 and 3.9 million people (Ref. 4). HCV infection can be asymptomatic, and accordingly, many HCV-infected individuals are unaware of their HCV infection. Between 20 percent and 30 percent of patients with acute infection, defined as the first 6 months after infection, clear the virus spontaneously while the other 70 percent to 80 percent of individuals become chronically infected with HCV (Ref. 5). Later diagnosis can lead to a more severe disease outcome and premature death among those who are chronically infected (Ref. 6). Patients who are tested and become aware that they are HCV infected may modify risk behaviors to prevent transmission to others and can be referred for treatment.

If left untreated, patients with chronic HCV infection have a significant risk of developing severe liver disease and/or hepatocellular cancer. Treatment of chronic HCV is highly effective, resulting in a sustained virological response (SVR) considered synonymous with cure. SVR is associated with improved clinical outcome, and a decrease in HCV-associated mortality (Ref. 7). Therefore, diagnosis of patients with chronic HCV infection through devices such as hepatitis C virus antibody tests is essential to ensure that patients are linked to the appropriate care (Ref. 6).

After consideration of FDA's accumulated experience with these devices from FDA review submissions, recommendations of the Panel for the classification of these devices (Ref. 2), and published literature, FDA has identified the following probable risks to health associated with HCV Antibody Tests:

- *Inaccurate interpretation of test results.* Inaccurate interpretation of test results by clinicians may negatively influence patient management decisions. A reactive test result misinterpreted as non-reactive may delay or prevent a patient with HCV infection from being identified and linked to care. Missed identification of patients with chronic HCV infection could lead to adverse effects on patient health such as progressive liver disease, cirrhosis and/or hepatocellular cancer, all of which are known to contribute to patient morbidity and mortality (Ref. 6). A reactive test incorrectly interpreted as non-reactive also may contribute to public health risk by leading to inadvertent transmission of virus by an infected person. A non-reactive test result incorrectly identified as reactive may contribute to unnecessary additional patient testing to exclude active HCV infection or potentially delay diagnosis of alternative causes of liver disease when present.
- *Failure of the device to perform as indicated (e.g., false negative results or false positive results).* A false negative test result due to failure of the device to perform may delay or prevent a patient with HCV infection from being identified and linked to care. Missed identification of patients with chronic HCV infection could lead to adverse effects on patient health such as progressive liver disease, cirrhosis and/or hepatocellular cancer, all of which are known to contribute to patient morbidity and mortality (Ref. 6). A false negative/false non-reactive test result also may contribute to public health risk by leading to inadvertent transmission of virus by an infected person. Factors that may cause decreased test sensitivity and/or an increased rate of false

[5] See 21 CFR 807.81(a)(3)(i).

negative results include, but are not limited to, the presence of interfering substances in the sample, acute infection at a stage that is too early for a device to detect the infection, and antibody concentrations that are too low to be detected by the device. They also can be caused by misinterpretation of invalid results as negative. A false positive test result may contribute to unnecessary additional patient testing to exclude active HCV infection or potentially delay diagnosis of alternative causes of liver disease when present. Factors that may lead to false positive results include device contamination from positive samples, cross-reactivity with other antibodies, or misinterpretation of invalid results as positive.

VI. Summary of the Reasons for Reclassification

FDA believes that HCV antibody tests should be reclassified from class III (general controls and premarket approval) into class II (general controls and special controls) because special controls, in addition to general controls, can be established to mitigate the risks to health identified in section V and provide a reasonable assurance of the safety and effectiveness of these devices. The proposed special controls are identified by FDA in section VII.

Taking into account the probable health benefits of the use of theses device and the nature and known incidence of the risks of the devices, FDA, on its own initiative, is proposing to reclassify these postamendments class III devices into class II. FDA believes that, when used as indicated, HCV antibody tests can provide significant benefits to clinicians and patients.

FDA's reasons for reclassification are based on the substantial scientific and medical information available regarding the nature, complexity, and risks associated with HCV antibody tests in the identified intended use populations (Ref. 1). The safety and effectiveness of this device type has become well-established since the initial approval of the first HCV antibody test for the qualitative detection of HCV in 2001.

VII. Proposed Special Controls

FDA believes that these devices can be classified into class II with the establishment of special controls. FDA believes that the following special controls, together with general controls, will provide a reasonable assurance of the safety and effectiveness of HCV antibody tests. Table 1 demonstrates how these proposed special controls will mitigate each of the identified risks to health in section V.

The risk of inaccurate interpretation of test results can be mitigated by special controls requiring certain labeling, including providing clearly stated warnings and limitations and information on principles of operation and procedures in performing the test.

Risks associated with the failure of the device to perform as indicated (*e.g.,* false negative and false positive test results) can be mitigated through a combination of special controls including certain labeling requirements, certain design verification and validation information, and performance studies. Examples of verification and validation information to be included in the design of the device includes documentation of performance specifications including analytical and clinical performance criteria. In addition, design verification and validation activities must include documentation of a complete device description, critical reagents, risk analysis strategies, lot release criteria, stability studies and protocols. Required statements in labeling can aid in mitigating the failure of the device to perform as indicated, for example including a statement that use of the test with specimen types other than those specifically identified for use with this device may cause inaccurate test results.

TABLE 1—RISKS TO HEALTH AND MITIGATION MEASURES FOR HCV ANTIBODY TESTS

Identified risks to health	Mitigation measures
Inaccurate interpretation of test results	Certain labeling warnings, limitations, and explanation of procedures.
Failure of the device to perform as indicated	Certain labeling warnings, limitations, and explanation of procedures. Performance specifications including analytical and clinical performance criteria. Certain design verification and validation information including documentation of device description, critical reagents, risk analysis strategies, lot release criteria, stability studies and protocols.

If this proposed order is finalized, HCV antibody tests will be reclassified into class II (general controls and special controls) and would be subject to premarket notification requirements under section 510(k) of the FD&C Act. As discussed below, the intent is for the reclassification to be codified in 21 CFR 866.3169. Firms submitting a premarket notification under section 510(k) of the FD&C Act for HCV antibody tests will be required to comply with the particular mitigation measures set forth in the special controls. Adherence to the special controls, in addition to the general controls, is necessary to provide a reasonable assurance of the safety and effectiveness of these devices.

VIII. Analysis of Environmental Impact

The Agency has determined under 21 CFR 25.34(b) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

IX. Paperwork Reduction Act of 1995

FDA tentatively concludes that this proposed order contains no new collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required. This proposed order refers to previously approved FDA collections of information. These collections of information are subject to review by OMB under the PRA. The collections of information in 21 CFR part 820 have been approved under OMB control number 0910–0073; the collections of information in 21 CFR parts 807, subpart E, have been approved under OMB control number 0910–0120; and the collections of information in 21 CFR parts 801 and 809 have been approved under OMB control number 0910–0485.

X. Codification of Orders

Under section 513(f)(3) of the FD&C Act, FDA may issue final orders to reclassify devices. FDA will continue to codify classifications and reclassifications in the Code of Federal Regulations (CFR). Changes resulting from final orders will appear in the CFR as newly codified orders. Therefore,

under section 513(f)(3), in the proposed order, we are proposing to codify HCV antibody tests in the new 21 CFR 866.3169, under which certain HCV antibody tests would be reclassified from class III to class II.

XI. Proposed Effective Date

FDA proposes that any final order based on this proposed order become effective 30 days after its date of publication in the **Federal Register**.

XII. References

The following references marked with an asterisk (*) are on display at 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 also are available electronically at *https://www.regulations.gov.* References without asterisks are not on public display at *https://www.regulations.gov* because they have copyright restriction. Some may be available at the website address, if listed. References without asterisks are available for viewing only at the Dockets Management Staff. 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. Executive Summary of the FDA Microbiology Devices Panel Meeting, March 22, 2018 (available at *https://www.fda.gov/media/111502/download*).
* 2. Transcript of the FDA Microbiology Devices Panel Meeting, March 22, 2018 (available at *https://www.fda.gov/media/119966/download*).
* 3. ''Deciding When to Submit a 510(k) for a Change to an Existing Device—Guidance for Industry and Food and Drug Administration Staff,'' issued October 25, 2017 (available at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/deciding-when-submit-510k-change-existing-device*).
* 4. Department of Health and Human Services—Viral Hepatitis Action Plan for 2017–2020 (available at *https://www.hhs.gov/sites/default/files/National%20Viral%20Hepatitis%20Action%20Plan%202017-2020.pdf*).
5. Aisyah, D.N., L. Shallcross, A.J. Hully, et al., ''Assessing Hepatitis C Spontaneous Clearance and Understanding Associated Factors—A Systematic Review and Meta-Analysis.'' *Journal of Viral Hepatitis,* 25(6): 680–698, 2018.
6. Moorman, A.C., J. Xing, S. Ko, et al., ''Late Diagnosis of Hepatitis C Virus Infection in the Chronic Hepatitis Cohort Study (CHeCS): Missed Opportunities for Intervention.'' *Hepatology,* 61(5): 1479–1484, 2015.
7. Ioannou, G.N., P.K. Green, and K. Berry, ''HCV Eradication Induced by Direct-Acting Antiviral Agents Reduces the Risk of Hepatocellular Carcinoma.'' *Journal of Hepatology,* 68(1): 25–33, 2018.

List of Subjects in 21 CFR Part 866

Biologics, Laboratories, Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR part 866 be amended as follows:

PART 866—IMMUNOLOGY AND MICROBIOLOGY DEVICES

■ 1. The authority citation for part 866 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 360*l,* 371.

■ 2. Add § 866.3169 to subpart D to read as follows:

§ 866.3169 Hepatitis C Virus Antibody Tests.

(a) *Identification.* A hepatitis C virus (HCV) antibody test is identified as an in vitro diagnostic device intended for use with human serum, plasma, or other matrices as a prescription device that aids in the diagnosis of HCV infection in persons with signs and symptoms of hepatitis and in persons at risk for hepatitis C infection. The test is not intended for screening blood, plasma, cell, or tissue donors.

(b) *Classification.* Class II (special controls). The special controls for this device are:

(1) The labeling required under 21 CFR 809.10(b) must include:

(i) A prominent statement that the test is not intended for the screening of blood, plasma, and cell or tissue donors.

(ii) Limitations, which must be updated to reflect current clinical practice and disease presentation and management. The limitations must include, but are not limited to, statements that indicate:

(A) When appropriate, the performance characteristics of the test have not been established in populations of immunocompromised or immunosuppressed patients or, other special populations where test performance may be affected.

(B) The detection of HCV antibodies indicates a present or past infection with hepatitis C virus, but does not differentiate between acute, chronic, or resolved infection.

(C) The specimen types for which the device has been cleared, and that use of the test with specimen types other than those specifically cleared for this device may result in inaccurate test results.

(D) Test results are to be interpreted by qualified licensed healthcare professionals in conjunction with the individual's clinical presentation, history, and other laboratory results.

(E) A non-reactive test result may occur early during acute infection, prior to development of a host antibody response to infection, or when analyte levels are below the limit of detection of the test.

(iii) A detailed explanation of the principles of operation and procedures for performing the test.

(2) Design verification and validation must include the following:

(i) A detailed device description, including all parts that make up the device, ancillary reagents required but not provided, an explanation of the device methodology, and design of the antigen(s) and capture antibody(ies) sequences, rationale for the selected epitope(s), degree of amino acid sequence conservation of the target, and the design and nature of all primary, secondary, and subsequent standards used for calibration.

(ii) Documentation and characterization (*e.g.,* supplier, determination of identity, and stability) of all critical reagents (including description of the antigen(s) and capture antibody(ies)), and protocols for maintaining product integrity throughout its labeled shelf life.

(iii) Risk analysis and management strategies, such as Failure Modes Effects Analysis and/or Hazard Analysis and Critical Control Points summaries and their impact on test performance.

(iv) Final release criteria to be used for manufactured test lots with appropriate evidence that lots released at the extremes of the specifications will meet the claimed analytical and clinical performance characteristics as well as the stability claims.

(v) Stability studies for reagents must include documentation of an assessment of real-time stability for multiple reagent lots using the indicated specimen types and must use acceptance criteria that ensure that analytical and clinical performance characteristics are met when stability is assigned based on the extremes of the acceptance range.

(vi) All stability protocols, including acceptance criteria.

(vii) Final release test results for each lot used in clinical studies.

(viii) Multisite reproducibility study that includes the testing of three independent production lots.

(ix) Analytical performance studies and results for determining the limit of blank (LoB), limit of detection (LoD), cutoff, precision (reproducibility) including lot-to-lot and/or instrument-to-instrument precision, interference, cross reactivity, carry-over, hook effect,

seroconversion panel testing, matrix equivalency, specimen stability, reagent stability, and cross-genotype antibody detection sensitivity, when appropriate.

(x) Analytical sensitivity of the test is the same or better than that of other cleared or approved tests.

(xi) Detailed documentation of clinical performance testing from a multisite clinical study. Performance must be analyzed relative to an FDA cleared or approved HCV antibody test, or a comparator that FDA has determined is appropriate. This study must be conducted using appropriate patient samples, with an acceptable number of HCV positive and negative samples in applicable risk categories. Additional relevant patient groups must be validated as appropriate. The samples may be a combination of fresh and repository samples, sourced from geographically diverse areas. The study designs, including number of samples tested, must be sufficient to meet the following criteria:

(A) Clinical sensitivity of the test must have a lower bound of the 95 percent confidence interval of greater than or equal to 95 percent.

(B) Clinical specificity of the test must have a lower bound of the 95 percent confidence interval of greater than or equal to 96 percent.

(3) For any HCV antibody test intended for Point of Care (PoC) use, the following special controls, in addition to those listed in paragraphs (b)(1) and (2) of this section, apply:

(i) Clinical studies must be conducted at PoC sites.

(ii) Additional labeling must include a brief summary of the instructions for use that are appropriate for use in a PoC environment.

Dated: March 27, 2020.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2020–06821 Filed 4–1–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 301

[REG–132529–17]

RIN 1545–BO13

Computation and Reporting of Reserves for Life Insurance Companies

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations that provide guidance on the computation of life insurance reserves and the change in basis of computing certain reserves of insurance companies. These proposed regulations implement recent legislative changes to the Internal Revenue Code. This document invites comments on these proposed regulations. This document affects entities taxable as insurance companies.

DATES: Written or electronic comments and requests for a public hearing must be received by June 1, 2020.

ADDRESSES: Submit electronic submissions via the Federal eRulemaking Portal at *www.regulations.gov* (indicate IRS and REG–132529–17) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment received to its public docket, whether submitted electronically or in hard copy. Send hard copy submissions to: CC:PA:LPD:PR (REG–132529–17), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Dan Phillips, (202) 317–6995; concerning submissions of comments and requests for a public hearing, Regina Johnson, (202) 317–5177 or *fdms.database@irscounsel.treas.gov* (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to 26 CFR part 1 under sections 807 and 816 of the Internal Revenue Code (Code). Sections 807 and 816 were added to the Code by section 211(a) of the Deficit Reduction Act of 1984, Public Law 98–369, 98 Stat. 494. Section 807 was amended by sections 13513 and 13517 of the Tax Cuts and Jobs Act, Public Law 115–97, 131 Stat. 2054, 2143, 2144 (2017) (TCJA). These amendments by the TCJA apply to taxable years beginning after December 31, 2017.

This document also proposes to amend or remove the following regulations in 26 CFR: §§ 1.338–11, 1.381(c)(22)–1, 1.801–2, 1.801–5, 1.801–7, 1.801–8, 1.806–4, 1.807–1, 1.809–2, 1.809–5, 1.810–3, 1.817A–0, 1.817A–1, 1.818–2, 1.818–4, 1.848–1, 1.6012–2, and 301.9100–6T. These proposed changes are conforming changes to regulations that (i) relate to repealed or amended law, (ii) reference regulations that are proposed to be removed, (iii) have no future application, or (iv) relate to other regulations proposed by this document.

A. Reserves Taken Into Account in Determining Life Insurance Company Taxable Income

Section 801(a) imposes a tax on the life insurance company taxable income of every life insurance company. Section 801(b) defines life insurance company taxable income to mean life insurance gross income, reduced by life insurance deductions. Under section 803(a)(2), life insurance gross income includes a net decrease in items described in section 807(c) as required by section 807(a). Under sections 804 and 805(a)(2), life insurance deductions include a deduction for a net increase in items as required by section 807(b).

The items described in section 807(c) are: (i) Life insurance reserves (as defined in section 816(b)); (ii) unearned premiums and unpaid losses included in total reserves; (iii) amounts that are discounted at the appropriate rate of interest to satisfy obligations under insurance and annuity contracts that do not involve life, accident, or health contingencies when the computation is made; (iv) dividend accumulations and other amounts held at interest in connection with insurance and annuity contracts; (v) premiums received in advance and liabilities for premium deposit funds; and (vi) reasonable special contingency reserves under contracts of group term life insurance or group accident and health insurance that are held for retired lives, premium stabilization, or a combination of both.

B. Life Insurance Reserves Taken Into Account in Determining Premiums Earned for a Nonlife Insurance Company

Section 831(a) generally imposes a tax on the taxable income of every insurance company other than a life insurance company (a nonlife insurance company). Section 832 defines taxable income for this purpose to be gross income (as defined in section 832(b)(1)) less allowed deductions. Section 832(b)(1) provides that gross income includes underwriting income, and section 832(b)(3) provides that underwriting income means premiums earned on insurance contracts during the taxable year less losses incurred and expenses incurred.

Under sections 832(b)(4) and 832(b)(7)(A), premiums earned on insurance contracts during the taxable year are reduced by life insurance

reserves at the end of the taxable year and increased by life insurance reserves at the end of the preceding taxable year. For this purpose, life insurance reserves are defined in section 816(b) but determined under section 807(d).

C. Method of Computing Life Insurance Reserves for Purposes of Determining Income

1. Prior to Modification by the TCJA

Section 807(d) sets forth rules for computing the amount of life insurance reserves for a contract for purposes of determining life insurance company taxable income and for purposes of computing premiums earned for a nonlife insurance company. Prior to amendment by the TCJA, section 807(d)(1) provided that the amount of the life insurance reserves for any contract was the greater of the net surrender value of the contract (determined under section 807(e)(1)) or the federally prescribed reserve determined under section 807(d)(2). This amount, however, could not exceed the amount that would have been taken into account with respect to the contract in determining statutory reserves (as defined in prior section 807(d)(6)).

Prior section 807(d)(2) provided that the federally prescribed reserve for a contract was computed using (i) the tax reserve method applicable to the contract, (ii) the greater of the applicable Federal interest rate or the prevailing state assumed interest rate, and (iii) the prevailing commissioners' standard tables for mortality and morbidity, adjusted as appropriate to reflect the risks (such as substandard risks) incurred under the contract that were not otherwise taken into account.

In the case of a contract to which the Commissioners' Reserve Valuation Method (CRVM) applied (generally, a life insurance contract), prior sections 807(d)(3)(A)(i) and 807(d)(3)(B)(i) provided that the tax reserve method applicable to the contract was the CRVM as prescribed by the National Association of Insurance Commissioners (NAIC) that was in effect on the date the contract was issued. Similarly, in the case of a contract to which the Commissioners' Annuity Reserve Valuation Method (CARVM) applied (generally, an annuity contract), prior sections 807(d)(3)(A)(ii) and 807(d)(3)(B)(ii) provided that the tax reserve method applicable to the contract was the CARVM as prescribed by the NAIC that was in effect on the date the contract was issued. Other parameters, such as the appropriate interest rate and mortality tables, were likewise generally determined with reference to the date the contract was issued.

Section 1.807–1 provided instructions on what mortality and morbidity tables taxpayers should have used to compute life insurance reserves for a contract for which there were no applicable commissioners' standard tables when the contract was issued. Section 1.807–1 was published as a final regulation in the **Federal Register** (54 FR 52933) on December 26, 1989 (T.D. 8278).

2. Principle-Based Reserves and IRS Notices

In recent years, the NAIC has promulgated and states have adopted principle-based reserving methods to better reflect the economics of more complex life insurance and annuity products. Principle-based reserves (PBR) are intended to replace a more formulaic approach to determining policy reserves with an approach that takes into account a range of future economic conditions and more closely reflects the risks of complex insurance products. *See, e.g., Principle-Based Reserves for Life Products under the NAIC Valuation Manual,* Actuarial Standard of Practice No. 52, Actuarial Standards Board, Sept. 2017, App 1.

Federal income tax issues arose when trying to apply the requirements of prior section 807(d) to tax reserve methods that were PBR methods. It was not clear how aspects of PBR methods fit within the statutory requirements of prior section 807(d). For example, a PBR method may require reserves to be computed based on many different scenarios in which many different interest rate assumptions are made, but prior section 807(d) required the use of a single interest rate when computing the reserve for a contract.

In 2008, the IRS issued Notice 2008–18, 2008–1 C.B. 363, to alert life insurance companies that Federal tax issues might arise as a result of the then-proposed PBR methods, identify areas of concern, and invite comments on these and other issues. Several comments were received and considered.

In 2010, the IRS issued Notice 2010–29, 2010–15 I.R.B. 547, to provide interim guidance to issuers of variable annuity contracts as a result of the adoption by the NAIC of Actuarial Guideline 43 (AG 43), which describes a PBR method. The interim guidance provided, among other things, that (i) for purposes of determining whether an insurance company satisfies the 50 percent of reserves test for qualification as a life insurance company under section 816(a), the Standard Scenario Amount (SSA) determined under AG 43 is included in life insurance reserves as defined in section 816(b) and total reserves as defined in section 816(c), (ii) for purposes of applying the statutory reserve cap of section 807(d)(1), the term ''statutory reserves'' under prior section 807(d)(6) (current section 807(d)(4)) includes the SSA, provided the requirements of prior section 807(d)(6) are otherwise met, and (iii) for purposes of determining the amount of the reserve under prior section 807(d)(2) for contracts falling within the scope of AG 43 and issued on or after December 31, 2009, the provisions for determining the SSA are taken into account and the provisions for determining the conditional tail expectation amount (a component of AG 43) are not taken into account.

3. Modification by the TCJA

Section 13517 of the TCJA amended section 807(d)(1) to provide generally that, for purposes of determining life insurance company taxable income, the amount of the life insurance reserves for any contract (other than a contract to which section 807(d)(1)(B) applies (relating to variable contracts)), is the greater of the net surrender value of such contract or 92.81 percent of the reserve determined under section 807(d)(2). The amount of the life insurance reserve for a variable contract, as specified in amended section 807(d)(1)(B), is the sum of (i) the greater of the net surrender value of such contract or the portion of the reserve that is separately accounted for under section 817 and (ii) 92.81 percent of the excess (if any) of the reserve determined under section 807(d)(2) over the amount in clause (i).

Section 13517 of the TCJA amended prior section 807(d)(2) to provide that the amount of the reserve under section 807(d)(2) is determined using the tax reserve method applicable to such contract. Section 13517 of the TCJA also amended prior section 807(d)(3) to provide generally that the tax reserve method applicable to a contract is the method prescribed by the NAIC that applies to the contract as of the date the reserve is determined, not the date the contract was issued, as was required prior to the TCJA.

The TCJA did not change the treatment of asset adequacy reserves. Asset adequacy reserves and similar reserves that address solvency concerns of state regulators but do not meet technical actuarial requirements have long been excluded from life insurance reserves for Federal income tax purposes. *See, e.g.,* Rev. Rul. 67–435, 1967–2C.B. 232; *Old Line Insurance Co.* v. *Commissioner,* 13 B.T.A. 758 (1928).

The Conference Report to the TCJA states that ''[a]s under present law, no deduction for asset adequacy reserves or deficiency reserves is allowed.'' H.R. Rep. No. 115–466, at 477 (2017) (Conference Report). *See also* Staff of the Joint Committee on Taxation, 115th Cong., General Explanation of Public Law 115–97, 235 (Comm. Print 2018) (Bluebook).

Section 13517(c)(3) of the TCJA provided a transition rule that requires any difference between (i) the amount of life insurance reserves with respect to any contract as of the close of the taxable year preceding the first taxable year beginning after December 31, 2017, computed using the method prescribed by the TCJA and (ii) the amount of such reserves computed using the method prior to the amendments by the TCJA, to be taken into account over the eight succeeding taxable years. Rev. Proc. 2019–34, 2019–35 I.R.B. 669, provides simplified procedures for an insurance company to obtain consent of the Commissioner of Internal Revenue or his delegate (Commissioner) to change its method of accounting for life insurance reserves to comply with the amendments to section 807 made by the TCJA.

D. Change in Basis of Computing Reserves

1. Prior to Modification by the TCJA

a. Statutory Provisions

Prior to amendment by the TCJA, section 807(f)(1) provided that if the basis for determining any item described in section 807(c) (for example, life insurance reserves) as of the close of any taxable year differed from the basis for that determination as of the close of the preceding taxable year, then so much of the difference between the amount of the items at the close of the taxable year computed on the new basis and the amount of the item at the close of the taxable year computed on the old basis, as is attributable to contracts issued before the taxable year, was taken into account ratably for each of the succeeding ten taxable years.

Prior section 807(f) was substantially similar to and replaced prior section 810(d) as enacted by the Life Insurance Company Income Tax Act of 1959, Public Law 86–69, 73 Stat. 112 (1959). By enacting prior section 810(d), Congress provided a specific treatment for adjustments resulting from a change in method of computing reserves that otherwise would have been subject to the general tax rules under section 481 for changes in method of accounting. *See, e.g., American General Life and Accident Insurance Co.* v. *United States,* 90–1 USTC (CCH) ¶ 50,010 (M.D. Tenn.1989) (section 481 is a more general provision dealing with a broad variety of cases and section 810, on the other hand, is much more specific and deals with a very narrow and limited type of change in method of accounting).

If a company ceases to qualify as a life insurance company, section 807(f)(2), which was not amended by the TCJA, requires, except as provided in section 381(c)(22), that the balance of any adjustment under section 807(f) be taken into account in the taxable year preceding the taxable year in which the taxpayer no longer qualifies as a life insurance company.

b. Regulatory Provisions

Regulations relating to the change in method of computing reserves were adopted under Code provisions that existed prior to their repeal by the Deficit Reduction Act of 1984. If and to the extent the Deficit Reduction Act of 1984 incorporated provisions of prior law, regulations and other guidance generally continued to serve as interpretive guides to the new provisions. H.R. Rep. No. 98–432, pt. 2, at 1401 (1984).

Section 1.801–5(c) provides that if reserves are claimed by a life insurance company then sufficient information must be filed with the return to enable the validation of the claim. Section 1.801–5(c) also requires certain information to be filed if the basis (for Federal income tax purposes) for determining the amount of the life insurance reserves as of the close of the taxable year differs from the basis for such determination as of the beginning of the taxable year. Section 1.801–5 was published as a final regulation in the **Federal Register** (25 FR 12654) on December 10, 1960 (T.D. 6513).

Section 1.806–4 describes prior section 806(b) and provides that a change in basis of computing any of the items in prior section 810(c) (the predecessor to section 807(c)) is not a change in method of accounting requiring the consent of the Secretary of the Treasury or his delegate (Secretary) under section 446(e). Section 1.806–4 was published as a final regulation in the **Federal Register** (25 FR 12654) on December 10, 1960 (T.D. 6513).

Section 1.810–3 describes how a change in basis of computing the items in prior section 810(c) should have been treated under the Code prior to its amendment by the Deficit Reduction Act of 1984. Section 1.810–3(a) provides that if the basis for determining an item in prior section 810(c) at the end of a taxable year differs from the basis for such determination at the end of the preceding taxable year, then the difference between the amount of the item computed at the end of the taxable year on the new basis and the amount of the item computed at the end of the taxable year on the old basis is generally taken into account ratably over the 10 succeeding taxable years. Example 1 of § 1.810–3(b) illustrates that if there is a change in basis of computing an item described in former section 810(c) during a taxable year, then for purposes of determining any increase or decrease in such item during the taxable year, such increase or decrease is the difference between the amount of such item computed at the beginning of the taxable year on the old basis and the amount of such item computed at the end of the taxable year on the old basis. Section 1.810–3(c) further provides that, subject to section 381(c)(22), if a company ceases to qualify as a life insurance company, the balance of any adjustment resulting from the change in method of computing reserves must be taken into account in the taxable year preceding the taxable year in which the taxpayer no longer qualifies as a life insurance company. Section 1.810–3 was published as a final regulation in the **Federal Register** (25 FR 12654) on December 10, 1960 (T.D. 6513).

Section 1.818–2(c) describes prior sections 806(b) and 810(d)(1). Section 1.818–2 was published as a final regulation in the **Federal Register** (26 FR 2781) on April 4, 1961 (T.D. 6558).

c. IRS Guidance

The application of section 807(f) prior to its amendment by the TCJA and the application of prior section 810(d) are illustrated by Rev. Rul. 2002–6, 2002–1 C.B. 460 (inclusion of factors omitted in a previous year's determination of reserves is a change in basis under prior section 807(f) and taxpayer may correct the method on an amended return); Rev. Rul. 94–74, 1994–2 C.B. 157 (applying prior section 807(f) in several situations in which taxpayer changed the basis of computing life insurance reserves); Rev. Rul. 80–117, 1980–1 C.B. 143 (revocation of the election to recompute life insurance reserves under prior section 818(c) of a company acquired in a merger results in a recomputation of the reserves, which is a change in basis of computing the reserves subject to the 10 year spread of prior section 810(d)); Rev. Rul. 80–116, 1980–1 C.B. 141 (recomputation of life insurance reserves under prior section 818(c) of a company acquired in a merger is not a change in basis of computing reserves under prior section 810(d) because reserves must be recomputed for both

beginning and end of year); Rev. Rul. 78–354, 1978–2 C.B. 190 (election of a life insurance company to recompute life insurance reserves under prior section 818(c) is terminated when company fails to qualify as a life insurance company and the required recomputation of the reserves is a change in basis of computing the reserves subject to the 10 year spread of prior section 810(d); method of nonlife insurance company taking 10 year spread into account is shown); Rev. Rul. 77–198, 1977–1 C.B. 190 (recomputation of certain reserves from a nonactuarial method to a method utilizing recognized mortality tables and assumed rates of interest is a change in basis of computing reserves under prior sections 806(b) and 810(d)); Rev. Rul. 75–308, 1975–2 C.B. 264 (change in basis of computing reserves under prior section 810(d) occurs when the addition to the reserve is made, not when the company adopts the policy to change the basis of computing reserves); Rev. Rul. 74–57, 1974–1 C.B. 163 (life insurance company that changes basis of computing reserves must take into account the entire adjustment under prior section 810(d) in the year of change if it ceases to qualify as a life insurance company in the year after the year of change); Rev. Rul. 70–568, 1970–2 C.B. 140 (recomputation of reserves under prior section 818(c) applies to contracts at beginning of year even if they are not held at end of year; prior section 810(d) does not apply to the recomputation); Rev. Rul. 70–192, 1970–1 C.B. 153 (change in assumption of when in year death benefits would be paid is a change in basis of computing reserves under prior sections 806(b) and 810 (d)); Rev. Rul. 69–444, 1969–2 C.B. 145 (an increase in life insurance reserves attributable solely to the addition of a new benefit on existing contracts is not a change in basis of computing reserves under prior sections 806(b) and 810(d)); Rev. Rul. 65–240, 1965–2 C.B. 236 (a nonlife company's change in basis of computing life insurance reserves is a change in basis of computing reserves under prior section 810(d) and is subject to the 10 year spread); Rev. Rul. 65–233, 1965–2 C.B. 228 (prior sections 806(b) and 810(d) apply in the year of a change in basis of computing reserves notwithstanding that state regulatory approval for change was not received until the following year); and Rev. Rul. 65–143, 1965–1 C.B. 261 (change in method of computing life insurance reserves from a preliminary term basis to a net level premium basis is a change in basis of computing reserves under prior sections 806(b) and 810(d); election under prior section 818(c) does not apply to life insurance contracts that are computed for statutory purposes on a net level premium basis at the end of the year of election).

d. Nonlife Insurance Companies

Section 832(b)(4) requires a nonlife insurance company to include life insurance reserves, as defined in section 816(b) and determined under section 807, in its determination of premiums earned on insurance contracts during the taxable year, which is a component of underwriting income. Section 807(f) provides rules for changing the basis for determining any item referred to in section 807(c), and life insurance reserves are referred to in section 807(c)(1). Nonlife insurance companies are required to follow the requirements in section 807(f) to change the basis of computing life insurance reserves. Rev. Rul. 65–240.

2. Modification by the TCJA

Section 13513 of the TCJA amended prior section 807(f) to provide that any difference between the amount of an item referred to in section 807(c) as of the close of the taxable year computed on a new basis and the amount of such item as of the close of the taxable year computed on the old basis, as is attributable to contracts issued before the taxable year, is to be taken into account under section 481 as adjustments attributable to a change in method of accounting initiated by the taxpayer and made with the consent of the Secretary.

Section 811(a), which was not amended by the TCJA, generally provides that computations made for the determination of Federal income taxes imposed by the provisions of subchapter L of chapter 1 of the Code (subchapter L) that are set forth in part I shall be made under an accrual method of accounting or, to the extent permitted under regulations, under a combination of an accrual method and any other permitted method. To the extent not inconsistent with the preceding sentence or any other provision in part I of subchapter L, these computations are to be made in a manner consistent with the manner required for the annual statement approved by the NAIC. Section 811(a) does not affect the application of section 446(e), which generally requires a taxpayer to secure the consent of the Secretary before changing the method of computing the taxpayer's taxable income. *See also* § 1.446–1(e).

After the amendment of section 807(f) by the TCJA, a life insurance company must follow the regular administrative procedures for a change in method of accounting for a change in basis of computing reserves referred to in section 807(c). *See, e.g.,* § 1.446–1(e); Rev. Proc. 2015–13, 2015–5 I.R.B. 419, Rev. Proc. 2019–43, 2019–48 I.R.B. 1107; Rev. Proc. 2002–18, 2002–1 C.B. 678. Similarly, a nonlife insurance company must follow the administrative procedures for a change in method of accounting to change its basis of computing life insurance reserves (as defined in section 816(b)).

The Conference Report explained that under the amended law ''[i]ncome or loss [sic] resulting from a change in method of computing life insurance company reserves is taken into account consistent with IRS procedures, generally ratably over a four-year period, instead of over a 10-year period.'' Conference Report at 467. The Joint Committee on Taxation explained that a company that makes a change in method of computing life insurance company reserves is required to report and file such statements and other information as the Secretary requires under the IRS procedures for accounting method changes, including the procedures for obtaining automatic consent to change an accounting method. Bluebook at 228.

Rev. Proc. 2015–13 provides the IRS procedures for a taxpayer to obtain the advance (non-automatic) or automatic consent of the Commissioner to change a method of accounting. These procedures generally require a taxpayer to file a Form 3115, ''Application for Change in Accounting Method,'' to change the taxpayer's method of accounting. Rev. Proc. 2019–10, 2019–02 I.R.B. 296, modified the list of automatic accounting method changes in Rev. Proc. 2018–31, 2018–22 I.R.B. 637, to add section 26.04, which provided procedures for an insurance company to obtain automatic consent of the Commissioner to change its method of accounting to comply with section 807(f) for taxable years beginning after December 31, 2017. In response to comments, section 26.04 of Rev. Proc. 2018–31 was modified and superseded by Rev. Proc. 2019–43. See section 26.04 of Rev. Proc. 2019–43 for the current procedures for an insurance company to obtain automatic consent of the Commissioner to change its method of accounting to comply with section 807(f). Rev. Proc. 2019–10 also modified Rev. Rul. 94–74 and Rev. Rul. 2002–6 to the extent their holdings are inconsistent with the general rules for changing a method of accounting under section 446(e) and § 1.446–1(e). Rev. Proc. 2002–18 provides the IRS

procedures for changes in method of accounting imposed by the IRS and other procedures for resolving accounting method issues.

E. Reporting of Reserves

Section 13517 of the TCJA added section 807(e)(6), which provides that the Secretary shall require reporting (at such time and in such manner as the Secretary shall prescribe) with respect to the opening and closing balance of reserves and with respect to the method of computing reserves for purposes of determining income.

The Conference Report states that for this purpose the Secretary may require a life insurance company (including an affiliated group filing a consolidated return that includes a life insurance company) to report each of the line item elements of each separate account by combining them with such items from other separate accounts and the general account and report the combined amounts on a line-by-line basis. The Secretary may also provide that the reporting on a separate account by separate account basis is generally not permitted. The Conference Report further states that under existing regulatory authority, the Secretary may require e-filing or comparable filing of the returns and may require that the taxpayer provide its annual statement via a link, electronic copy, or other similar means. Conference Report at 478–79.

F. Annual Statements and Electronically Filed Forms 1120–L and 1120–PC

Section 6012(a)(2) generally requires that returns with respect to income taxes must be made by every corporation subject to taxation under subtitle A of the Code. Final regulations under section 6012 related to insurance companies were published in the **Federal Register** (72 FR 32794) on June 14, 2007 (T.D. 9329). Section 1.6012–2(c)(1) provides that a life insurance company must make a return on Form 1120–L, ''U.S. Life Insurance Company Income Tax Return,'' and, except as provided in § 1.6012–2(c)(4), file with its return a copy of its annual statement. Similarly, § 1.6012–2(c)(2) requires every domestic insurance company other than a life insurance company to make a return on Form 1120–PC, ''U.S. Property and Casualty Insurance Company Income Tax Return,'' and, except as provided in § 1.6012–2(c)(4), file with its return a copy of its annual statement. For these purposes, an annual statement means the annual statement, the form of which is approved by the NAIC, that is filed by an insurance company for the year with the applicable state regulators or, if the insurance company is not required to file the NAIC annual statement, a pro forma annual statement. Section 1.6012–2(c)(3) generally provides that the requirements of § 1.6012–2(c)(1) and (2) concerning returns and annual statements also apply to foreign insurance companies subject to tax under section 801 or section 831.

Section 1.6012–2(c)(4) provides that if an insurance company described in § 1.6012–2(c)(1), (2), or (3) files its return electronically, it should not include its annual statement with such return but that such statement (or pro forma annual statement) must be available at all times to the IRS.

Explanation of Provisions

A. Computation of Life Insurance Reserves

Section 1.807–1(a) of the proposed regulations provides that no asset adequacy reserve may be included in the determination of the amount of life insurance reserves under section 807(d). This proposed regulation is consistent with the law both before and after the TCJA. The substantive rules in current § 1.807–1 have no application for taxable years beginning after December 31, 2017, and therefore, are not included in § 1.807–1 of the proposed regulations.

B. Reporting of Reserves

Section 1.807–3 of the proposed regulations allows the IRS to require information necessary for the proper reporting of items described in section 807(c), including separate account items. This provision is consistent with section 807(e)(6), as added by the TCJA.

C. Change in Basis of Computing Reserves

1. Proposed Section 1.807–4

Section 1.807–4 of the proposed regulations provides guidance relating to both the change in basis of computing reserves of a life insurance company and the change in basis of computing life insurance reserves of a nonlife insurance company. Section 1.807–4(a) of the proposed regulations requires an insurance company to follow administrative procedures prescribed by the Commissioner to change the basis of computing reserves. This requirement is consistent with the Conference Report relating to section 13513 of the TCJA, which provides that a taxpayer is required to follow IRS procedures. Conference Report at 467; *see also* Bluebook at 228 (a company is required to comply with procedures for automatic method changes and to report and file statements and other information as the Secretary requires).

Section 1.807–4(b) of the proposed regulations provides that, to avoid the double counting of income or a deduction, a taxpayer that changes its basis of computing reserves is required to take into account under section 481(a) an adjustment attributable to the change in basis. The proposed regulations provide that if a taxpayer loses its insurance company status, then any remaining balance of a section 481(a) adjustment must be taken into account in the last taxable year the taxpayer was an insurance company. This proposed rule, however, would not require an insurance company to accelerate the accounting for such adjustment if it changes from a life insurance company to a nonlife insurance company or vice versa.

Section 1.807–4(c) of the proposed regulations provides that for purposes of determining any increase or decrease in items described in section 807(c) (for a life insurance company) or the amount of life insurance reserves (for a nonlife insurance company), the determination should be made for the year of change using the old basis of computing reserves and should be made in the following taxable year using the new basis of computing reserves.

Certain revenue rulings are inconsistent with section 807(f), as amended by the TCJA. Accordingly, these revenue rulings are proposed to be obsoleted for taxable years beginning on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. *See* Effect on Other Documents.

2. Procedure for Obtaining Automatic Consent

Section 26.04 of Rev. Proc. 2019–43 provides the current procedures for an insurance company to obtain automatic consent of the Commissioner to change its method of accounting to comply with section 807(f). In response to comments, the Treasury Department and the IRS intend to revise section 26.04 of Rev. Proc. 2019–43 as described in the following paragraphs.

First, section 26.04(2)(b)(ii) of Rev. Proc. 2019–43 provides that multiple changes during the same taxable year for the same type of contract are considered a single change in basis and the effects of such changes are netted and treated as a single section 481(a) adjustment. Section 807(f)(1), however, provides that the section 481(a) adjustment is the difference between the amount of any item referred to in section 807(c) computed on the new basis and the

amount of such item computed on the old basis. Accordingly, the Treasury Department and the IRS intend to revise section 26.04 of Rev. Proc. 2019–43 to require netting of the section 481(a) adjustments at the level of each item referred to in section 807(c) so there is a single section 481(a) adjustment for each of the items referred to in section 807(c).

Second, section 26.04(1) of Rev. Proc. 2019–43 provides that the automatic change procedures apply to a nonlife insurance company. The Treasury Department and the IRS intend to revise section 26.04 of Rev. Proc. 2019–43 to clarify the manner in which nonlife insurance companies implement changes to the basis of computing life insurance reserves (as defined in section 816(b)) during a taxable year (year of change). Specifically, the clarification would provide that, if a nonlife insurance company changes the basis of computing its life insurance reserves, then for purposes of applying section 832(b)(4), (i) for the year of change, life insurance reserves at the end of the year of change with respect to contracts issued before the year of change are determined on the old basis and (ii) for the year following the year of change, life insurance reserves at the end of the preceding taxable year with respect to contracts issued before the year of change are determined on the new basis. Life insurance reserves attributable to contracts issued during the year of change and thereafter must be computed on the new basis.

D. Definition of Life Insurance Reserves

The TCJA modified section 807(d) to provide that, for purposes of part I of subchapter L (other than section 816), the amount of life insurance reserves for any contract (other than a variable contract) is the greater of the net surrender value of such contract or 92.81 percent of the reserve determined under the applicable tax reserve method. For any variable contract, the amount of the life insurance reserve is the sum of (i) the greater of the net surrender value of such contract or the portion of the reserve that is separately accounted for under section 817 and (ii) 92.81 percent of the excess (if any) of the reserve determined under the applicable tax reserve method over the amount in clause (i).

Section 807(d)(3) provides that the applicable tax reserve method is CRVM in the case of a contract covered by CRVM and CARVM in the case of a contract covered by CARVM. The CRVM and CARVM may be PBR methods, which may be gross premium reserves and may take into account certain expenses and other factors. Congress understood that for this purpose life insurance reserves could be determined using PBR methods. The Joint Committee on Taxation described the purpose of the TCJA's amendments to section 807(d) as ''accomodat[ing] the NAIC-prescribed principle-based reserve methodology.'' Bluebook at 235.

Section 807(c)(1), however, provides that the reserves referred to in sections 807(a) and (b), which are the reserves taken into account in determining the gross income or deductions of a life insurance company, are ''life insurance reserves (as defined in section 816(b)).''

Section 816(b) generally defines life insurance reserves to be amounts that are (i) computed or estimated on the basis of recognized mortality or morbidity tables and assumed rates of interest, (ii) set aside to mature or liquidate, either by payment or reinsurance, future unaccrued claims arising from life insurance, annuity, and noncancellable accident and health insurance contracts involving, at the time with respect to which the reserves are computed, life, accident, or health contingencies, and (iii) with some exceptions, required by law. Section 816(b) (and its predecessor provisions) have been interpreted as describing a net premium reserve that does not take into account expenses or certain other factors. *See, e.g.,* Rev. Rul. 77–451, 1977–2 C.B. 224; *Maryland Casualty Co.* v. *United States,* 251 U.S. 342 (1920).

Thus, although Congress intended that the tax reserve method used to compute life insurance reserves under section 807(d), as amended by the TCJA, could include PBR methods, section 816(b) (by virtue of the reference in section 807(c)(1)) could be interpreted to preclude reserves determined under PBR methods from qualifying as life insurance reserves for purposes of section 807. To clarify the interaction between sections 807 and 816, § 1.816–1 of the proposed regulations provides that a reserve that meets the requirements in sections 816(b)(1) and (2) will not be disqualified as a life insurance reserve if it is determined using a method that takes into account other factors, provided that the method used to compute the reserves is a ''tax reserve method'' as defined in section 807(d)(3). This definition would apply to life insurance reserves taken into account by nonlife insurance companies under section 832(b)(4) and for purposes of determining an insurance company's qualification as a life insurance company under section 816.

E. Electronic Filing of Annual Statements

The Conference Report contemplates requiring the electronic filing of annual statements to improve reporting of insurance reserves, as necessary to carry out and enforce section 807. Conference Report at 478–79. The Treasury Department and the IRS believe that requiring an insurance company to file its annual statement electronically (if the company's Form 1120–L or Form 1120–PC is also filed electronically) is necessary to allow the IRS to better and more efficiently examine the return. Accordingly, § 1.6012–2(c) is proposed to be amended to remove the rule that prohibits an insurance company that files its Form 1120–L or Form 1120–PC electronically from filing its annual statement (or pro forma annual statement) electronically. The Treasury Department and the IRS request comments regarding potential issues that may arise in filing the annual statement (or pro forma annual statements) electronically (for example, if the size of the annual statement(s) may exceed or cause the filed return to exceed the size limits in section 2.1.2 (Submission Size) of IRS Publication 4164, *Modernized e-File (MeF) Guide for Software Developers and Transmitters, Processing Year 2020.*)

F. Proposed Removal or Revision of Regulations With no Future Application

1. In General

This notice of proposed rulemaking proposes to remove §§ 1.801–7, 1.801–8(e), 1.806–4, 1.809–2, 1.810–3, 1.818–2(c), and 1.818–4 because these provisions provide guidance under law that has been repealed or substantially changed and will have no application after the adoption of the proposed regulations as final. Section 1.801–5(c) is proposed to be removed because its requirement that a taxpayer file certain information when it changes the basis of computing life insurance reserve is obviated by the requirement in § 1.807–4(b) of the proposed regulations that a taxpayer changing the basis of computing any item referred to in section 807(c) follow the administrative procedures prescribed by the Commissioner.

This notice of proposed rulemaking proposes to revise § 301.9100–6T to remove provisions related to elections under law that has been repealed or elections that may no longer be made.

2. Section 1.381(c)(22)–1

This notice of proposed rulemaking proposes to remove § 1.381(c)(22)–1(b)(6) because its requirement that an

acquiring corporation take into account any net increases or net decreases in reserves of the distributor or transferor corporation under section 810(d)(1) is no longer applicable. The principle in § 1.381(c)(22)–1(b)(6), however, applies to transactions in which the distributor or transferor corporation has any remaining portion of an adjustment that was required to be taken into account over 10 years under prior section 807(f). *See* section 2.08 of Rev. Proc. 2019–10. After the amendment of section 807(f) by the TCJA, an acquiring corporation must take into account any remaining section 481(a) adjustment of the transferor or distributor corporation pursuant to the IRS's administrative procedures. *See* section 7.03 of Rev. Proc. 2015–13.

3. Section 1.817A–1

This notice of proposed rulemaking proposes to revise § 1.817A–1 to remove the requirement that the current market rate of interest prescribed in § 1.817A–1(a)(5) be used to determine both the life insurance reserve and the required interest (as provided in prior section 812(b)(2)(A)) during the temporary guarantee period of a non-equity indexed modified guaranteed contract (MGC).

Prior to its amendment by the TCJA, section 807(d) generally provided that life insurance reserves for a contract were determined using a rate of interest applicable when the contract was issued. Prior section 807(d)(2)(B) provided that the rate of interest to be used was the greater of the applicable Federal interest rate or the prevailing State assumed interest rate. The TCJA amended section 807(d), however, to provide that life insurance reserves for a contract are generally computed using a method applicable to the contract and in effect as of the date the reserve is determined. Section 807(d), as amended, does not prescribe a particular interest rate to be used in determining life insurance reserves. Thus, the requirement in § 1.817A–1(b)(2) that the applicable interest rate to be used under section 807(d)(2)(B) to compute life insurance reserves for an MGC is a prescribed current market interest rate is now inapplicable. Additionally, the need for § 1.817A–1(b)(1) to prescribe a current market interest rate to determine life insurance reserves for MGCs (as opposed to an interest rate applicable when the contract was issued) is no longer present because section 807(d), as amended, requires the use of a method in effect as of the date the reserve is determined.

Prior to its amendment by the TCJA, section 812 determined ''company's share'' and ''policyholder's share,'' in part, by reference to required interest on certain reserves under section 807(c). Prior section 812(b)(2)(A) provided that the required interest was computed at the greater of the prevailing State assumed rate or the applicable Federal interest rate. The TCJA amended section 812 to provide that the ''company's share'' means 70% and the ''policyholder's share'' means 30%. Accordingly, after the TCJA's amendment of section 812, a particular interest rate is no longer needed to determine the ''company's share'' and the ''policyholder's share.''

Section 1.817A–1 also requires that the current market rate of interest prescribed in § 1.817A–1(a)(5) be used to determine reserves under section 807(c)(3) for an MGC during any temporary guarantee period. Prior to amendment of section 807(c), the ''appropriate rate of interest'' that was otherwise required to determine reserves for MGCs under section 807(c)(3) (the highest of the applicable Federal interest rate, the prevailing State assumed interest rate, or the interest rate assumed by the company in determining the guaranteed benefit) was determined when the obligation first did not involve life, accident, or health contingencies, and was thus not necessarily a current interest rate. The TCJA, however, modified the flush language in section 807(c)(3) to provide that the ''appropriate rate of interest'' is the highest rate or rates permitted to be used to discount the obligations by the NAIC as of the date the reserve is determined. Because the interest rate now required to be used to determine reserves under section 807(c)(3) (in the absence of the application of § 1.817A–1) is a current market interest rate, § 1.817A–1 may no longer be needed to provide a current interest rate. The Treasury Department and the IRS request comments on whether the current market rate of interest prescribed by § 1.817A–1 should continue to apply to reserves under section 807(c)(3) for an MGC during any temporary guarantee period.

4. Section 1.338–11

This notice of proposed rulemaking proposes to revise § 1.338–11(d)(2) to reflect the change in section 807(f) made by the TCJA. Section 1.338–11(d) generally provides that when a section 338 election is made for an insurance company, new target must effectively capitalize its subsequent increase in reserves for any acquired contracts in the deemed asset sale to the extent the fair market value of certain assets acquired by new target in the deemed asset sale exceeds the adjusted grossed-up basis (AGUB) allocated to those assets (that is, to the extent of a ''bargain purchase''). In the absence of this rule, new target could obtain a better tax result if it acquired understated reserves and subsequently increased them rather than acquiring adequately stated reserves.

Section 1.338–11(d) was intended to minimize incentives for sellers to defer increases in reserves. *See* T.D. 9257 (71 FR 17990). An exception to § 1.338–11(d), however, is provided if new target is required by section 807(f) to spread the reserve increase over the 10 succeeding taxable years. *See* § 1.338–11(d)(2)(ii). There was limited incentive for sellers to defer increases in reserves when new target was required to spread the deduction resulting from the reserve increase over 10 years, as was the case under section 807(f) prior to its amendment by the TCJA. The amendment to section 807(f) by the TCJA together with the applicable administrative procedures require a deduction resulting from a reserve increase under section 807(f) to be taken into account in one year. As a result, there is greater incentive for a seller to defer increases in reserves if new target would be allowed to take the deduction into account in one year, and the reason for providing the exception currently in § 1.338–11(d)(2)(ii) no longer exists. Accordingly, this notice of proposed rulemaking proposes to remove the exception for reserve increases under section 807(f) that is currently provided in § 1.338–11(d)(2)(ii).

A new § 1.338–11(d)(3)(iii) is also proposed to be added so the standard used for determining when there is an additional premium under § 1.338–11(d)(3) for a change in items referenced in section 807(c) is the same as that used under section 807(f). Changes in PBRs that are contemplated by the applicable method, for example, may not constitute changes in the basis of computing reserves under section 807(f) and should not result in an amount of additional premium under § 1.338–11(d)(3).

G. Proposed Conforming Changes to Regulations

This notice of proposed rulemaking proposes to revise §§ 1.801–2, 1.809–5, and 1.848–1 to correct references to Code provisions or regulations that have been changed, removed, or are proposed to be removed by this notice of proposed rulemaking.

Determination of Life Insurance or Annuity Contract Status for Certain Foreign-Issued Contracts

The Code contains a statutory definition of a life insurance contract under section 7702, rules applicable to certain flexible premium contracts under section 101(f), distribution on death requirements under section 72(s), and diversification requirements under section 817(h). These requirements, which reflect Congress's concern that the tax-favored treatment generally accorded life insurance and annuity contracts was available to contracts that were too investment oriented or provided for undue tax deferral, are relevant to the tax treatment of a policyholder, annuitant, or beneficiary as well as the entity that issues or reinsures a life insurance or annuity contract.

The Treasury Department and IRS received a request to promulgate regulations under section 807 that generally would provide, for purposes of subchapter L, that the determination of whether a contract issued by a non-United States insurance company and reinsured by a United States insurance company is a life insurance or annuity contract is made without regard to these statutory requirements, provided that (i) no policyholder, insured, annuitant, or beneficiary with respect to the contract is a United States person and (ii) such contract is regulated as a life insurance or annuity contract by a foreign regulator. Under the requested approach, a United States insurance company may be able to establish additional life insurance or other tax reserves for such a contract that is reinsured by a United States insurance company even if the contract does not meet these statutory requirements.

The Treasury Department and the IRS are evaluating this request, including whether to address it as part of this rulemaking. Comments are requested generally in respect of the requested change, including in respect of statutory interpretation and implications in various contexts and provisions outside of subchapter L, such as, for example, the interaction with policies underlying the Federal withholding tax provisions that could apply to reinsurance payments from a United States reinsurer to a non-United States insurer as well as the administrability of requiring a United States reinsurance company to track the residence of direct and indirect beneficial owners of any interest in the contract, policyholder, insured, annuitant, or beneficiary of a contract issued by a non-United States insurance company that it may not administer.

Proposed Applicability Dates

The rules in this notice of proposed rulemaking are proposed to apply to taxable years beginning on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

A taxpayer may choose to apply §§ 1.807–4, 1.816–1, and 1.817A–1(b) of the final regulations to taxable years beginning after December 31, 2017, the effective date of the revision of section 807 made by the TCJA, and ending before the first taxable year that begins on or after the date of publication of the Treasury decision adopting these rules as final in the **Federal Register**. *See* section 7805(b)(7). Alternatively, a taxpayer may rely on §§ 1.807–4 and 1.816–1 of the proposed regulations for taxable years beginning after December 31, 2017, and ending before the first taxable year that begins on or after the date of publication of the Treasury decision adopting these rules as final in the **Federal Register**.

Under proposed § 1.6012–2(l), taxpayers may choose to apply § 1.6012–2(c) of the final regulations to any original Federal income tax return (including any amended return filed on or before the due date (including extensions) of such original return) timely filed on or after the date of publication of the Treasury decision adopting these rules as final in the **Federal Register**.

Effect on Other Documents

The following revenue rulings are proposed to be obsoleted for taxable years beginning on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**: Rev. Rul. 2002–6, Rev. Rul. 94–74, Rev. Rul. 80–117, Rev. Rul. 80–116, Rev. Rul. 78–354, Rev. Rul. 77–198, Rev. Rul. 75–308, Rev. Rul. 74–57, Rev. Rul. 70–568, Rev. Rul. 70–192, Rev. Rul. 69–444, Rev. Rul. 65–240, Rev. Rul. 65–233, Rev. Rul. 65–143. Comments are requested regarding principles contained within these revenue rulings that are consistent with current section 807(f) and for which additional guidance is needed if these rulings are obsoleted.

Notice 2010–29 is proposed to be obsoleted for taxable years beginning after December 31, 2017.

Special Analyses

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

Paperwork Reduction Act

The collection of information relating to this notice of proposed rulemaking will be submitted to the Office of Management and Budget for review under OMB Control Number 1545–0123 in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)).

In response to the Conference Report, § 1.6012–2 of the proposed regulations would require an insurance company to include the insurance company's annual statement (as defined in § 1.6012–2(c)(5)) with an electronically filed Federal income tax return (Form 1120–L for a life insurance company and Form 1120–PC for a nonlife insurance company). Federal income tax items of an insurance company are determined in part based upon the insurance company's annual statement. Providing the annual statement to the IRS with an electronically filed Federal income tax return is necessary to allow the IRS to better and more efficiently examine an insurance company's Federal income tax return.

In accordance with section 807(e)(6), as added by the TCJA, § 1.807–3 of the proposed regulations provides that the IRS may require reporting on Form 1120–L of the opening balance and closing balance of items described in section 807(c) (for example, life insurance reserves) and the method of computing such items for purposes of determining income. Providing this information is necessary to allow the IRS to better examine an insurance company's Federal income tax return.

For purposes of the Paperwork Reduction Act, the burden for the collection of information associated with § 1.6012–2 of the proposed regulations will be reflected in the burden on the Form 1120–L and in the burden on the Form 1120–PC (OMB Control Number 1545–0123) when the burden for each is revised to reflect the collection of information associated with § 1.6012–2 of the proposed regulations. The respondents to the collection of information are life insurance companies that file the Form 1120–L electronically and nonlife insurance companies that file the Form 1120–PC electronically.

For purposes of the Paperwork Reduction Act, the burden for the collection of information associated with § 1.807–3 of the proposed regulations will be reflected in the burden on the Form 1120–L (OMB Control Number 1545–0123) when the burden is revised to reflect the

collection of information associated with § 1.807–3 of the proposed regulations. The respondents to the collection of information are life insurance companies that file a Form 1120–L.

Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by June 1, 2020. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Regulatory Flexibility Act

It is hereby certified that the proposed regulations will not have a significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6).

Section 13517 of the TCJA added section 807(e)(6) to the Code. Under section 807(e)(6), the Secretary may require reporting (at such time and in such manner as the Secretary shall prescribe) with respect to the opening balances and the closing balances of reserves and with respect to the method of computing reserves for purposes of determining income. Section 1.807–3 of the proposed regulations would allow the IRS to require the reporting of this information on any prescribed forms, such as the Form 1120–L.

The Conference Report at 478–479 provides that, under existing authority, the Secretary may require an insurance company to provide its annual statement via a link, electronic copy, or other similar means. Section 1.6012–2(c) of the proposed regulations would require an insurance company to include the insurance company's annual statement with an electronically filed Federal income tax return (Form 1120–L for a life insurance company and Form 1120–PC for a nonlife insurance company). Under current procedures, an insurance company can only electronically file a Form 1120–L or Form 1120–PC if the insurance company is part of an affiliated group filing a consolidated return, the parent of which files a Form 1120. Although data are not readily available, the IRS and the Treasury Department expect that any reporting burden associated with § 1.6012–2(c) of the proposed regulations will fall primarily on financial and insurance firms with annual receipts greater than $41.5 million and, therefore, will not affect a substantial number of small entities. *See* 13 CFR 121.201, sector 52 (finance and insurance).

As stated in the preceding paragraph, the rule is not expected to affect a substantial number of small entities; however, even if a substantial number of small entities were affected, the economic impact of the regulation is not likely to be significant. Section 1.807–3 of the proposed regulations is limited in scope to time and manner of information reporting, and any economic impact associated with this proposed regulation is expected to be minimal. Further, the information reported to the IRS is information that the insurance company has readily available.

Notwithstanding this certification, the Treasury Department and the IRS invite comments on the impact this rule would have on small entities.

Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the **ADDRESSES** heading. The Treasury Department and the IRS request comments on all aspects of the proposed rules and the other proposed actions described herein. All comments that are submitted by the public will be available for public inspection and copying at *http://www.regulations.gov* or upon request.

A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments and an outline of the topics to be discussed and the time to be devoted to each topic by May 18, 2020. Such persons should submit a signed paper original and eight (8) copies or an electronic copy. A period of 10 minutes will be allotted to each person for presenting oral comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is Dan Phillips, Office of Associate Chief Counsel (Financial Institutions and Products), IRS. However, other personnel from the Treasury Department and the IRS participated in their development.

Statement of Availability of IRS Documents

The IRS notices, revenue procedures, and revenue rulings cited in this preamble are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at *http://www.irs.gov.*

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 301

Employment taxes, Estate taxes, Excise Taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 301 are proposed to be amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding a sectional authority for § 1.807–3 in numerical order to read in part as follows:

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

* * * * *

Section 1.807–3 also issued under 26 U.S.C. 807(e)(6).

* * * * *

§ 1.338–11 [Amended]

■ **Par. 2.** Section 1.338–11 is amended by:

■ 1. Revising paragraph (d)(2).

■ 2. Removing the language ''and (d)(3)(iii)'' from the first sentence in paragraph (d)(3)(i) and adding ''through (iv)'' in its place.

■ 3. Redesignating paragraph (d)(3)(iii) as paragraph (d)(3)(iv).

■ 4. Adding a new paragraph (d)(3)(iii).

■ 5. Revising newly redesignated paragraph (d)(3)(iv).

■ 6. Adding paragraph (d)(7)(iii).

The revisions and additions read as follows:

§ 1.338–11 Effect of section 338 election on insurance company targets.

* * * * *

(d) * * *

(2) *Exception.* New target is not treated as receiving additional premium under paragraph (d)(1) of this section if it is under state receivership as of the close of the taxable year for which the increase in reserves occurs.

(3) * * *

(iii) *Increases in section 807(c) reserves.* The positive amounts with respect to the items referred to in section 807(c) other than discounted unpaid loss reserves is the sum of the net increases in such items that are required to be taken into account under section 807(f).

(iv) *Increases in other reserves.* The positive amount with respect to reserves other than discounted unpaid loss reserves and other items referred to in section 807(c) is the net increase of those reserves due to changes in estimate, methodology, or other assumptions used to compute the reserves (including the adoption by new target of a methodology or assumptions different from those used by old target).

* * * * *

(7) * * *

(iii) *Application of paragraphs (d)(2) and (3) of this section.* Paragraphs (d)(2) and (3) of this section apply to taxable years beginning on or after [DATE FINAL REGULATIONS ARE PUBLISHED IN THE **Federal Register**]. For taxable years beginning before such date, see paragraph (d) of this section as contained in 26 CFR part 1 revised as of April 1, 2019.

* * * * *

§ 1.381(c)(22)–1 [Amended]

■ **Par. 3.** In § 1.381(c)(22)–1, paragraph (b)(6) is removed and reserved.

§ 1.801–2 [Amended]

■ **Par. 4.** Section 1.801–2 is amended by removing the language ''1.801–7'' and adding the language ''1.801–6'' in its place.

■ **Par. 5.** Section 1.801–5 is amended by:

■ 1. Removing paragraph (c) and redesignating paragraph (d) as paragraph (c).

■ 2. In newly redesignated paragraph (c), designating the *Example* as paragraph (c)(1).

■ 3. In newly designated paragraph (c)(1):

■ i. Designating the introductory text as paragraph (c)(1)(i).

■ ii. Adding a heading for the table in newly designated paragraph (c)(1)(i).

■ iii. Designating the undesignated paragraph following newly designated paragraph (c)(1)(i) as paragraph (c)(1)(ii).

■ 4. Adding reserved paragraph (c)(2).

The addition reads as follows:

§ 1.801–5 [Amended]

* * * * *

(c) * * *

(1) * * *

(i) * * *

Table 1 to Paragraph (c)(1)(i)

* * * * *

§ 1.801–7 [Removed and Reserved]

■ **Par. 6.** Section 1.801–7 is removed and reserved.

§ 1.801–8(e) [Amended]

■ **Par. 7.** In § 1.801–8, paragraph (e) is removed and reserved.

§ 1.806–4 [Removed]

■ **Par. 8.** Section 1.806–4 is removed.

■ **Par. 9.** Section 1.807–1 is revised to read as follows:

§ 1.807–1 Computation of life insurance reserves.

(a) *No asset adequacy reserve.* The life insurance reserve determined under section 807(d)(1) does not include any asset adequacy reserve. An asset adequacy reserve includes any reserve that is established as an additional reserve based upon an analysis of the adequacy of reserves that would otherwise be established or any reserve that is not held with respect to a particular contract. In determining whether a reserve is a life insurance reserve, the label placed on such reserve is not determinative, provided, however, any reserve or portion of a reserve that would have been established pursuant to an asset adequacy analysis required by the National Association of Insurance Commissioner's Valuation Manual 30 as it existed on December 22, 2017, the date of enactment of Public Law 115–97, is an asset adequacy reserve.

(b) *Applicability date.* The rules of this section apply to taxable years beginning on or after [DATE FINAL REGULATIONS ARE PUBLISHED IN THE **Federal Register**].

■ **Par. 10.** Section 1.807–3 is added to read as follows:

§ 1.807–3 Reporting of reserves.

(a) *Reserve reporting.* A life insurance company subject to tax under section 801 is required to make a return on Form 1120–L, *U.S. Life Insurance Company Income Tax Return.* The Internal Revenue Service may require reporting with respect to the opening balance and closing balance of items described in section 807(c) and with respect to the method of computing such items for purposes of determining income. Such reporting may provide for the manner in which separate account items are reported. (See section 6011 and § 301.6011–1 of this chapter.)

(b) *Applicability date.* The rules of this section apply to taxable years beginning on or after [DATE FINAL REGULATIONS ARE PUBLISHED IN THE **Federal Register**].

■ **Par. 11.** Section 1.807–4 is added to read as follows:

§ 1.807–4 Adjustment for change in computing reserves.

(a) *Requirement to follow administrative procedures.* Except as provided in § 1.446–1(e), a change in basis of computing an item referred to in section 807(c) is a change in method of accounting for purposes of § 1.446–1(e). Before computing such item under a new basis, a life insurance company must obtain the consent of the Commissioner of Internal Revenue or his delegate (Commissioner) pursuant to administrative procedures prescribed by the Commissioner. Similarly, an insurance company other than a life insurance company (a nonlife insurance company) that changes its basis of computing life insurance reserves must obtain the consent of the Commissioner pursuant to administrative procedures prescribed by the Commissioner.

(b) *Section 481 adjustment*—(1) *In general.* If the basis of computing any item referred to in section 807(c) as of the close of any taxable year (the year of change) differs from the basis of computing such item at the close of the preceding taxable year, then the difference between the amount of the item at the close of the taxable year computed on the new basis and the amount of the item at the close of the taxable year computed on the old basis that is attributable to contracts issued

before the taxable year, is taken into account under section 481 and §§ 1.481–1 through 1.481–5 as an adjustment attributable to a change in method of accounting.

(2) *Loss of company status.* If for any taxable year a taxpayer that was an insurance company for the year of change is no longer an insurance company, then the taxpayer must take into account in the preceding taxable year (that is, the last taxable year it was an insurance company) the balance of any section 481(a) adjustment determined under paragraph (b)(1) of this section. A taxpayer that was an insurance company for the year of change does not accelerate the balance of any section 481(a) adjustment determined under paragraph (b)(1) of this section merely because it changes from a life insurance company to a nonlife insurance company or because it changes from a nonlife insurance company to a life insurance company.

(c) *Effect on determining increase or decrease in reserves*—(1) *Effect under section 807(a) and (b).* If there is a change in basis of computing any item described in section 807(c) for a taxable year, then, for purposes of section 807(a) and (b), the closing balance for such item for the year of change with respect to contracts issued before the year of change is determined on the old basis and the opening balance for such item for the next taxable year for such contracts is computed on the new basis.

(2) *Effect under section 832.* The following rules apply for purposes of section 832(b)(4):

(i) For the year of change, life insurance reserves at the end of the year of change with respect to contracts issued before the year of change are determined on the old basis.

(ii) For the taxable year following the year of change, life insurance reserves at the end of the preceding taxable year (that is, the year of change) with respect to contracts issued before the year of change are determined on the new basis.

(d) *Examples.* The principles of paragraphs (a) through (c) of this section are illustrated by the following examples. For purposes of these examples and except as otherwise provided, IC is a life insurance company within the meaning of section 816(a) that issues life insurance and annuity contracts. IC is required to determine the amount of life insurance reserves under section 807(d) and to take net increases or decreases in the reserves into account in computing life insurance company taxable income. IC's reserve for each insurance contract at issue exceeds the net surrender value for such contract and does not exceed the statutory reserve for such contract. IC uses a calendar year as its taxable year.

(1) *Example 1*—(i) *Facts.* In 2021, IC discovered that it had computed the amount of life insurance reserves for its 2019 and 2020 taxable years by using a mortality table that was not permitted by the tax reserve method (as defined in section 807(d)(3)).

(ii) *Analysis.* To comply with section 807(d), IC must use the appropriate mortality table to compute its life insurance reserves for the 2021 taxable year. This change is a change in basis of computing life insurance reserves and a change in method of accounting described in § 1.446–1(e). IC is required to obtain the consent of the Commissioner to change its basis of computing its life insurance reserves by following the administrative procedures prescribed by the Commissioner.

(2) *Example 2*—(i) *Facts.* IC issues variable annuity contracts with guaranteed minimum benefits. In Year 1, the National Association of Insurance Commissioners makes a change to the Commissioners' Annuity Reserve Valuation Method that imposes a new computational requirement on issuers of variable annuities with guaranteed minimum benefits. The requirement applies to the determination of statutory reserves as of December 31, Year 1, for contracts issued on or prior to December 31, Year 1.

(ii) *Analysis.* To comply with section 807(d), IC must compute its life insurance reserves for variable annuities with guaranteed minimum benefits for the Year 1 taxable year using the new computational requirement. This change is a change in basis of computing life insurance reserves for such contracts issued prior to Year 1 and a change in method of accounting described in § 1.446–1(e). IC is required to obtain the consent of the Commissioner to change its basis of computing its life insurance reserves by following the administrative procedures prescribed by the Commissioner.

(3) *Example 3*—(i) *Facts.* In 2021, IC changed the basis of computing the amount of life insurance reserves for a certain type of life insurance contract as described in section 807(f). Both the basis used for computing the reserves for the relevant contracts at the close of the 2020 taxable year (old basis) and the basis of computing the reserves for the relevant type of contract at the close of the 2021 taxable year (new basis) are consistent with the applicable Commissioners' Reserve Valuation Method. IC followed the administrative procedures prescribed by the Commissioner to obtain consent to change the basis of computing these reserves. IC determined that the life insurance reserves as of December 31, 2021, for the relevant contracts issued prior to 2021 were $110 if computed using the old method and $120 if computed using the new method. IC also determined that the life insurance reserves as of December 31, 2021, for the relevant contracts issued during 2021 were $15 using the new basis.

(ii) *Analysis.* IC must take into account under section 481 and the administrative procedures prescribed by the Commissioner the $10 difference between the reserves for the relevant contracts issued prior to 2021 computed under the old basis ($110) and the reserves for such contracts computed under the new basis ($120). For purposes of determining any net increase or net decrease in reserves in taxable year 2021 under section 807(a) or (b), IC's closing balance of life insurance reserves computed under section 807(d) with respect to the relevant contracts is $110 for contracts issued prior to 2021 (computed on the old basis) and $15 for contracts issued during 2021 (computed on the new basis). IC's opening balance in 2022 for life insurance reserves for the relevant contracts is $135 (computed on the new basis).

(4) *Example 4*—(i) *Facts.* The facts are the same as in paragraph (d)(3) of this section (the facts in *Example 3*), except that IC is an insurance company that is not a life insurance company. IC is required to compute taxable income under section 832.

(ii) *Analysis.* IC must take into account under section 481 and the administrative procedures prescribed by the Commissioner the $10 difference between the reserves for the relevant contracts issued prior to 2021 computed under the old basis ($110) and the reserves for such contracts computed under the new basis ($120). For purposes of determining the premiums earned on insurance contracts during the taxable year as described in section 832(b)(4) for the year of change, the life insurance reserves at the end of the taxable year are $110 for contracts issued prior to 2021 (computed on the old basis) and $15 for contracts issued during 2021 (computed on the new basis). For purposes of determining the premiums earned on insurance contracts during the taxable year as described in section 832(b)(4) for the taxable year following the year of change, the life insurance reserves at the end of the preceding taxable year (the year of change) with respect to relevant contracts are $135 (computed on the new basis).

(e) *Applicability date.* The rules of this section apply to taxable years beginning on or after [DATE FINAL REGULATIONS ARE PUBLISHED IN THE **Federal Register**]. However, a taxpayer may choose to apply the rules of this section for taxable years beginning after December 31, 2017, the effective date of the revision of section 807 by Public Law 115–97, and ending before the first taxable year that begins on or after [DATE FINAL REGULATIONS ARE PUBLISHED IN THE **Federal Register**]. See section 7805(b)(7).

§ 1.809–2 [Removed]

■ **Par. 12.** Section 1.809–2 is removed.

§ 1.809–5 [Amended]

■ **Par. 13.** Section 1.809–5 is amended by removing the language ''and § 1.810–3'' from the last sentence of paragraph (a)(5)(iii).

§ 1.810–3 [Removed]

■ **Par. 14.** Section 1.810–3 is removed.

■ **Par. 15.** Section 1.816–1 is added before the undesignated center heading ''Miscellaneous Provisions'' to read as follows:

§ 1.816–1 Life insurance reserves.

(a) *Definition of life insurance reserves.* Except as provided in section 816(h), a reserve that meets the requirements of section 816(b)(1) and (2) will not be disqualified as a life insurance reserve solely because the method used to compute the reserve takes into account other factors, provided that the method used to compute the reserve is a tax reserve method as defined in section 807(d)(3) and that such reserve is not an asset adequacy reserve as described in § 1.807–1(a).

(b) *Applicability date.* The section applies to taxable years beginning on or after [DATE FINAL REGULATIONS ARE PUBLISHED IN THE **Federal Register**]. However, a taxpayer may choose to apply the rules of this section for taxable years beginning after December 31, 2017, the effective date of the revision of section 807 by Public Law 115–97, and ending before the first taxable year that begins on or after [DATE FINAL REGULATIONS ARE PUBLISHED IN THE **Federal Register**]. See section 7805(b)(7).

§ 1.817A–0 [Removed]

■ **Par. 16.** Section 1.817A–0 is removed.

■ **Par. 17.** Section 1.817A–1 is amended by:

■ 1. Revising the heading to paragraph (b) and paragraph (b)(1).

■ 2. Removing paragraph (b)(2).

■ 3. Redesignating paragraphs (b)(3) and (4) as paragraph (b)(2) and (3).

■ 5. In newly redesignated paragraph (b)(3):

■ i. Revising the first sentence.

■ ii. Removing the word ''None'' in the second sentence and adding ''Neither'' in its place.

■ 6. Removing paragraph (b)(5)

■ 7. Revising paragraph (d).

The revisions read as follows:

§ 1.817A–1 Certain modified guaranteed contracts.

* * * * *

(b) *Applicable interest rates for certain non-equity-indexed modified guaranteed contracts*—(1) *Tax reserves during temporary guarantee period under section 807(c)(3).* An insurance company is required to determine the tax reserves for certain MGCs under section 807(c)(3). During the temporary guarantee period of such an MGC that is a non-equity-indexed MGC, the applicable interest rate to be used is the current market rate, as defined in paragraph (a)(5) of this section. For periods after the end of such a temporary guarantee period, section 807(c)(3) is not modified when applied to a non-equity indexed MGC. Section 807(c)(3) is not affected by the definition of current market rate contained in paragraph (a)(5) of this section once the temporary guarantee period has expired.

* * * * *

(3) *Periods after the end of the temporary guarantee period.* For periods after the end of the temporary guarantee period, sections 807(c)(3) and 811(d) are not modified when applied to non-equity-indexed MGCs. * * *

* * * * *

(d) *Applicability dates.* Paragraph (b) of this section applies to taxable years beginning on or after [DATE FINAL REGULATIONS ARE PUBLISHED IN THE **Federal Register**]. However, a taxpayer may choose to apply the rules of paragraph (b) of this section for taxable years beginning after December 31, 2017, the effective date of the revision of section 807 by Public Law 115–97, and ending before the first taxable year that begins on or after [DATE FINAL REGULATIONS ARE PUBLISHED IN THE **Federal Register**]. See section 7805(b)(7). For taxable years beginning before [DATE FINAL REGULATIONS ARE PUBLISHED IN THE **Federal Register**], see paragraph (b) of this section as contained in 26 CFR part 1 revised as of April 1, 2019.

§ 1.818–2 [Amended]

■ **Par. 18.** Section 1.818–2 is amended by removing paragraph (c).

§ 1.818–4 [Removed and Reserved]

■ **Par. 19.** Section 1.818–4 is removed and reserved.

§ 1.848–1 [Amended]

■ **Par. 20.** Section 1.848–1 is amended by removing the language ''section 807(e)(4)'' in paragraph (b)(2)(i) and adding the language ''section 807(e)(3)'' in its place.

■ **Par. 21.** Section 1.6012–2 is amended by:

■ 1. In the second sentence of paragraph (c)(1)(i), removing ''Except as provided in paragraph (c)(4) of this section, such'' and adding ''Such'' in its place.

■ 2. In the third sentence of paragraph (c)(2), removing ''Except as provided in paragraph (c)(4) of this section, such'' and adding ''Such'' in its place.

■ 3. Removing paragraph (c)(4).

■ 4. Redesignating paragraph (c)(5) as paragraph (c)(4).

■ 5. Revising paragraph (l).

The revision reads as follows.

§ 1.6012–2 Corporations required to make returns of income.

* * * * *

(l) *Applicability date.* Except as provided in this paragraph (l), paragraph (c) of this section applies to any taxable year beginning on or after [DATE FINAL REGULATIONS ARE PUBLISHED IN THE **Federal Register**]. However, a taxpayer may choose to apply paragraph (c) of this section to any original Federal income tax return (including any amended return filed on or before the due date (including extensions) of such original return) timely filed on or after [DATE FINAL REGULATIONS ARE PUBLISHED IN THE **Federal Register**]. For taxable years beginning before [DATE FINAL REGULATIONS ARE PUBLISHED IN THE **Federal Register**] see paragraph (c) of this section as contained in 26 CFR part 1 in effect on April 1, 2019.

PART 301—PROCEDURE AND ADMINISTRATION

■ **Par. 22.** The authority citation for part 301 continues to read in part as follows:

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

§ 301.9100–6T [Amended]

■ **Par. 25.** Section 301.9100–6T is amended by:

■ 1. Removing from the table in paragraph (a)(1) the three entries for ''211'' and the entries for ''216(c)(1),'' ''216(c)(2),'' ''217(i),'' and ''217(l)(2)(B).''

■ 2. Removing and reserving paragraph (a)(2)(iii).

■ 3. Removing paragraph (a)(3)(v).

■ 4. In paragraph (a)(4):

■ i. Removing ''211 (Code section 810(b)(3)), 216(c) (1) and (2), 217(l),'' from the first sentence.

■ ii. Removing ''211 (Code sections 806(d)(4), and 807(d)(4)(C)), 217(i),'' from the second sentence.
■ iii. Removing the last sentence.

Sunita Lough,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2020–05701 Filed 4–1–20; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF EDUCATION

34 CFR Chapter III

[ED–2020–OSERS–0034]

Proposed Waiver and Extension of the Project Periods for Television Access Grants

AGENCY: Office of Special Education and Rehabilitative Services (OSERS), Department of Education.

ACTION: Proposed waiver and extension of project periods.

SUMMARY: The Secretary proposes to waive the requirements in the Education Department General Administrative Regulations that generally prohibit project periods exceeding five years and project period extensions involving the obligation of additional Federal funds. The proposed waiver and extension would enable five projects under Catalog of Federal Domestic Assistance (CFDA) number 84.327C to receive funding for an additional period, not to exceed September 30, 2021.

DATES: We must receive your comments on or before May 4, 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 ''How to use Regulations.gov'' in the Help section.

• *Postal Mail, Commercial Delivery, or Hand Delivery:* If you mail or deliver your comments about the proposed waiver and extension, address them to Glinda Hill, U.S. Department of Education, 400 Maryland Avenue SW, Room 5173, Potomac Center Plaza, Washington, DC 20202–5076.

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: Glinda Hill, U.S. Department of Education, 400 Maryland Avenue SW, Room 5173, Potomac Center Plaza, Washington, DC 20202–5076. Telephone: 202–245–7376. Email: *Glinda.Hill@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 this proposed waiver and extension. To ensure that your comments have maximum effect in developing the final waiver and extension, we urge you to identify clearly the specific grantee or grantees (listed in the table under the *Background* section) 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 waivers and extensions. 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 the program.

During and after the comment period, you may inspect all public comments about this proposed waiver and extension of the project period by accessing *Regulations.gov*. You may also inspect all public comments about this proposal in Room 5173, 550 12th Street SW, Washington, DC, between the hours of 8:30 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 this proposed waiver and extension. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Background

On January 14, 2015, the Department of Education (Department) published in the **Federal Register** (80 FR 1900) a notice inviting applications for five video description and captioning projects for fiscal year (FY) 2015 under the Educational Technology, Media, and Materials program, authorized under sections 674 and 681(d) of the Individuals with Disabilities Education Act (IDEA).

The purpose of the video description and captioning projects is to improve the learning opportunities for children with disabilities by providing access to television programming through high-quality video description and captioning. These projects support access to widely available television programs that are appropriate for use in the classroom setting and are not otherwise required to be captioned or described by the Federal Communications Commission (FCC). A table listing the FY 2015 video description and captioning projects follows.

FY 2015 Awards under CFDA 84.327C	Grantee project name
H327C150001	Companion Enterprise, Inc., Tulsa, OK. *Project:* Narrative Television Network.
H327C150007	Bridge Multimedia, Inc., New York, NY. *Project:* Video Description for the Next Generation.
H327C150008	Bridge Multimedia, Inc., New York, NY. *Project:* Standards Aligned Video Description.
H327C150009	Closed Caption Latina, Corp., Winter Springs, FL. *Project:* Captions and Video Description: Educational Tools for Hispanic Children with Disabilities.

FY 2015 Awards under CFDA 84.327C	Grantee project name
H327C170002 (Transferred from H327C150003).	Captionmax LLC, Minneapolis, MN. *Project:* Television Access for Preschool and Elementary School Children.

The Office of Special Education Programs (OSEP) also funds one project under CFDA 84.327N, Educational Technology, Media, and Materials for Individuals with Disabilities—Captioned and Described Educational Media, the Center for the Described and Captioned Media Program (DCMP; 84.327N). The purpose of the DCMP is to establish and operate an Accessible Learning Center that would oversee the selection, acquisition, captioning, video description, and distribution of educational media through a free loan service for eligible users. The video description and captioning projects are required to use the DCMP's portal as a repository so that eligible users can easily access the video described and captioned media. The DCMP's project period started on October 1, 2016, and will end on September 30, 2021.

Waivers and Extensions

OSEP proposes to extend the five video description and captioning projects to align the projects' end dates with that of the DCMP, which will receive its final year of funding in FY 2020 and end on September 30, 2021. OSEP does not believe that it would be in the public interest to run a competition for CFDA 84.327C in FY 2020. Aligning the ends of these project periods would allow the Department to better coordinate the Description and Captioning program. Aligning the video description and captioning projects' periods with the DCMP's project period also would improve coordination across projects, allow for more efficient use of the funding available to support these activities, and ensure easier access to a wider range and increasing numbers of captioned and described educational media and programming.

For these reasons, the Secretary proposes to waive the requirements in 34 CFR 75.250, which prohibit project periods exceeding five years, as well as the requirements in 34 CFR 75.261(a) and (c)(2), which allow the extension of a project period only if the extension does not involve the obligation of additional Federal funds. The waiver would allow the Department to issue a one-time FY 2020 continuation award to each of the five currently funded 84.327C projects.

Any activities carried out during the year of this continuation award must be consistent with, or a logical extension of, the scope, goals, and objectives of the grantees' applications as approved in the FY 2015 competition. The requirements for continuation awards are set forth in 34 CFR 75.253.

Regulatory Flexibility Act Certification

The Secretary certifies that the proposed waiver and extension of the project period would not have a significant economic impact on a substantial number of small entities. The only entities that would be affected by the proposed waiver and extension of the project period are the current grantees.

The Secretary certifies that the proposed waiver and extension would not have a significant economic impact on these entities, because the extension of an existing project period imposes minimal compliance costs, and the activities required to support the additional year of funding would not impose additional regulatory burdens or require unnecessary Federal supervision.

Paperwork Reduction Act of 1995

This notice of proposed waiver and extension of the project period does not contain any information collection requirements.

Intergovernmental Review

These programs are 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.

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 contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Mark Schultz,

Commissioner, Rehabilitation Services Administration. Delegated the authority to perform the functions and duties of the Assistant Secretary for the Office of Special Education and Rehabilitative Services.

[FR Doc. 2020–06752 Filed 4–1–20; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R09–OAR–2019–0654; FRL 10007–30–Region 9]

PM_{10} Maintenance Plan and Redesignation Request; Imperial Valley Planning Area; California

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve the ''Imperial County 2018 Redesignation Request and Maintenance Plan for Particulate Matter Less Than 10 Microns in Diameter (PM_{10})'' (''Imperial PM_{10} Plan'') as a revision of the California state implementation plan (SIP). The Imperial PM_{10} Plan includes, among other elements, a demonstration of implementation of best available control measures (BACM) and a maintenance plan that includes an emissions inventory consistent with attainment, a maintenance demonstration, contingency provisions, and motor vehicle emissions budgets for use in transportation conformity determinations. In connection with the proposed approval of the Imperial PM_{10} Plan, the EPA is proposing to determine that PM_{10} precursors do not contribute significantly to elevated PM_{10} levels in the area. The EPA is also proposing to

approve the State of California's request to redesignate the Imperial Valley Planning Area from nonattainment to attainment for the PM_{10} national ambient air quality standards. The EPA is proposing these actions because the SIP revision meets the applicable statutory and regulatory requirements for such plans and motor vehicle emissions budgets and because the area meets the Clean Air Act requirements for redesignation of nonattainment areas to attainment. Lastly, the EPA is beginning the adequacy process for the 2016 and 2030 motor vehicle emissions budgets in the 2018 Imperial PM_{10} Plan through this proposed rule.

DATES: Comments must be received on or before May 4, 2020.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2019–0654, at *http://www.regulations.gov*. For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the EPA's full public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Ginger Vagenas, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone at 415–972–3964, or by email at *Vagenas.Ginger@epa.gov.*

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

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I. Background

A. National Ambient Air Quality Standards

Under section 109 of the Clean Air Act (CAA or ''Act''), the EPA has established national ambient air quality standards (NAAQS or ''standards'') for certain pervasive air pollutants (referred to as ''criteria pollutants'') and conducts periodic reviews of the NAAQS to determine whether they should be revised or whether new NAAQS should be established. The EPA sets the NAAQS for criteria pollutants at levels required to protect public health and welfare.[1] Particulate matter is one of the ambient pollutants for which the EPA has established NAAQS.[2]

In 1987, the EPA established primary and secondary NAAQS for particles with an aerodynamic diameter less than or equal to a nominal ten micrometers (PM_{10}).[3] At that time, the EPA established two PM_{10} standards; an annual standard and a 24-hour standard.[4] An area attains the 24-hour standard of 150 micrograms per cubic meter (μg/m^3) when the expected number of days per calendar year with a 24-hour concentration in excess of the standard (referred to as an exceedance), averaged over three years, is equal to or less than one.[5] The annual PM_{10} standard was subsequently revoked.[6] More recently, the EPA announced that it was retaining the 24-hour PM_{10} NAAQS as a 24-hour standard of 150 μg/m^3.[7] In this document, ''PM_{10} NAAQS'' or ''PM_{10} standard'' refer to the 24-hour-average PM_{10} NAAQS.

B. State Implementation Plans and Area Designations

Following promulgation of a new or revised NAAQS, section 110 of the CAA requires states to adopt and submit a plan, referred to as the SIP, that provides for the implementation, maintenance, and enforcement of each NAAQS within each state. Under CAA section 107(d), the EPA is required to designate areas throughout the nation as nonattainment, attainment, or unclassifiable based on ambient pollutant monitoring data showing whether the area is attaining or not attaining the NAAQS. States with nonattainment areas are required to revise their SIPs to provide for attainment of the NAAQS and to meet other nonattainment area requirements.

C. Exceptional Events Rule

Congress has recognized that it may not be appropriate for the EPA to use certain monitoring data collected by the ambient air quality monitoring network and maintained in the EPA's Air Quality

[1] For a given air pollutant, ''primary'' standards are those determined by the EPA as requisite to protect the public health. ''Secondary'' standards are those determined by the EPA as requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. CAA section 109(b).

[2] Particulate matter is the generic term for a broad class of chemically and physically diverse substances that exist as discrete particles (liquid droplets or solids) over a wide range of sizes. Particles originate from a variety of anthropogenic stationary and mobile sources as well as from natural sources. Particles may be emitted directly or form in the atmosphere by transformations of gaseous emissions such as sulfur dioxide (SO_2), oxides of nitrogen (NO_X), volatile organic compounds (VOC), and ammonia (NH_3). The chemical and physical properties of particulate matter vary greatly with time, region, meteorology, and source category. SO_2, NO_X, VOC, and NH_3 are referred to as PM_{10} precursors. As discussed later in this proposed rule, precursors do not contribute significantly to elevated ambient PM_{10} concentrations in the Imperial Valley Planning Area. Some California air quality plans use the term reactive organic gases (ROG) instead of VOC. The terms cover essentially the same compounds, and herein we use the term VOC.

[3] 52 FR 24634 (July 1, 1987).

[4] The primary and secondary standards were set at the same level for both the 24-hour and the annual PM_{10} standards.

[5] An exceedance is defined as a daily value that is above the level of the 24-hour standard, 150 μg/m^3, after rounding to the nearest 10 μg/m^3 (*i.e.,* values ending in five or greater are to be rounded up). Consequently, a recorded value of 154 μg/m^3 would not be an exceedance because it would be rounded to 150 μg/m^3. A recorded value pf 155 μg/m^3 would be an exceedance because it would be rounded to 160 μg/m^3. 40 CFR part 50, Appendix K, section 1.0.

[6] In 2006, the EPA retained the 24-hour PM_{10} standards but revoked the annual standards. 71 FR 61144 (October 17, 2006).

[7] 78 FR 3086 (January 15, 2013).

System database (AQS)[8] in certain regulatory determinations. Thus, in 2005, Congress provided the statutory authority for the exclusion of data influenced by ''exceptional events'' meeting specific criteria by adding section 319(b) to the CAA.[9] To implement this 2005 CAA amendment, the EPA promulgated the 2007 Exceptional Events Rule.[10] The 2007 Exceptional Events Rule created a regulatory process codified at 40 CFR parts 50 and 51 (sections 50.1, 50.14 and 51.930). These regulatory sections, which superseded the EPA's previous guidance on handling data influenced by events, contain definitions, procedural requirements, requirements for air agency demonstrations, criteria for the EPA's approval of the exclusion of event-affected air quality data from the data set used for regulatory decisions, and requirements for air agencies to take appropriate and reasonable actions to protect public health from exceedances or violations of the NAAQS. In 2016, the EPA promulgated a comprehensive revision to the 2007 Exceptional Events Rule.[11]

Under the Exceptional Events Rule, if a state demonstrates to the EPA's satisfaction that emissions from a high wind dust event caused a specific air pollution concentration in excess of the NAAQS at a particular air quality monitoring location and otherwise satisfies the requirements of 40 CFR 50.14, the EPA must exclude that data from use in determinations of exceedances and violations.[12] The EPA considers high wind dust events to be natural events in cases where windblown dust is entirely from natural undisturbed lands in the area or where all anthropogenic sources are reasonably controlled.[13] For areas in California, the EPA accepts sustained winds of 25 miles per hour as a high wind threshold.[14]

D. Imperial Valley Planning Area

Through its enactment of the Clean Air Act Amendments of 1990, Congress designated certain areas of the country as nonattainment areas for the PM_{10} NAAQS. A portion of Imperial County (or ''County''), referred to as the Imperial Valley Planning Area, was one of the areas designated as nonattainment.[15] In 1991, the EPA classified the Imperial Valley Planning Area, also referred to herein as the ''Imperial PM_{10} nonattainment area,'' as a ''Moderate'' PM_{10} nonattainment area.[16]

Imperial County encompasses approximately 4,500 square miles in southeastern California. It is home to approximately 190,600 people, and its principal industries are farming and retail trade. It is bordered by Riverside County to the north, Arizona to the east, Mexico to the south, and San Diego County and coastal mountains to the west. The Salton Sea straddles the boundary between Riverside and Imperial counties with most of the lake located in the northwest portion of Imperial County. Winters are mild and dry, and summers are extremely hot, with average annual rainfall of about 3 inches. The topography and meteorology of the area creates conditions conducive to moderate and occasionally extremely high winds that result in elevated levels of particulate matter.[17]

The Imperial PM_{10} nonattainment area encompasses the western and central parts of the County and includes the Imperial Valley.[18] The Imperial Valley runs north-south through the central part of the County. Most of the County's population and industries exist within this relatively narrow land area, which extends about one-fourth the width of the County. The rest of Imperial County is primarily open desert, with little or no human population. The Torres Martinez Desert Cahuilla Indians have reservation land in the northwestern corner of the nonattainment area, and the Quechan Tribe of the Fort Yuma Indian Reservation has reservation land in the southeastern portion of the nonattainment area.

In California, the California Air Resources Board (CARB) is the state agency responsible for the adoption and submission to the EPA of California SIPs and SIP revisions and it has broad authority to establish emissions standards and other requirements for mobile sources. Local and regional air pollution control districts in California are responsible for the regulation of stationary sources and are generally responsible for the development of air quality plans. In Imperial County, the Imperial County Air Pollution Control District (ICAPCD or ''District'') develops and adopts air quality plans to address CAA planning requirements applicable to the Imperial Valley Planning Area. Such plans are then submitted to CARB for adoption and submittal to the EPA as revisions to the California SIP.

E. PM_{10} Planning in the Imperial Valley Planning Area

Under section 189(a) of the CAA, as amended in 1990, states with Moderate PM_{10} nonattainment areas were required to develop and submit SIP revisions that, among other things, provide for implementation of reasonably available control measures (RACM) and that demonstrate that the nonattainment area would attain the PM_{10} NAAQS no later than the applicable attainment date of December 31, 1994. Subsequent to litigation over the extent to which PM_{10} emissions generated within Mexico contributed to PM_{10} exceedances over the 1992 to 1994 period, we determined that the Imperial PM_{10} nonattainment area did not attain the PM_{10} NAAQS by the Moderate area deadline (December 31, 1994) and reclassified the area from Moderate to ''Serious.''[19]

Under section 189(b) of the CAA, states with Serious PM_{10} nonattainment areas are required to submit SIP revisions that, among other things, provide for implementation of BACM and attainment no later than applicable Serious area attainment date (December 31, 2001). In the case of the Imperial PM_{10} nonattainment area, we determined that the area did not attain the PM_{10} NAAQS by the Serious area deadline (December 31, 2001), which triggered the requirement under CAA section 189(d) for the State to revise the SIP to provide for attainment of the PM_{10} NAAQS in the Imperial PM_{10} nonattainment area and to provide at

[8] AQS is the EPA's official repository of ambient air data.

[9] Under CAA section 319(b), an exceptional event means an event that (i) affects air quality; (ii) is not reasonably controllable or preventable; (iii) is an event caused by human activity that is unlikely to recur at a particular location or a natural event; and (iv) is determined by the EPA under the process established in regulations promulgated by the EPA in accordance with section 319(b)(2) to be an exceptional event. For the purposes of section 319(b), an exceptional event does not include (i) stagnation of air masses or meteorological inversions; (ii) a meteorological event involving high temperatures or lack of precipitation; or (iii) air pollution relating to source noncompliance.

[10] 72 FR 13560, March 22, 2007.

[11] 81 FR 68216 (October 3, 2016). We refer herein to the 2016 revision as the ''Exceptional Events Rule.''

[12] 40 CFR 50.14(b)(5).

[13] 40 CFR 50.14(b)(5)(ii).

[14] 40 CFR 50.14(b)(5)(iii).

[15] CAA section 107(d)(4)(B)(i) and 52 FR 29383 (August 7, 1987).

[16] 56 FR 56694 (November 6, 1991). On March 19, 2013, we clarified the description of the Imperial Valley planning area. 78 FR 16792. An exact description of the Imperial PM_{10} nonattainment area is provided in 40 CFR 81.305.

[17] Section 1.3 of the Imperial PM_{10} Plan includes a description of the geography, climate and meteorology, and atmospheric stability and dispersion characteristics in Imperial County.

[18] Figure 1–3 of the Imperial PM_{10} Plan illustrates the boundary of the nonattainment area. Generally, the nonattainment area covers that portion of Imperial County that lies west of the crestline of the Chocolate Mountains.

[19] 69 FR 48972 (August 11, 2004). Please see our August 11, 2004 final rule for details concerning the litigation and our determination that the Imperial PM_{10} nonattainment area had failed to attain by the applicable Moderate area attainment date.

least five percent annual reductions in PM_{10} or PM_{10} precursor emissions until attainment is reached.[20]

Meanwhile, in response to the designation of the Imperial Valley Planning Area as a Moderate, then Serious, nonattainment area, the District and CARB developed several air quality plans to address applicable CAA requirements for the area. In developing the plans and control strategies, the District and CARB identified direct PM_{10} sources, such as fugitive dust sources (*e.g.,* farming, construction, and vehicle travel over paved and unpaved roads) and windblown dust as two principal sources of PM_{10} emissions causing or contributing to PM_{10} exceedances in the nonattainment area.[21] The District and CARB found that secondarily-formed PM_{10} (*i.e.,* PM_{10} derived from PM_{10} precursors such as NO_X and SO_2) contributed little to exceedances in the nonattainment area.

To address fugitive dust sources in the nonattainment area and to address the Serious area requirement for implementation of BACM, the District adopted a set of rules in Regulation VIII establishing emission control requirements for such fugitive sources as construction and earthmoving, bulk materials, carry out and track out, open areas, paved and unpaved roads, and agricultural activities. In 2010, the EPA approved the rules, but also identified certain deficiencies with respect to the BACM requirement in some of the rules that prevented full approval.[22] In response, in 2012, the District amended certain Regulation VIII rules, including the rules for open areas, paved and unpaved roads, and agricultural activities.

In the following year, the EPA found that the deficiencies had been corrected and approved the amended rules as revisions to the Imperial County portion of the California SIP.[23] In our 2013 final rule, we indicated our preliminary view that the Regulation VIII rules, as revised in 2012, constitute reasonable control of the sources covered by Regulation VIII for the purpose of evaluating whether an exceedance of the PM_{10} NAAQS is an exceptional event pursuant to the Exceptional Events Rule, including reasonable and appropriate control measures on significant contributing anthropogenic sources.[24]

More recently, the District and CARB reviewed the PM_{10} ambient monitoring data collected within the Imperial Valley Planning Area and preliminarily determined that the Imperial Valley Planning Area has attained the PM_{10} NAAQS based on 2014–2016 data. Their preliminary determination assumes the EPA's concurrence, under the Exceptional Events Rule, on the District's and CARB's determination that nearly all the exceedances during that period were exceptional events caused by emissions due to high winds. Attainment of the NAAQS is one of the criteria for redesignation of a nonattainment area to attainment, and the District and CARB developed the Imperial PM_{10} Plan to address all the redesignation criteria, including the attainment criterion.

Following approval by the District in October 2018 and by CARB in December 2018, CARB submitted the Imperial PM_{10} Plan to the EPA under cover of letter dated February 6, 2019, as a revision to the Imperial County portion of the California SIP. We received the SIP submittal on February 13, 2019. In addition to the Imperial PM_{10} Plan itself, the SIP revision submittal package includes the District Board Minute Order approving the plan and related District staff report, the CARB Board Resolution 18–58 adopting the plan and related CARB staff report, and documentation of public participation. In this action, for the reasons discussed in the following sections of this document, we are proposing to approve the Imperial PM_{10} Plan and to approve CARB's request to redesignate the Imperial Valley Planning Area from nonattainment to attainment for the PM_{10} NAAQS.

II. Procedural Requirements for Adoption and Submittal of State Implementation Plan Revisions

CAA sections 110 (a)(1) and (2) and section 110(l) require a state to provide reasonable notice and opportunity for public hearing prior to adoption and submission of a SIP or SIP revision. To meet these procedural requirements, every SIP submission should include evidence that the state provided adequate public notice and an opportunity for a public hearing consistent with the EPA's implementing regulations in 40 CFR 51.102.

CARB's February 6, 2019 SIP submittal package includes documentation of the public processes used by the District and CARB to adopt the Imperial PM_{10} Plan. As documented in the SIP revision submittal package, on September 20, 2018, the District published a notice in a newspaper of general circulation in Imperial County that a public hearing to consider adoption of the plan would be held on October 23, 2018. As documented in the Minute Order of the Air Pollution Control Board that is included in the SIP revision submittal package, the Imperial County Air Pollution Control Board of Directors adopted the Imperial PM_{10} Plan on October 23, 2018, following the public hearing.

Following transmittal by the District of the adopted Imperial PM_{10} Plan to CARB, on November 9, 2018, CARB published on its website a notice of a public hearing to be held on December 13, 2018, to consider adoption of the plan. As evidenced by CARB Resolution 18–58, CARB adopted the Imperial PM_{10} Plan on December 13, 2018, following a public hearing. Based on documentation included in the February 6, 2019 SIP revision submittal package, we find that both the District and CARB have satisfied the applicable statutory and regulatory requirements for reasonable public notice and hearing prior to the adoption and submission of the Imperial PM_{10} Plan. Therefore, we find that the submission of the Imperial PM_{10} Plan meets the procedural requirements for public notice and hearing in CAA sections 110(a) and 110(l) and in 40 CFR 51.102.

III. Clean Air Act Requirements for Redesignation to Attainment

The CAA establishes the requirements for redesignation of a nonattainment area to attainment. Specifically, section 107(d)(3)(E) allows for redesignation provided that the following criteria are met: (1) The EPA determines that the area has attained the applicable NAAQS; (2) the EPA has fully approved the applicable implementation plan for the area under 110(k); (3) the EPA determines that the improvement in air quality is due to permanent and enforceable reductions; (4) the EPA has fully approved a maintenance plan for the area as meeting the requirements of CAA 175A; and (5) the state containing such area has met all requirements applicable to the area under section 110 and part D of the CAA. Section 110 identifies a comprehensive list of elements that SIPs must include and part D establishes the SIP requirements for nonattainment areas. Part D is divided into six subparts. The generally-

[20] 72 FR 70222 (December 11, 2007).

[21] CARB, ''Status Report on Imperial County Air Quality and Approval of the State Implementation Plan Revision for PM_{10},'' Release Date: April 26, 2010.

[22] 75 FR 39366 (July 8, 2010).

[23] 78 FR 23677 (April 22, 2013).

[24] Id., at 23682. As stated in our 2013 final rule, our preliminary view did not extend to exceedances of NAAQS other than the PM_{10} NAAQS or to events that differ significantly in terms of meteorology, sources, or conditions from the events that were at issue in the EPA's July 2010 final action and associated litigation, nor was our preliminary statement intended to be a determination with respect to any specific PM_{10} exceedances.

applicable nonattainment SIP requirements are found in part D, subpart 1, and the particulate matter-specific SIP requirements are found in part D, subpart 4.

The EPA provided guidance on redesignations in a document entitled ''State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990,'' published in the **Federal Register** on April 16, 1992,[25] and supplemented on April 28, 1992 [26] (referred to herein as the ''General Preamble''). We issued additional guidance on September 4, 1992, in a memorandum from John Calcagni, Director, Air Quality Management Division, EPA Office of Air Quality Planning and Standards, entitled ''Procedures for Processing Requests to Redesignate Areas to Attainment'' (referred to herein as the ''Calcagni memo''). On August 16, 1994, the EPA published guidance for Serious PM_{10} nonattainment areas in a document entitled ''State Implementation Plans for Serious PM_{10} Nonattainment Areas, and Attainment Date Waivers for PM_{10} Nonattainment Areas Generally; Addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990,'' (herein referred to as the ''Addendum'').[27]

Maintenance plan submittals are SIP revisions, and as such, the EPA is obligated under CAA section 110(k) to approve them or disapprove them depending upon whether they meet the applicable CAA requirements for such plans.

For reasons set forth in Section IV of this document, we propose to approve the Imperial PM_{10} Plan and to approve CARB's request for redesignation of the Imperial Valley Planning Area from nonattainment to attainment for the PM_{10} NAAQS based on our conclusion that all the criteria under CAA section 107(d)(3)(E) have been satisfied.

IV. Evaluation of the State's Redesignation Request for the Imperial PM_{10} Nonattainment Area

A. Determination That the Area Has Attained the PM_{10} National Ambient Air Quality Standards

Section 107(d)(3)(E)(i) of the CAA states that, for an area to be redesignated to attainment, the EPA must determine that the area has attained the relevant NAAQS. In this case, the relevant standard is the PM_{10} NAAQS. Generally, the EPA determines whether an area's air quality is meeting the PM_{10} NAAQS based upon complete, quality-assured, and certified data gathered at established state and local air monitoring stations (SLAMS) in the nonattainment area and entered into the EPA's AQS database.[28]

Data from air monitors operated by state, local, or tribal agencies in compliance with EPA monitoring requirements must be submitted to AQS. These monitoring agencies certify annually that these data are accurate to the best of their knowledge. Accordingly, the EPA relies primarily on data in AQS when determining the attainment status of an area.[29] All valid data are reviewed to determine the area's air quality status in accordance with 40 CFR part 50, Appendix K.

The PM_{10} standard is attained when the expected number of exceedances per year, averaged over a three-year period, is less than or equal to one. The expected number of exceedances averaged over a three-year period at any given monitor is known as the PM_{10} design value. The PM_{10} design value for the area is the highest design value within the nonattainment area. Three consecutive years of air quality data are required to show attainment of the PM_{10} standard.[30] The demonstration of attainment in the Imperial PM_{10} Plan is based on data from 2014–2016. In order to ensure the area has continued to attain, the EPA is also considering data collected subsequent to the time frame of the Plan.

ICAPCD is a monitoring organization within the CARB Primary Quality Assurance Organization (PQAO). ICAPCD and CARB are jointly responsible for monitoring ambient air quality within the Imperial PM_{10} nonattainment area. CARB submits annual monitoring network plans to the EPA describing the monitoring network operated by ICAPCD and CARB within Imperial County and discussing the status of the air monitoring network, as required under 40 CFR 58.10.

The EPA reviews these annual plans for compliance with the applicable reporting requirements in 40 CFR part 58. With respect to PM_{10}, the EPA has found that CARB's network plans meet the applicable reporting requirements for the area under 40 CFR part 58.[31] The EPA also concluded from its 2018 Technical System Audit that CARB and ICAPCD's monitoring network currently meets or exceeds the requirements for the minimum number of SLAMS for PM_{10} in the El Centro, CA Metropolitan Statistical Area, which includes the Imperial PM_{10} nonattainment area.[32] ICAPCD and CARB annually certify that the data they submit to AQS are complete and quality-assured.[33]

During the 2014–2016 time period, CARB operated one and ICAPCD operated four PM_{10} SLAMS monitoring sites within the Imperial PM_{10} nonattainment area. These sites are oriented along a roughly north-south axis in the central, populated part of the nonattainment area.[34] Historically, all five sites monitored PM_{10} concentrations using filter-based designated Federal Reference Method (FRM) monitors. Two sites have also monitored concentrations using continuous Federal Equivalent Method (FEM) monitors since 2009.

[25] 57 FR 13498.

[26] 57 FR 18070.

[27] 59 FR 41998.

[28] For PM_{10}, a complete year of air quality data includes all four calendar quarters with each quarter containing a minimum of 75 percent of the scheduled PM_{10} sampling days. 40 CFR part 50, Appendix K, section 2.3(a).

[29] 40 CFR 50.6; 40 CFR part 50, appendices J and K; 40 CFR part 53; and 40 CFR part 58, appendices A, C, D, and E.

[30] 40 CFR part 50 and Appendix K.

[31] For example, see letter dated November 26, 2018, from Gwen Yoshimura, Manager, Air Quality Analysis Office, EPA Region IX, to Ravi Ramalingam, Chief, Consumer Products and Air Quality Assessment Branch, CARB, approving CARB's 2018 Annual Network Plan.

[32] See EPA Region IX, Technical Systems Audit Final Report of the Ambient Air Monitoring Program: California Air Resources Board, September–December 2018. Enclosed with letter dated February 3, 2020, from Elizabeth J. Adams, Director, Air and Radiation Division, EPA Region IX, to Richard Corey, Executive Officer, CARB.

[33] See, *e.g.,* letter dated August 12, 2019, from Michael Benjamin, Chief, Air Quality Planning and Science Division, CARB, to Mike Stoker, Regional Administrator, EPA Region IX, certifying 2018 ambient air quality data and quality assurance data.

[34] Section 2.2 of the Imperial PM_{10} Plan includes a description of the monitoring sites and information regarding the history and timing of the addition of BAM monitors to the network. Figure 2–1 of the Imperial PM_{10} Plan shows the locations of the SLAMS monitoring sites within the Imperial Valley Planning Area.

Between 2015 and 2016, data from FEM monitors became available at the remaining stations, while the filter-based FRM monitors at all five stations were gradually retired.[35] The PM_{10} monitoring sites have been established to monitor for population exposure in the middle or neighborhood scale.[36]

Consistent with the requirements contained in 40 CFR part 50, the EPA has reviewed the quality-assured and certified PM_{10} ambient air monitoring data as recorded in AQS for the applicable monitoring period collected at the monitoring sites in the Imperial PM_{10} nonattainment area and determined that the data are of sufficient completeness for the purposes of making comparisons with the PM_{10} standards.

The monitoring data for the PM_{10} standard for the Imperial PM_{10} nonattainment area include exceedances of the standard recorded during the 2014–2016 time period and in 2017 and 2018. However, the EPA is excluding most of the exceedances of the standard in these years from the attainment determination because they were the result of exceptional events as defined in section 319(b) of the Act and its implementing regulations, referred to herein as the Exceptional Events Rule.[37] The Exceptional Events Rule defines an exceptional event as an event that the EPA determines affects air quality in such a way that there is a clear causal relationship between the event and a monitored exceedance (or violation) that is not reasonably controllable or preventable. Such events can be natural (for example, high winds or wildfires) or can be caused by human activity that is unlikely to recur.[38]

On various dates, CARB submitted demonstrations for high wind PM_{10} exceptional events covering the exceedances recorded at various monitoring sites in the nonattainment area during the 2014—2018 time period.[39] The demonstrations include a narrative conceptual model of each event that describes the event-specific characteristics, evidence showing the exceedances were not reasonably controllable or preventable, and evidence of the clear causal relationship between the high wind events and the exceedances flagged as exceptional events.

The EPA reviewed the documentation that CARB and the District developed to demonstrate that the exceedances on these days met the criteria for an exceptional event under the Exceptional Events Rule. As conveyed in the EPA's concurrence letters included in the docket for this action, we have concurred with 91 exceedance days that the State requested for determinations that, based on the weight of evidence, exceedances were caused by high wind exceptional events.[40] Accordingly, the EPA has determined that the monitored exceedances associated with these exceptional events should be excluded from use in determinations of exceedances and violations, including the evaluation of whether the Imperial PM_{10} nonattainment area has attained the standard for the purposes of redesignation under CAA section 107(d)(3)(E)(i). Table 1 presents a summary of the PM_{10} design values for 2016, 2017, and 2018 at the various monitors within the Imperial Valley Planning Area, excluding the exceedances for which the EPA has issued concurrences, based on the data for 2014–2016, 2015–2017 and 2016–2018 data, respectively.[41] The PM_{10} design value for the area is the PM_{10} design value at the monitor with the highest design value in a given year.

TABLE 1—2016, 2017, AND 2018 DESIGN VALUES FOR THE 1987 PM_{10} NAAQS AT IMPERIAL COUNTY, CA AIR QUALITY MONITORING STATIONS

Station Name	AQS ID	PM_{10} design value					
		2016	Valid	2017	Valid	2018	Valid
Calexico	06–025–0005–3	0.0 [a]	Y	0.7 [a]	Y	1.0	Y
Brawley	06–025–0007–1	Invalid [b]	N	N/A [c]	Y	N/A [c]	Y
Brawley	06–025–0007–3	0.0	Y	0.3	Y	0.3	Y
El Centro	06–025–1003–4	0.0 [a]	Y	0.0 [a]	Y	0.3	Y
Westmorland	06–025–4003–3	0.0 [a]	Y	0.3 [a]	Y	0.3	Y
Niland	06–025–4004–1	0.0	Y	N/A [c]	Y	N/A [c]	Y
Niland	06–025–4004–3	0.0	Y	0.0	Y	0.0	Y

[a] The 2016 and 2017 design values for the Westmorland (06–025–4003–3), El Centro (06–025–1003–4), and Calexico (06–025–0005–3) are derived from a combination of data resulting from the monitoring agency transitioning from one monitor to a newer monitor at the same monitoring station.
[b] The 2016 design value for Brawley (06–025–0007–1) is invalid due to insufficient data completeness in 2014.
[c] The Niland (06–025–4004–1) and Brawley (06–025–0007–1) monitors were approved for closure by the EPA.

Based on a review of air quality data during the three-year period covered by the Plan (2014–2016) (summarized above in Table 1), excluding the exceedances flagged by CARB and ICAPCD and concurred with by the EPA as exceptional events, we find that the 2016 design value for the Imperial PM_{10} nonattainment area is 0.0 and that the area attained the standard by that year. We have also evaluated the certified data for 2017 and 2018 and find that that the 2017 design value for the Imperial PM_{10} nonattainment area is 0.7 and the 2018 design value is 1.0, which

[35] Memorandum dated March 5, 2020, from Jennifer Williams, EPA Region IX and Brett Gantt, EPA Office of Air Quality Planning and Standards, to Docket Number EPA–R09–OAR–2019–0654, Subject: Imperial County, CA PM_{10} Nonattainment Area Design Value Calculations.

[36] In this context, ''middle scale'' refers to conditions characteristic of areas from 100 meters to half a kilometer, and ''neighborhood scale'' refers to conditions throughout some reasonably homogeneous urban sub-region with dimensions of a few kilometers. 40 CFR part 58, Appendix D, section 4.6.

[37] As noted in Section I.C. of this notice, the EPA promulgated the Exceptional Events Rule (''Treatment of Data Influenced by Exceptional Events'') on March 22, 2007 (72 FR 13560) and later revised it on October 3, 2016 (81 FR 68216).

[38] 40 CFR 50.1.

[39] While submitted by CARB, the demonstrations and addendums were developed through a joint effort by CARB and ICAPCD. The exceptional events demonstrations are included in the docket for this action.

[40] The EPA's concurrence letters and technical support documents are located in the docket for this action.

[41] More information can be found in the memorandum dated March 5, 2020, from Jennifer Williams, EPA Region IX and Brett Gantt, EPA Office of Air Quality Planning and Standards, to Docket Number EPA–R09–OAR–2019–0654, Subject: Imperial County, CA PM_{10} Nonattainment Area Design Value Calculations.

demonstrates that the area continues to attain the standard. Therefore, based on complete, quality-assured, and certified data for 2014–2018, we find that the Imperial County PM_{10} nonattainment area attained the PM_{10} NAAQS in 2016 and has continued to attain since that time.

We have also reviewed preliminary data for 2019 that have been entered in AQS and have determined that they are consistent with attainment.[42] We will review any additional data that becomes available prior to final action to ensure that they are consistent with continued attainment.[43]

B. The Area Must Have a Fully Approved State Implementation Plan Meeting the Requirements Applicable for Purposes of Redesignation Under Section 110 and Part D

Sections 107(d)(3)(E)(ii) and (v) require the EPA to determine that the area has a fully approved applicable SIP under section 110(k) that meets all applicable requirements under section 110 and part D for the purposes of redesignation. The EPA may rely on prior SIP approvals in approving a redesignation request[44] as well as any additional measure it may approve in conjunction with a redesignation action.[45] In this instance, we are proposing to approve two part D elements as part of this action—the emissions inventory under CAA section 172(c)(3) and the BACM demonstration under CAA section 189(b)(1)(B). With full approval of those two elements, the Imperial County portion of the California SIP will be fully approved under section 110(k) for the purposes of redesignation of the area to attainment.

1. Basic State Implementation Plan Requirements Under Section 110

The general SIP elements and requirements set forth in section 110(a)(2) include, but are not limited to, the following: Submittal of a SIP that has been adopted by the state after reasonable public notice and hearing; provisions for establishment and operation of appropriate procedures needed to monitor ambient air quality; implementation of a source permitting program; provision for the implementation of part C requirements for prevention of significant deterioration; provisions for the implementation of part D requirements for nonattainment new source review permit programs; provisions for air pollution modeling; and provisions for public and local agency participation in planning and emission control rule development.

We note that SIPs must be fully approved only with respect to applicable requirements for purposes of redesignation in accordance with section 107(d)(3)(E)(ii). The section 110(a)(2) (and part D) requirements that are linked to a particular nonattainment area's designation and classification are the relevant measures to evaluate in reviewing a redesignation request. Requirements that apply regardless of the designation of any particular area of a state are not applicable requirements for the purposes of redesignation, and the State will remain subject to these requirements after the Imperial PM_{10} nonattainment area is redesignated to attainment.

For example, CAA section 110(a)(2)(D) requires that SIPs contain certain measures to prevent sources in a state from significantly contributing to air quality problems in another state: These SIPs are often referred to as ''transport SIPs.'' Because the section 110(a)(2)(D) requirements for transport SIPs are not linked to a particular nonattainment area's designation and classification, but rather apply regardless of the area's attainment status, these are not applicable requirements for the purposes of redesignation under section 107(d)(3)(E).

Similarly, the EPA considers other section 110(a)(2) (and part D) requirements that are not linked to nonattainment plan submissions or to an area's attainment status as not applicable requirements for purposes of redesignation. The EPA evaluates the section 110 (and part D) requirements that relate to a particular nonattainment area's designation and classification as the relevant measures to evaluate in reviewing a redesignation request. This is consistent with the EPA's existing policy on applicability of the conformity SIP requirement for redesignations.[46]

On numerous occasions, CARB and ICAPCD have submitted and we have approved provisions addressing the basic CAA section 110 provisions. The Imperial County portion of the California SIP contains enforceable emissions limitations; requires monitoring, compiling and analyzing of ambient air quality data; requires preconstruction review of new or modified stationary sources; provides for adequate funding, staff, and associated resources necessary to implement its requirements; and provides the necessary assurances that the State maintains responsibility for ensuring that the CAA requirements are satisfied in the event that Imperial County is unable to meet its CAA obligations.[47] There are no outstanding or disapproved applicable SIP submittals with respect to the Imperial County portion of the SIP that prevent redesignation of the Imperial PM_{10} nonattainment area for the PM_{10} NAAQS. Therefore, we find that CARB and ICAPCD have met all general SIP requirements for Imperial that are applicable for purposes of redesignation under section 110 of the CAA.

2. State Implementation Plan Requirements Under Part D

Subparts 1 and 4 of part D, title 1 of the CAA contain air quality planning requirements for PM_{10} nonattainment areas. Subpart 1 contains general requirements for all nonattainment areas of any pollutant, including PM_{10}, governed by a NAAQS. The subpart 1 requirements include, in relevant part, provisions for implementation of RACM, a demonstration of reasonable further progress (RFP), emissions inventories, a program for preconstruction review and permitting of new or modified major stationary sources, contingency measures, transportation conformity, and for areas that fail to attain the standard by the applicable attainment date, a plan

[42] AQS Design Value Report (AMP 480), dated March 5, 2020.

[43] We recognize that, on October 22, 2019, the Imperial County Board of Supervisors adopted a proclamation of local emergency for air pollution at the Salton Sea. See letter dated November 4, 2019, from Tony Rouhotas, Jr., County Executive Officer, to Gavin Newsom, Governor of the State of California. The proclamation was based primarily on ambient PM_{10} concentration data collected at two nonregulatory monitors located immediately west of the Salton Sea at Salton City and Naval Test Base that showed exceedances of the PM_{10} NAAQS. Nonregulatory monitors are those that have not been determined to comply with the minimum requirements in 40 CFR part 58 (''Ambient Air Quality Surveillance''), such as the siting criteria. While data from nonregulatory monitors are not appropriate for use in determining whether an area attained or failed to attain the NAAQS, the data are appropriate for other purposes. In this case, under the Salton Sea Air Quality Mitigation Program, the nonregulatory data are used to produce the annual emissions inventories, assemble dust control plans, and evaluate the performances of the dust control plans. Imperial PM_{10} Plan, 5–5. The State of California's initial response to Imperial County's November 4, 2019 letter is contained in a letter dated January 6, 2020, from Wade Crowfoot, Secretary for Natural Resources and Jared Blumenfeld, Secretary for Environmental Protection, which is included in the docket for this rulemaking.

[44] Calcagni Memo, 3; *Wall* v. *EPA,* F.3d 416 (6th Cir. 2001); and *Southwestern Pennsylvania Growth Alliance* v. *Browner,* (144 F.3d 984, 989–990 (6th Cir. 1998).

[45] 68 FR 25418, 25426 (May 12, 2003) and citations within.

[46] 75 FR 36023, 36026 (June 24, 2010) and citations within.

[47] The Imperial County portion of the federally approved California SIP can be viewed at *https://www.epa.gov/sips-ca/epa-approved-imperial-county-apcd-regulations-california-sip.*

meeting the requirements of section 179(d).

Subpart 4 contains specific planning and scheduling requirements for PM_{10} nonattainment areas. Section 189(a), (c), and (e) requirements apply specifically to Moderate PM_{10} nonattainment areas and include the following: An approved permit program for construction of new and modified major stationary sources; provisions for RACM; an attainment demonstration; quantitative milestones demonstrating RFP toward attainment by the applicable attainment date; and provisions to ensure that the control requirements applicable to major stationary sources of PM_{10} also apply to major stationary sources of PM_{10} precursors, except where the Administrator has determined that such sources do not contribute significantly to PM_{10} levels that exceed the NAAQS in the area.

Under CAA section 189(b), Serious PM_{10} nonattainment areas such as the Imperial PM_{10} nonattainment area, must meet the subpart 1 and Moderate area requirements discussed above and, in addition, must develop and submit provisions to assure the implementation of BACM for the control of PM_{10}.[48] Under CAA section 189(d), Serious PM_{10} nonattainment areas that fail to attain the standard by the applicable attainment date, such as Imperial County, must develop and submit plan revisions that provide for attainment of the PM_{10} standard and, from the date of such submission until attainment, for an annual reduction in PM_{10} of not less than 5 percent of the amount of such emissions.

In the context of evaluating an area's eligibility for redesignation, the EPA has interpreted CAA requirements associated with attainment of the NAAQS (such as attainment and RFP demonstrations) as not being applicable for purposes of redesignation.[49] The Calcagni memo similarly provides that requirements for RFP and other measures needed for attainment will not apply for redesignations because they have meaning and applicability only where areas do not meet the NAAQS.[50] With respect to contingency measures, the EPA explained that the section 172(c)(9) contingency measure requirements are directed at ensuring RFP and attainment by the applicable date and that, consequently, these requirements no longer apply when an area has attained the standard and is eligible for redesignation. Furthermore, CAA section 175A(d) provides for specific requirements for maintenance plan contingency measures that effectively supersede the requirements of section 172(c)(9) for these areas.[51]

Thus, the requirements associated with attainment do not apply for purposes of evaluating whether an area that has attained the standard qualifies for redesignation. The EPA has enunciated this position since the General Preamble was published more than 25 years ago, and it represents the Agency's interpretation of what constitutes applicable requirements under section 107(d)(3)(E). The courts have recognized the scope of the EPA's authority to interpret ''applicable requirements'' in the redesignation context.[52]

The remaining applicable Part D requirements for Serious PM_{10} areas include the following: (1) An emissions inventory under section 172(c)(3); (2) a permit program for the construction and operation of new and modified major stationary sources of PM_{10} under sections 172(c)(5), 189(a)(1)(A) and 189(b)(3); (3) provisions to assure the implementation of BACM under section 189(b)(1)(B); (4) control requirements for major stationary sources of PM_{10} precursors under section 189(e), except where the Administrator determines that such sources do not contribute significantly to PM_{10} levels that exceed the standard in the area; (5) requirements under section 172(c)(7) that meet the applicable provisions of section 110(a)(2); and (6) provisions to ensure that federally supported or funded transportation projects conform to the air quality planning goals in the applicable SIP under section 176(c). We discuss each of these requirements below.

a. PM_{10} Precursors

While CAA section 189(e) expressly requires control of precursors from major stationary sources, it is clear that subpart 4 and other CAA provisions collectively require the control of direct $PM_{2.5}$ and $PM_{2.5}$ precursors from all types of sources (*i.e.,* stationary sources, area sources and mobile sources) as may be needed for the purposes of demonstrating attainment as expeditiously as practicable in a given nonattainment area. See CAA requirements for states to demonstrate attainment ''as expeditiously as practicable.'' CAA section 188(c)(1) and section 172(a)(1).

For the purposes of the redesignation request and development of the maintenance plan, CARB undertook an analysis of mass and speciation data to determine the extent to which PM_{10} precursors contribute to ambient concentrations of PM_{10} in the Imperial Valley Planning Area.[53] CARB identified five days within the period of 2007 to 2016 where concentrations of PM_{10} were greater than 95% of the NAAQS and for which PM_{10} mass and PM_{10} and $PM_{2.5}$ speciation data were available.[54] Values for PM_{10} mass on these dates ranged from 144 $\mu g/m^3$ to 305 $\mu g/m^3$.[55] Using this information, CARB calculated that for these five days, on average, SO_X [56] contributes 4.5 $\mu g/m^3$ or 2 percent (%) of the PM_{10} mass, NO_X contributes 3 $\mu g/m^3$ or 1.3% of the PM_{10} mass, ammonia contributes 4.7 $\mu g/m^3$ or 2.1% of the PM_{10} mass, and VOC contributes 4.1 $\mu g/m^3$ or 1.8% of the PM_{10} mass.

In its evaluation of whether precursors are significant contributors to PM_{10} nonattainment, CARB relied upon a significance threshold of 3.7%, which CARB derived by adapting for PM_{10} the recommended significance threshold of 1.3 $\mu g/m^3$ for the 24-hour $PM_{2.5}$ standard of 35 $\mu g/m^3$.[57] CARB concluded that, because each of the precursors contribute less than 2.1% of the PM_{10} standard,[58] they do not contribute significantly to elevated PM_{10} concentrations in the Imperial Valley Planning Area.

CARB also plotted $PM_{2.5}$ and PM_{10} from the Calexico monitoring site collected from 2007 through 2016 to illustrate the relationship between PM_{10}

[48] In Moderate PM_{10} nonattainment areas, major sources include sources that emit or have the potential to emit at least 100 tons per year of PM_{10} or its precursors. Sources that emit less than 100 tons per year are minor sources. In Serious PM_{10} nonattainment areas, the threshold distinguishing major stationary sources from minor stationary sources is 70 tons per year.

[49] General Preamble, 13564.

[50] Calcagni memo, 6.

[51] Our evaluation of the contingency plan element of the Imperial PM_{10} Plan in in Section IV.D.4 of this document.

[52] The Seventh Circuit in *Sierra Club* v. *EPA,* 375 F.3d 537 (7th Cir. 2004) (upholding EPA redesignation of the St. Louis metropolitan area to attainment) is one such example.

[53] Imperial PM_{10} Plan, Appendix A, ''PM_{10} Precursor Analysis for Imperial County.''

[54] Secondarily-formed particulate matter, *i.e.,* the particulate matter derived from gases such as NO_X and SO_2, is in the fine fraction of particulate matter ($PM_{2.5}$).

[55] Imperial PM_{10} Plan, Appendix A, ''PM_{10} Precursor Analysis for Imperial County,'' Table 1.

[56] The Imperial PM_{10} Plan generally uses ''sulfur oxides'' or ''SO_X'' in reference to SO_2 as a precursor to the formation of PM_{10}. We use SO_X and SO_2 interchangeably.

[57] We assume that the 1.3 $\mu g/m^3$ threshold cited by CARB refers to the recommended contribution threshold in the EPA's draft ''$PM_{2.5}$ Precursor Demonstration Guidance,'' released for public review and comment on November 17, 2016. The final guidance, issued on May 30, 2019, establishes a recommended contribution threshold for the 24-hour $PM_{2.5}$ standard of 1.5 $\mu g/m^3$, which represents about 4.3% of the standard.

[58] The estimated contribution of ammonia (2.1%) is rounded up from 2.05%.

concentrations and $PM_{2.5}$ concentrations in the area. The data generally show that elevated $PM_{2.5}$ concentrations correspond to PM_{10} concentrations below the PM_{10} NAAQS and that $PM_{2.5}$ contributes a small percentage of the PM_{10} mass when PM_{10} levels exceed the PM_{10} NAAQS. This suggests that high PM_{10} concentrations are driven by fugitive dust and that secondarily-formed particulate matter does not increase as a percentage of mass as PM_{10} concentration exceed the NAAQS. The data also show that $PM_{2.5}$ represents about 11% of the total PM_{10} mass when PM_{10} concentrations approach the level of the PM_{10} NAAQS.

We have reviewed the precursor analysis prepared by CARB and agree that precursors do not contribute significantly to elevated PM_{10} concentrations in the Imperial Valley Planning Area. First, we generally recommend using 5 μg/m³ as the threshold for identifying potentially significant contributions to elevated PM_{10} concentrations.[59] The contribution of precursors to PM_{10} concentrations is not significant using either CARB's 3.7% threshold or the 5 μg/m³ threshold. As CARB notes, the highest average precursor contribution based on data for the five specific analysis days presented in Appendix A of the Imperial PM_{10} Plan is less than 2.1%, and the highest average estimated precursor contribution is approximately 4.7 μg/m³ (*i.e.,* for NH_3).

Second, as described in section IV.A of this notice, exceedances of the PM_{10} standard in Imperial County are caused by windblown dust that is generated during high wind events. When such days are removed from consideration in accordance with the EPA's Exceptional Events Rule, the area is attaining the PM_{10} standard. In this context, we believe it is appropriate to evaluate the contribution of precursors on days that are close to the level of the standard rather than days on which elevated levels of PM_{10} are likely associated with high wind exceptional events. CARB's analysis includes two such days. On October 21, 2007, the total PM_{10} mass was 144 μg/m³ and on July 18, 2009, the total PM_{10} mass was 147.9 μg/m³. The estimated contribution of each precursor on each of these two dates ranges from 1.4 μg/m³ to 4.1 μg/m³. All values are below the 5 μg/m³ threshold established in the Addendum.

Thus, for the reasons stated above, we propose to find that PM_{10} precursors do not significantly contribute to elevated PM_{10} concentrations in the Imperial Valley Planning Area. With respect to future conditions, we note that the emissions inventories prepared for the Imperial PM_{10} Plan show a downward trend in the County for the PM_{10} precursor emissions through the initial maintenance period (*i.e.,* through 2030),[60] and thus, we also find that PM_{10} precursors will not significantly contribute to elevated PM_{10} concentrations within the Imperial Valley Planning Area through the initial maintenance period.

b. Emissions Inventory

Section 172(c)(3) of the CAA requires states to submit a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant(s) within the nonattainment area. The EPA interprets the Act such that the emissions inventory requirement of section 172(c)(3) is satisfied by the inventory requirement of the maintenance plan.[61] In section IV.D.1 of this document, we are proposing to approve the 2016 attainment inventory submitted as part of the Imperial PM_{10} Plan as satisfying the emissions inventory requirement under section 172(c)(3) for the Imperial Valley Planning Area for the PM_{10} NAAQS.

c. Permits for New and Modified Major Stationary Sources

CAA sections 172(c)(5) and 189(a)(1)(A) require that states submit SIP revisions that establish certain requirements for new or modified major stationary sources in nonattainment areas, including provisions to ensure that new major sources or major modifications of existing sources of nonattainment pollutants incorporate the highest level of control, referred to as the lowest achievable emission rate, and that increases in emissions from such stationary sources are offset so as to provide for reasonable further progress towards attainment in the nonattainment area. The major source threshold for Serious PM_{10} nonattainment areas is 70 tons per year of PM_{10}.[62]

The process for reviewing permit applications and issuing permits for new or modified major stationary sources of air pollution is referred to as new source review (NSR). With respect to nonattainment pollutants in nonattainment areas, this process is referred to as nonattainment NSR (NNSR). Areas that are designated as attainment or unclassifiable for one or more NAAQS are required to submit SIP revisions that ensure that new major stationary sources or major modifications of existing stationary sources meet the federal requirements for prevention of significant deterioration (PSD), including application of best available control technology for each applicable pollutant emitted in significant amounts, among other requirements.[63]

The District is responsible for the regulation of stationary sources, and its rules govern air permits issued for such units. In 2017, the EPA approved ICAPCD's NNSR rule, Rule 207 (''New and Modified Stationary Source Review'') as satisfying the statutory and regulatory requirements for a NNSR permit program for Serious PM_{10} nonattainment areas as set forth in the applicable provisions of part D of title I of the Act (sections 172 and 173), and in 40 CFR 51.165 and 40 CFR 51.307.[64]

If we finalize the redesignation action proposed herein, the Imperial PM_{10} nonattainment area will become an attainment area, and new or modified major sources in the area will be subject to the PSD permitting requirements rather than the NNSR requirements.

The District has a SIP-approved PSD program (Rule 904, ''Prevention of Significant Deterioration (PSD) Permit Program'') that will apply to PM_{10} emissions from new major sources or major modifications upon redesignation of the area to attainment.[65] Thus, new PM_{10} major sources and major modifications with significant PM_{10} emissions at major sources will be required to obtain a PSD permit or address PM_{10} emissions in their existing PSD permit.

d. Best Available Control Measures

Clean Air Act section 189(b)(1)(B) requires that Serious areas implement BACM for the control of PM_{10} for all source categories that contribute significantly to nonattainment of the NAAQS.[66] The EPA has long interpreted this requirement to apply independent of attainment.[67] Consequently, the requirement for BACM level controls continues to apply,

[59] Addendum, 42011.

[60] Imperial PM_{10} Plan, Appendix H, tables H–2—H–5.

[61] General Preamble, 13564.

[62] CAA section 189(b)(3).

[63] PSD requirements control the growth of new source emissions in areas designated as attainment or unclassifiable for a NAAQS.

[64] 82 FR 41895 (September 5, 2017).

[65] The EPA approved Rule 904 at 77 FR 73316 (December 10, 2012).

[66] Addendum, 42011.

[67] In the Addendum, the EPA provided its rationale for interpreting the CAA to require BACM be carried out independently from the analysis to determine the emissions reductions necessary to attain the NAAQS by the statutory attainment date. 59 FR 41998, 42011–42012.

even when the area has attained the standard.

The Imperial PM_{10} plan addresses the BACM requirement by first, providing a detailed emissions inventory and determining which source categories of directly emitted PM_{10} contribute significantly; second, by identifying the rules that apply to significantly contributing source categories and documenting that those rules require BACM level controls; and third, by documenting compliance with CAA best available control technology requirements by major sources of PM_{10} that are located within the nonattainment area.

Identification of Significant Contributors

The Imperial PM_{10} Plan's BACM demonstration includes an analysis that establishes which sources of directly emitted PM_{10} contribute significantly to ambient levels of PM_{10}. It does this by calculating the percent contribution of sources in Imperial County's average annual daily emissions inventory and then performing a sensitivity analysis to determine if reducing the contribution of windblown dust to the inventory would alter the conclusions of the analysis.[68] Because the 5 μg/m^3 significant contribution threshold equates to 3.25% of the PM_{10} NAAQS, the District concludes that any source category that contributes more than 3.25% of the inventory would be significant and therefore subject to BACM.

Based on the Imperial County 2016 average annual daily PM_{10} emissions inventory, the only source categories that contribute more than 3.25% of the total direct PM_{10} emissions are entrained unpaved road dust from city and county roads (6.47%) and canal roads (10.82%), and windblown dust from open areas (70.37%) and non-pasture agricultural lands (3.79%).[69] If windblown dust is reduced by 25% (*i.e.,* to 75% of its average annual daily contribution), there are no changes to significantly contributing categories. When windblown dust is reduced by 50%, the only change is that the PM_{10} contribution from non-pasture agricultural lands drops below the significance threshold. If windblown dust is reduced by 75% (*i.e.,* to 25% of its average annual daily contribution), the contribution from tilling operations increases to 3.9%. If windblown dust is removed entirely, the source categories that exceed the 3.25% threshold are mineral processes (5.12%), tilling (6.8%), cattle operations (3.66%), and entrained unpaved road dust from city and county roads (25.65%) and canal roads (42.90%).

The District plotted PM_{10} concentrations against wind speed for 2014 to 2016 monitoring data.[70] Each value that exceeds the PM_{10} standard has been flagged by the District as an exceptional event. To evaluate the contribution of sources of non-windblown dust, the District analyzed January 15, 2016, which was a low-wind day that approached but did not exceed the standard. Although the average hourly wind speed was 4.28 miles per hour, an examination of the hourly wind speeds for that date show there were periods of elevated wind speed that indicate the date ''could not reasonably be categorized as a 'no-wind' day.'' [71] Based on this analysis, ICAPCD concludes that ''it is unlikely that a day with low winds and 0% windblown dust contributions would result in an exceedance of the PM_{10} NAAQS at a monitor in Imperial County.'' Consequently, the District determined that mineral processes, cattle, and construction, which only exceed the 3.25% threshold on days where windblown dust is completely eliminated from the inventory, do not contribute significantly to exceedances of the NAAQS.

We find the District's analysis to be sound and, based on a conservative determination of the percent contribution of source categories when windblown dust is reduced by 75%, agree that the source categories that contribute significantly are tilling, entrained unpaved road dust, and windblown dust from open areas. We note that the BACM demonstration in the Imperial PM_{10} Plan does not address PM_{10} precursor emissions, but we find that the decision to exclude PM_{10} precursors in this instance is acceptable in light of our proposed determination in section IV.B.2.a of this document that PM_{10} precursors do not contribute significantly to elevated PM_{10} concentrations in the Imperial Valley Planning Area.

BACM Analysis for Significantly Contributing Source Categories

The Imperial PM_{10} Plan provides documentation showing that the source categories that contribute significantly to exceedances of the PM_{10} NAAQS in Imperial County are subject to the provisions of Regulation VIII, which form the core of the ICAPCD's control strategy for PM_{10}. Specifically, the following rules apply to the significantly contributing source categories: Rule 800 (''General Requirements for Control of Fine Particulate Matter (PM_{10})''), Rule 804 (''Open Areas''), Rule 805 (''Paved and Unpaved Roads''), and Rule 806 (''Conservation Management Practices'').[72] ICAPCD's Regulation VIII rules were originally adopted by the District in 2005. The EPA partially approved and partially disapproved these rules after identifying certain deficiencies in rules 800, 804, 805, and 806.[73] The District subsequently revised and strengthened the rules by addressing these deficiencies and on April 23, 2013, the EPA approved the revised rules and found that they established BACM-level controls for the categories they regulate.[74] Based on our prior approval of these rules and our conclusion that they cover all significant PM_{10} source categories in the Imperial PM_{10} nonattainment area, we propose to approve ICAPCD's demonstration as satisfying the requirement to ensure implementation of BACM under CAA section 189(b)(1)(B).

e. Control Requirements for Major Sources of PM_{10} Precursors

CAA section 189(e) provides that control requirements for major stationary sources of direct PM_{10} also apply to major stationary sources of PM precursors, except where the EPA determines that major stationary sources of such precursors do not contribute significantly to PM_{10} levels that exceed the standard in the area. In general, a major stationary source in a PM_{10} Serious area is a stationary source that

[68] The District notes that the language of the Addendum (''a source category will be presumed to contribute significantly to a violation of the 24-hour PM_{10} NAAQS if its PM_{10} Impact at the location of the expected violation would exceed 5 μg/m^3'') appears to require information that could only be obtained through comprehensive air dispersion modeling. Instead, the District uses ''a more practical alternative approach that involves evaluating the fractional contribution of sources in Imperial County's average annual daily inventory and then performing a sensitivity analysis to determine if variations in the inventory would alter the conclusions of the analysis.'' Imperial PM_{10} Plan, Appendix E, 3.

[69] Imperial PM_{10} Plan, Appendix E, Table 3–1 summarizes the Plan's significant source sensitivity analysis.

[70] Id., figures 3–1, 3–2, and 3–3.

[71] Id. at 8 and Figure 3–4.

[72] The provisions of Regulation VIII, including rules 800, 804, 805, and 806, are summarized in Chapter 3 of the Imperial PM_{10} Plan. Rules 800 and 804 apply to windblown dust from open areas, Rule 805 applies to entrained and windblown dust from unpaved roads, and Rule 806 applies to windblown dust from non-pasture agricultural lands and tilling dust from agricultural operations.

[73] 75 FR 39366 (July 8, 2010). On September 11, 2018, the District again revised Rule 804. The EPA approved the revision on August 29, 2019 (84 FR 45418).

[74] 78 FR 23677.

emits, or has the potential to emit, 70 tons per year of PM_{10}. As described in more detail in section IV.B.2.a of this action, we are proposing to approve the demonstration the Imperial PM_{10} plan that precursors do not contribute significantly to PM_{10} levels that exceed the standard.

f. Compliance With Section 110(a)(2)

Section 172(c)(7) requires the SIP to meet the applicable provisions of section 110(a)(2). As described above in Section IV.B., we conclude the California SIP meets the requirements of section 110(a)(2) applicable for purposes of this redesignation.

g. General and Transportation Conformity Requirements

Under section 176(c) of the CAA, states are required to revise their SIPs to establish criteria and procedures to ensure that federally supported or funded projects in nonattainment areas and formerly nonattainment areas subject to a maintenance plan (referred to as ''maintenance areas'') conform to the air quality planning goals in the applicable SIP. Section 176(c) further provides that state conformity provisions must be consistent with federal conformity regulations that the CAA requires the EPA to promulgate. The EPA's conformity regulations are codified at 40 CFR part 93, subparts A (referred to herein as ''transportation conformity'') and B (referred to herein as ''general conformity''). Transportation conformity applies to transportation plans, programs, and projects developed, funded, and approved under title 23 U.S.C. or the Federal Transit Act, and general conformity applies to all other federally-supported or funded projects. SIP revisions intended to address the conformity requirements are referred to herein as ''conformity SIPs.'' In 2005, Congress amended section 176(c) of the CAA. Under the amended conformity statutory provisions, states are no longer required to submit conformity SIPs for general conformity, and the conformity SIP requirements for transportation conformity have been reduced to include only those relating to consultation, enforcement and enforceability.[75]

In 1999, before the general conformity SIP requirement was eliminated by Congress, we approved the District's general conformity rule, Rule 925 (''General Conformity'') as a revision to the Imperial County portion of the California SIP.[76] We have not approved a transportation conformity SIP for the Imperial PM_{10} nonattainment area. However, we consider it reasonable to interpret the conformity SIP requirements as not applying for purposes of a redesignation request under section 107(d) because the conformity SIP requirement continues to apply post-redesignation (because conformity applies in maintenance areas as well as nonattainment areas) and because the federal conformity rules (set forth in 40 CFR part 93, subparts A and B) apply where state rules have not been approved.[77]

C. The Area Must Show the Improvement in Air Quality is Due to Permanent and Enforceable Emission Reductions

In order to approve a redesignation to attainment, section 107(d)(3)(E)(iii) of the CAA requires the EPA to determine that the improvement in air quality is due to emissions reductions that are permanent and enforceable, and that the improvement results from the implementation of the applicable SIP and applicable federal air pollution control regulations and other permanent and enforceable regulations. Attainment resulting from temporary reductions in emissions rates (*e.g.,* reduced production or shutdown due to temporary adverse economic conditions) or unusually favorable meteorology would not qualify as an air quality improvement due to permanent and enforceable emissions reductions.[78]

The 2018 Imperial PM_{10} Plan concludes that the improvement in PM_{10} air quality in the Imperial Valley Planning Area is due to emissions reductions from implementation of the District's Regulation VIII fugitive dust rules, adopted in 2005, based on data for years 2000 to 2016 that show a gradual decline in annual average PM_{10} concentrations that cannot be explained by adverse economic conditions or usually favorable meteorology. With respect to economic conditions, the data presented in the 2018 Imperial PM_{10} Plan show a gradual increase in population over the 2000 to 2016 period and a very gradual decline in harvested acres over that period suggesting little change in the agricultural sector of the economy during this time. With respect to meteorological conditions, the plan presents annual rainfall totals for Imperial County from 2000 through 2016 ranging from less than 1 inch to approximately 5 inches with rainfall totals during the 2014–2016 attainment period of approximately 2 inches each year.

First, we agree that the implementation of the District's Regulation VIII fugitive dust rules has reduced PM_{10} emissions within the Imperial Valley Planning Area. More specifically, we find that emissions of the largest contributors to ambient PM_{10} concentrations (*i.e.,* fugitive windblown dust and unpaved road dust) declined significantly after Regulation VIII was adopted in 2005. For instance, in 2005, PM_{10} emissions from unpaved road dust and fugitive windblown dust totaled approximately 288 tons per day (tpd) in Imperial County. After implementation of Regulation VIII, emissions attributable to these categories declined by approximately 16 tpd, or about 6 percent by 2008. While the amount of fugitive windblown dust has remained relatively constant since 2008, unpaved road dust has continued to decline until, by 2017, it accounted for an additional 7 tpd reduction of PM_{10}.[79] Overall, between 2005 and 2016, PM_{10} emissions within Imperial County have declined from approximately 313 tpd to approximately 284 tpd in 2016. The most significant reductions from 2005 and 2016 occurred in the farming operations, unpaved road dust and fugitive windblown dust source categories, all of which are subject to one or more Regulation VIII rules.

Second, because we have approved the Regulation VIII fugitive dust rules, the associated emissions reductions are permanent and enforceable. Table 2 lists the District's Regulation VIII rules with most recent adoption or amendment dates and most recent EPA approval dates.

[75] CAA section 176(c)(4)(E).

[76] 64 FR 19916 (April 23, 1999).

[77] *See Wall* v. *EPA,* 265 F. 3d 426 (6th Cir. 2001), upholding this interpretation. Also see, for example, 60 FR 62748 (December 7, 1995).

[78] Calcagni memo, 4.

[79] These figures are based on data from CARB's Emissions Inventory Database, California Emissions Projection and Analysis Model (CEPAM). A print out of the report is included in the docket for this action.

TABLE 2—ICAPCD REGULATION VIII RULES AND RELATED EPA APPROVALS

Rule	Title	Most recent adoption or amendment date	EPA approval
800	General Requirements for Control of Fine Particulate Matter (PM–10).	October 16, 2012	78 FR 23677, April 22, 2013.
801	Construction and Earthmoving Activities	November 8, 2005	75 FR 39366, July 8, 2010.
802	Bulk Materials	November 8, 2005	75 FR 36366, July 8, 2010.
803	Carry-Out and Track-Out	November 8, 2005	75 FR 36366, July 8, 2010.
804	Open Areas	September 11, 2018	84 FR 45418, August 29, 2019.
805	Paved and Unpaved Roads	October 16, 2012	78 FR 23677, April 22, 2013.
806	Conservation Management Practices	October 16, 2012	78 FR 23677, April 23, 2013.

Third, based on the data on population growth, harvested acreage, and rainfall totals in the 2018 Imperial PM_{10} Plan, we agree that the reduction in PM_{10} emissions within Imperial County is due largely to the District's Regulation VIII fugitive dust rules and is not due to adverse economic conditions or favorable meteorology. In this regard, we note that we are proposing herein to find that the area attained the standard during the 2014 to 2016 period. During that time, Imperial County saw a slight increase in population, relatively steady economic activity, and lower than average rainfall. Therefore, attainment of the PM_{10} NAAQS in that period could not have been the result of adverse economic conditions or favorable meteorology. Moreover, the determination of attainment relies upon the implementation of Regulation VIII rules, without which high-wind-caused exceedances would not have been deemed to be exceptional events under the EPA's Exceptional Events Rule.

Therefore, for the above reasons, we find that attainment of the PM_{10} NAAQS in the Imperial Valley Planning Area is due to permanent and enforceable emissions reductions resulting from implementation of the applicable SIP, namely the District's Regulation VIII fugitive dust rules. Consequently, we propose to find that the criterion for redesignation set forth at CAA section 107(d)(3)(E)(iii) is satisfied.

D. The Area Must Have a Fully Approved Maintenance Plan Under Section 175A

Section 107(d)(3)(E)(iv) of the CAA requires that, in order to approve a redesignation to attainment, the EPA must fully approve a maintenance plan for the area as meeting the requirements of section 175A of the Act. Section 175A sets forth the required elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment. Under section 175A, the plan must demonstrate continued attainment of the applicable NAAQS for at least 10 years after the EPA approves a redesignation to attainment. Eight years after redesignation, the state must submit a revised maintenance plan that demonstrates continued attainment for the subsequent ten-year period following the initial ten-year maintenance period. To address the possibility of future NAAQS violations, the maintenance plan must contain such contingency provisions as the EPA deems necessary to promptly correct any violation of the NAAQS that occurs after redesignation of the area. The Calcagni memo provides further guidance on the content of a maintenance plan, explaining that a maintenance plan should include an attainment emissions inventory, maintenance demonstration, monitoring and verification of continued attainment, and a contingency plan. For the reasons provided below, we are proposing to approve the Imperial PM_{10} Plan as meeting the requirements for maintenance plans under CAA section 175A.

1. Attainment Inventory

A maintenance plan for the PM_{10} NAAQS should include an inventory of direct PM_{10} emissions in the area to identify a level of emissions sufficient to attain the PM_{10} NAAQS.[80] This inventory should be consistent with the EPA's most recent guidance on emissions inventories for nonattainment areas available at the time and should represent emissions during the time period associated with the monitoring data showing attainment. The inventory must also be comprehensive, including emissions from stationary point sources, area sources, and mobile sources and must be based on actual emissions during the appropriate season, if applicable. See CAA section 172(c)(3).

The specific PM_{10} emissions inventory requirements are set forth in the Air Emissions Reporting Rule (40 CFR 51, subpart A). The EPA has provided additional guidance for developing PM_{10} emissions inventories in ''PM_{10} Emissions Inventory Requirements,'' EPA–454/R–94–033 (September 1994) and ''Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations'' (July 2017) (''EPA 2017 EI Guidance'').[81]

The Imperial PM_{10} Plan provides an emissions inventory of actual emissions from all direct PM_{10} sources within Imperial County on an average annual day in 2016. The District and CARB developed this inventory based on the methods and assumptions presented in detail in Appendix G (''Emission Inventory Documentation for the Imperial County PM_{10} Nonattainment Maintenance Plan'') and Appendix H (''PM_{10} and PM_{10} Precursor Emission Inventories''). Appendix H also identifies the specific filterable and condensable components of the direct PM_{10} emissions estimates. Table 3 below provides a summary of the 2016 direct PM_{10} emissions inventory for Imperial County. As shown in Table 3, fugitive dust sources, particularly fugitive windblown dust and entrainment of dust from vehicle travel over unpaved roads, are the predominant sources of direct PM_{10} emissions in the County.

[80] PM_{10} precursor emissions should also be included depending upon the contribution of secondarily-formed particulate matter to high ambient PM_{10} concentrations in the area. In this instance, an inventory of PM_{10} precursor emissions would not be required based on our proposed determination in section IV.B.2.a of this document that PM_{10} precursors do not contribute significantly to elevated PM_{10} concentrations in the Imperial Valley Planning Area. While not required, the Imperial PM_{10} Plan includes an inventory of PM_{10} precursors in Appendix H (''PM_{10} and PM_{10} Precursor Emission Inventories'').

[81] The more recent guidance document is available at *https://www.epa.gov/sites/production/files/2017-07/documents/ei_guidance_may_2017_final_rev.pdf.*

TABLE 3—IMPERIAL COUNTY PM_{10} ATTAINMENT YEAR (2016) EMISSIONS INVENTORY

[annual average, tpd]

Source category	Subcategory	PM_{10} [a]
Stationary Point Sources	All	4.19
Areawide Sources	Farming Operations	8.48
	Construction and Demolition	3.02
	Paved Road Dust	1.16
	Unpaved Road Dust	51.88
	Fugitive Windblown Dust	212.52
	Other Areawide Sources	1.43
	Subtotal—Areawide Sources	278.48
Mobile Sources	All	1.50
Totals	All Stationary, Areawide, and Mobile Sources	284.17

Source: Imperial PM_{10} Plan, Table 4–1 and Appendix H ("PM_{10} and PM_{10} Precursor Emission Inventories").

[a] Emissions inventories are required to include direct PM_{10} emissions, separately reported as PM_{10} filterable and condensable emissions. 40 CFR 51.15(a)(1)(vii). Table H–1b of Appendix H of the Imperial PM_{10} plan provides this information.

As discussed in Appendix G of the Imperial PM_{10} Plan, direct PM_{10} emissions estimates for stationary point sources reflect actual emissions reported to the District in 2012 by owners or operators of industrial point sources in the County and then adjusted to 2016 based on applicable growth surrogates. Areawide sources occur over a wide geographic area. Examples of these sources are consumer products, paved and unpaved road dust, fireplaces, farming operations, and prescribed burning. Emissions for these categories are estimated by both CARB and the ICAPCD using various models and methodologies. Emissions estimates for the fugitive dust source categories also reflect implementation of the District's various Regulation VIII rules.

Emissions from on-road mobile sources, which include passenger vehicles, buses, and trucks, were estimated using outputs from CARB's EMFAC2014 model.[82] These emissions were calculated by applying EMFAC2014 emissions factors to the transportation activity data provided by the Southern California Association of Governments (SCAG) from their 2016 adopted Regional Transportation Plan/Sustainable Communities Strategy (2016 RTP/SCS).[83] SCAG is the metropolitan planning organization representing Imperial County, along with five other counties in Southern California.

Emissions from off-road mobile sources, which include cargo handling equipment, pleasure craft, recreational vehicles, and locomotives, were estimated using a suite of category-specific models or, where a new model was not available, the OFFROAD2007 model. Many of the newer models were developed to support recent regulations, including in-use offroad equipment.

The EPA considers the selection of 2016 for the attainment year inventory to be appropriate given that the design value for 2016, excluding exceedances caused by exceptional events, is consistent with attainment of the PM_{10} NAAQS. Moreover, preparation of an annual average daily inventory, as opposed to a seasonal or episodic inventory, is appropriate given that elevated PM_{10} concentrations in Imperial County do not exhibit a clear seasonal or episodic pattern. Also, we find that the county-wide basis for the inventory is appropriate in this instance even though the County is larger than the nonattainment area because the nonattainment area encompasses the vast majority of the population and vehicular activity within the County. Based on our review of the documentation provided with the plan, we find that the 2016 emissions inventory for direct PM_{10} is based on reasonable assumptions and methodologies, and that the inventory is comprehensive, current and accurate. We therefore propose to approve the inventory of actual emissions in 2016 in the Imperial PM_{10} Plan as meeting the requirements of CAA section 172(c)(3). We also find the 2016 inventory in the plan to be acceptable for use in demonstrating maintenance of the PM_{10} NAAQS in the future.

2. PM_{10} Maintenance Demonstration

Section 175A requires a state seeking redesignation to attainment to submit a SIP revision to provide for maintenance of the NAAQS for a period of at least ten years following redesignation. This can be shown either by demonstrating that future emissions of a pollutant and its precursors will not exceed the level of the attainment inventory or by conducting modeling that shows the future emissions will not cause a violation of the standard. In accordance with EPA guidance, the state should project emissions for the 10-year period following redesignation, for either purpose.[84] Projected emissions inventories for future years must account for, among other things, the ongoing effects of economic growth and adopted emissions control requirements, and the inventories are expected to be the best available representation of future emissions. The plan submission should include documentation explaining how the state calculated the emissions data for the base year and projected inventories.

The Imperial PM_{10} Plan demonstrates that the Imperial Valley Planning Area will maintain the PM_{10} NAAQS through 2030 by projecting the direct PM_{10} emissions in the County for years 2018–2030 and by estimating the proportional change in the design concentration[85] based on the change in future emissions relative to the 2016 attainment inventory. The last year for which a maintenance plan demonstrates maintenance of the NAAQS is referred to as the horizon year, and for the Imperial PM_{10} Plan, 2030 is the horizon year.

Projected inventories are derived by applying expected growth trends for each source category and are based on

[82] EMFAC is short for EMission FACtor. The EPA approved EMFAC2014 for SIP development and transportation conformity purposes in California at 80 FR 77337 (December 14, 2015). EMFAC2014 was the most recently approved version of the EMFAC model that was available at the time of preparation of the Imperial PM_{10} Plan. Recently, the EPA approved an updated version of the EMFAC model, EMFAC2017, for future SIP development and transportation conformity purposes in California. 84 FR 41717 (August 15, 2019).

[83] 2016 RTP/SCS was current as of April 2016.

[84] Calcagni memo, 9.

[85] In this context, the design concentration generally refers to the third or fourth highest 24-hour PM_{10} concentration measured at the monitoring site measuring the highest concentrations over a three-year period, in this case, excluding exceedances caused by high wind exceptional events.

data that reflect historical trends, current conditions, and recent economic and demographic forecasts with expected emissions reductions resulting from adopted control measures to the base year inventory. For the Imperial PM_{10} Plan, emissions projections for 2018 through 2030 were generated by applying growth and control profiles to the 2016 attainment inventory. Growth forecasts for most point and areawide sources were developed either by CARB or by SCAG and provided to CARB through the South Coast Air Quality Management District. Mobile sources were forecast using total vehicle miles traveled projections provided by SCAG. Off-road sources were forecast using various growth surrogates as shown in Table 5 of Appendix G of the plan. Appendix G of the plan documents the methods and assumptions used to develop the emissions projections upon which the maintenance demonstration relies, and Appendix H of the plan presents the detailed source-category-specific estimates for each of the analysis years.

Table 4 presents a summary of the Imperial PM_{10} Plan's estimates of direct PM_{10} emissions in an interim year (2025) and the horizon year (2030) along with the corresponding emissions estimates for the attainment year (2016). For the sake of simplicity, Table 4 shows emissions for just one of the interim years (*i.e.,* 2025) between the attainment year and the horizon year, but the plan itself provides emissions estimates for each year from 2018 through 2030.[86] The emissions estimates in the plan predict a gradual change in emissions within the County over time with slight decreases in certain categories (*e.g.,* farming operations and unpaved road dust) nearly offsetting slight increases in certain other source categories (*e.g.,* construction and demolition and paved road dust). By 2030, overall direct PM_{10} emissions are estimated to be approximately 2 tpd (0.6 percent) higher than in the 2016 attainment year.

TABLE 4—IMPERIAL COUNTY PM_{10} EMISSIONS INVENTORY, 2016, 2025 AND 2030

[annual average, tpd]

Source category	Subcategory	2016	2025	2030
Stationary Point Sources	All	4.19	5.46	6.22
Areawide Sources	Farming Operations	8.48	8.11	7.98
	Construction and Demolition	3.02	3.82	4.22
	Paved Road Dust	1.16	1.43	1.50
	Unpaved Road Dust	51.88	50.20	50.16
	Fugitive Windblown Dust	212.52	212.47	212.45
	Other Areawide Sources	1.43	1.36	1.33
	Subtotal—Areawide Sources	278.48	277.39	277.64
Mobile Sources	All	1.50	2.03	2.09
Totals	All Stationary, Areawide, and Mobile Sources	284.17	284.88	285.96

Source: Imperial PM_{10} Plan, Appendix H, Table H–1a.
Totals may not add up due to rounding.

For the Imperial PM_{10} Plan, based on 2014–2016 ambient PM_{10} concentration data (excluding exceedances from high wind exceptional events), the District identified a design concentration of 149 μg/m³, which is about 3.8% less than the level at which the PM_{10} NAAQS is exceeded.[87] The Imperial PM_{10} Plan concludes that maintenance is demonstrated through the horizon year because the projected increase in emissions through the horizon year (0.6%) is less than the margin between the design concentration and an exceedance of the PM_{10} NAAQS (3.8%).

We note that over the initial maintenance period (*i.e.,* through 2030), the lake surface of the Salton Sea is expected to shrink, and that the future emissions projections in the Imperial PM_{10} Plan used as the basis for the maintenance demonstration do not include any emissions increases directly related to the increased exposure of previously submerged lakebed, known as playa, as the lake surface shrinks. However, the Imperial PM_{10} Plan recognizes the potential for emissions increases from windblown dust from the exposed playa and describes the various efforts underway to evaluate and control this emerging source.[88] These efforts include the establishment in 2015 of the Salton Sea Task Force, which has developed a 10-year plan that endeavors to expedite wildlife habitat construction and to suppress dust from playa that will be exposed in the future. The Imperial Irrigation District's Salton Sea Air Quality Mitigation Program, which applies in addition to other programs and requirements, represents another of these efforts. It includes three components: A monitoring program and development of an emissions inventory; a dust control strategy that includes the development and testing of dust control measures; and the implementation of an annual proactive dust control plan that includes performance modeling. The District also notes that state law and water transfer permits include requirements to control PM_{10} emissions from exposed lake bed, and that District Rule 804, which requires the control of fugitive dust from open areas, also applies to the playa.[89] Therefore, we find that the Imperial PM_{10} Plan adequately addresses the potential for an increase in PM_{10} emissions from newly exposed playa along the shores of the Salton Sea to interfere with maintenance of the PM_{10} NAAQS

[86] Imperial PM_{10} Plan, Table 4–2 and Table H–1a.

[87] With respect to the PM_{10} NAAQS, an exceedance is defined as a daily value that is above the level of the 24-hour standard, 150 μg/m³, after rounding to the nearest 10 μg/m³ (*i.e.,* values ending in five or greater are to be rounded up). Consequently, exceedances are daily values equal to or greater than 155 μg/m³. 40 CFR part 50, Appendix K, section 1.0.

[88] Imperial PM_{10} Plan, Chapter 5, ''Salton Sea Considerations''; Appendix I, ''Salton Sea Management Program Phase I: 10-Year Plan (March 2017)''; and Appendix J, ''Salton Sea Air Quality Mitigation Program (July 2016).''

[89] District Rule 804, ''Open Areas,'' applies to any open area having 0.5 acres or more within urban areas, or 3.0 acres or more within rural areas that contain at least 1,000 square feet of disturbed surface area, excluding certain sites that are subject to other Regulation VIII rules. Under Rule 804, all persons who own or otherwise have jurisdiction over an open area must implement one or more of BACM listed in the rule to achieve a stabilized surface and to limit visible dust emissions to no more than 20% opacity. One of the BACM listed in the rule was drafted specifically to allow the implementation of alternative BACM, with the approval of the ICAPCD and the EPA, to more effectively control dust from exposed playa at the Salton Sea (paragraph F.1.d. of the rule) than the standard BACM otherwise required under the rule.

through the initial maintenance period.[90]

Based on our review of the documentation provided with the Imperial PM_{10} Plan, we find that the projected emissions inventories for direct PM_{10} for years 2018 through 2030 are based on reasonable methods, growth factors, and assumptions, and are based on the most current and accurate information available to CARB and ICAPCD at the time the plan and its inventories were being developed. Given that the projections of direct PM_{10} emissions show future emissions increases through 2030 that would be less than the margin between the design concentration and an exceedance of the standard, we find that Imperial PM_{10} Plan provides an adequate basis to demonstrate maintenance of the PM_{10} NAAQS within the Imperial Valley Planning Area through 2030.[91] Lastly, section 175A of the CAA requires that a maintenance plan provide for maintenance of the NAAQS in the area for at least ten years after redesignation. If we finalize this proposed approval of CARB's redesignation request and such approval becomes effective in 2020, the projected 2030 inventory in the Imperial PM_{10} Plan demonstrates that the Imperial Valley Planning Area will maintain the PM_{10} NAAQS for at least 10 years beyond redesignation.

3. Verification of Continued Attainment

Once an area has been redesignated, the state should continue to operate an appropriate air quality monitoring network, in accordance with 40 CFR part 58, to verify the attainment status of the area.[92] Data collected by the monitoring network are also needed to implement the contingency plan element of the maintenance plan. As discussed in section IV.A. of this document, CARB and the District monitor ambient concentrations of PM_{10} at five monitoring sites within the Imperial PM_{10} nonattainment area. In section 4.2 (''Future Monitoring Network'') of the Imperial PM_{10} Plan, the District states that, in conjunction with CARB, it will assure the quality of the data using various quality assurance procedures and notes that, under federal regulations, the monitoring network is reviewed annually. ICAPCD also commits to continuing to assure PM_{10} monitoring is conducted in accordance with 40 CFR part 58. We find that the Imperial PM_{10} Plan contains adequate provisions for continued operation of an appropriate air quality monitoring network that will provide a basis to verify the attainment status of the area.

The EPA also recommends that the state verify continued attainment through methods in addition to the ambient air monitoring program, *e.g.,* through periodic review of the factors used in developing the attainment inventory to show no significant change.[93] In the Imperial PM_{10} Plan, the District commits to periodic review of the inputs and assumptions used for the emissions inventory on an annual basis and, if the District finds that these inputs have changed significantly, to request that CARB update the existing inventory and take other appropriate measures.[94] We find that the District's commitments to verify continued attainment of the PM_{10} NAAQS through continued ambient air monitoring and annual review of the inputs and assumptions used for the emission inventory in the Imperial PM_{10} plan are acceptable.

4. Contingency Provisions

Section 175A(d) of the CAA requires that maintenance plans include contingency provisions, as the EPA deems necessary, to promptly correct any violations of the NAAQS that occur after redesignation of the area. Such provisions must include a requirement that the state will implement all measures with respect to the control of the air pollutant concerned that were contained in the SIP for the area before redesignation of the area as an attainment area.[95] These contingency provisions are distinguished from those generally required for nonattainment areas under CAA section 172(c)(9) in that they are not required to be fully-adopted measures that will take effect without further action by the state for the maintenance plan to be approved. However, the contingency plan is considered to be an enforceable part of the SIP and it should ensure that the contingency measures are adopted expeditiously once the requirement for contingency measures has been triggered. The maintenance plan should clearly identify the measures to be adopted, a schedule and procedure for adoption and implementation, and a specific timeline for action by the state. As a necessary part of the plan, the state should also identify the specific indicators or triggers that will be used to determine when the contingency measures need to be implemented.

The District has adopted a contingency plan to address future PM_{10} exceedances occurring after redesignation of the area to attainment. The contingency plan is contained in Section 4.4 of the Imperial PM_{10} Plan.

As noted by the District in the Imperial PM_{10} Plan, contingency provisions are typically implemented when air quality deteriorates beyond a specified level, such as a certain number of exceedances of the standard or a violation of the standard. In this case, the contingency provisions will be triggered when the number of exceedances at a monitor, averaged over three years, is greater than 1.05. However, because PM_{10} exceedances in Imperial County are largely driven by high wind dust events that may be eligible for consideration under the Exceptional Events Rule,[96] the contingency plan includes a screening process that allows the District and CARB, subject to EPA review, to exclude exceedances from the trigger calculation if the agencies show that the exceedances meet certain criteria indicating they are likely eligible for treatment as an exceptional event.[97] The purpose of the screening process is to differentiate between exceedances that are not within the District or State

[90] The Imperial PM_{10} Plan includes contingency provisions that establish a process for evaluating and remedying increased emissions from newly-exposed playa if the ongoing efforts fail to adequately control the emissions such that the related emissions cause or contribute to exceedances at one of the five SLAMS PM_{10} monitoring sites.

[91] We recognize that the increased exposure of playa as the Salton Sea continues to shrink will likely result in higher windblown PM_{10} emissions than quantified in the Imperial PM_{10} Plan, but we anticipate that, given the federal, state and local efforts to identify and remedy such emissions increases, any exceedances to which the emissions would contribute would be eligible as exceptional events under the Exceptional Events Rule because, among other reasons, the emissions would be reasonably controlled for the purposes of the Exceptional Events Rule.

[92] Calcagni memo, 11.

[93] Id.

[94] Imperial PM_{10} Plan, 4–10 and 4–11.

[95] No PM_{10} controls contained in the SIP would be relaxed or suspended upon redesignation. All such controls would continue to be implemented during the maintenance period. Consequently, the Imperial PM_{10} Plan meets the requirement in CAA section 175A(d) for contingency provisions to require implementation of all measures with respect to the control of the air pollutant concerned that were contained in the SIP for the area before redesignation of the area to attainment.

[96] As described in section IV.A. of this action, we have concurred with 91 exceedance days that the State flagged and documented as caused by high wind exceptional events.

[97] The criteria include: (1) exceedances at multiple monitors in specified areas; (2) wind speeds in excess of 25 miles per hour consistent with increasing hourly PM_{10} concentrations; (3) reduced visibility (less than 10 miles) consistent with increasing hourly PM_{10} concentrations; (4) issuance of advisories or warnings consistent with increasing hourly PM_{10} concentrations; and (5) no dust complaints involving anthropogenic sources located upwind of an exceeding monitor. If any of these five criteria are not met, or if other available data contradict the assessment, additional information and analyses will be provided to the EPA as described on pages 4–12 and 4–13 of the Imperial PM_{10} Plan.

control (*i.e.,* exceedances that occur despite the implementation of reasonable measures), and exceedances that are within the District's or State's control and should be included in the trigger calculation. It is important to note that, should the District or State exclude an exceedance from the contingency trigger calculation using this process, it would not constitute the EPA's concurrence that the exceedance was caused by an exceptional event. The exceedance will therefore continue to be included in design value calculations for the Imperial Valley Planning Area unless CARB, following opportunity for public comment, submits a request for the EPA to concur on the exceedance as an exceptional event pursuant to 40 CFR 50.14, and the EPA reviews the submittal and formally concurs.

Under the contingency trigger screening process, within 60 days of the end of each calendar quarter, the District will complete the following: Provide a list of exceedances that occurred during that previous quarter to CARB, identify those exceedances that meet the criteria specified in the contingency measure screening process, flag the relevant data, and provide an initial description in AQS. The State then has 60 days to review the information, during which time it may request additional information from the District to supplement the District's analysis. Following CARB's review, CARB will transmit the information to the EPA, including information for those exceedances the District believes should be excluded from the contingency plan trigger calculation.

The Imperial PM_{10} Plan anticipates that, within 60 days of receipt, the EPA will review the submitted information, notify the District if the submitted information is insufficient to support exclusion from the contingency plan trigger calculation, include such exceedances in calculating the trigger for the contingency plan, and notify the District if the contingency plan has been triggered. The EPA intends to notify the District, within 60 days of receipt, whether submitted information is sufficient or insufficient to support the exclusion of a given exceedance from the contingency plan trigger calculation and to take the other actions described in the plan. If the submitted information is not sufficient, the EPA will include the exceedance in the calculation to determine if the contingency plan has been triggered. If the State or District subsequently provide additional information sufficient to support the conclusion that the exceedance meets the criteria for exclusion from the trigger calculation, the EPA will notify the District that the calculation will be adjusted.

Under the contingency plan, if the EPA determines that contingency provisions have been triggered (*i.e.,* the number of exceedances at any single monitor, averaged over three years, is greater than 1.05 excluding those exceedances identified through the screening process), ICAPCD commits to the following steps:

(1) Within six months of EPA notification, ICAPCD will complete an analysis of the exceedances and the available contingency measures. During this time, the District will determine the possible cause of the exceedances and will consult with community and local industry members to determine if any voluntary or incentive measures could be implemented to reduce the magnitude of or eliminate the source of emissions.

If voluntary and incentive-based measures do not adequately address the problem, the ICAPCD will evaluate its Regulation VIII fugitive dust rules, or other rules as appropriate, to determine where such rules could be improved or expanded to achieve additional emissions reductions. The measures that ICAPCD would consider and analyze include but are not limited to those listed in Table 4–6 in the Plan.

(2) Within 12 months of completing its analysis, the District will adopt and implement the new contingency measures.

Based on our review of the Imperial PM_{10} Plan, as summarized above, we propose to find that the contingency provisions of the Imperial PM_{10} Plan clearly identify specific contingency measures, contain a triggering mechanism to determine when contingency measures are needed, contain a description of the process of recommending and implementing contingency measures, and contain specific and appropriate timelines for action. We also propose to find that the contingency trigger screening process, including the associated EPA review, is reasonably designed to distinguish between exceedances that are the type that have been deemed exceptional events in the past and exceedances for which new or tightened control measures might be effective. Our assessment indicates that the screening process is an appropriate element of the contingency plan for the Imperial Valley Planning Area because of the frequency of exceedances related to high wind dust events in this area. Thus, we propose to conclude that the contingency plan in the Imperial PM_{10} Plan is adequate to ensure prompt correction of any violation of the PM_{10} NAAQS that occurs after redesignation, as required by section 175A(d) of the CAA.

5. Motor Vehicle Emissions Budgets for Transportation Conformity

Section 176(c) of the CAA requires federal actions in nonattainment and maintenance areas to conform to the SIP's goals of eliminating or reducing the severity and number of violations of the NAAQS and achieving expeditious attainment of the standards. Conformity to the SIP's goals means that such actions will not: (1) Cause or contribute to violations of a NAAQS, (2) worsen the severity of an existing violation, or (3) delay timely attainment of any NAAQS or any interim milestone.

Actions involving Federal Highway Administration (FHWA) or Federal Transit Administration (FTA) funding or approval are subject to the EPA's transportation conformity rule, codified at 40 CFR part 93, subpart A. Under this rule, metropolitan planning organizations (MPOs) in nonattainment and maintenance areas coordinate with state and local air quality and transportation agencies, the EPA, FHWA, and FTA to demonstrate that an area's regional transportation plans and transportation improvement programs conform to the applicable SIP. This demonstration is typically done by showing that estimated emissions from existing and planned highway and transit systems are less than or equal to the motor vehicle emissions budgets (''budgets'') contained in submitted or approved control strategy plans or maintenance plans.

Budgets are generally established for specific years and specific pollutants or precursors. PM_{10} maintenance plan submittals should identify budgets for transportation-related PM_{10} emissions in the last year of the maintenance period.[98] Budgets may also be specified for additional years during the maintenance period.

[98] Transportation-related emissions of VOC or NO_X must also be specified in PM_{10} areas if the EPA or the state find that transportation-related emissions of one or both of these precursors within the nonattainment area are a significant contributor to the PM_{10} nonattainment problem and has so notified the MPO and the U.S. Department of Transportation (DOT), or the applicable SIP revision or SIP revision submittal establishes an approved or adequate budget for such emissions as part of the reasonable further progress, attainment or maintenance strategy. 40 CFR 93.102(b)(2)(iii). Neither of these conditions apply to the Imperial PM_{10} nonattainment area.

For budgets in a maintenance plan to be approvable, they must meet, at a minimum, the EPA's adequacy criteria (40 CFR 93.118(e)(4)). To meet these requirements, the budgets must be consistent, when considered with emissions from all other sources, with maintenance of the NAAQS and reflect all the motor vehicle control measures relied upon for the maintenance demonstration.

The EPA's process for determining adequacy of a budget consists of three basic steps: (1) Notifying the public of a SIP submittal; (2) providing the public the opportunity to comment on the budget during a public comment period; and (3) making a finding of adequacy or inadequacy. The process for determining the adequacy of a submitted budget is codified at 40 CFR 93.118(f). The EPA can notify the public by either posting an announcement that the EPA has received SIP budgets on the EPA's adequacy website (40 CFR 93.118(f)(1)), or via a **Federal Register** notice of proposed rulemaking when the EPA reviews the adequacy of an maintenance plan budget simultaneously with its review and action on the SIP submittal itself (40 CFR 93.118(f)(2)).

The Imperial PM_{10} Plan includes budgets for direct PM_{10} for the attainment year (2016) and the last year of the maintenance plan (2030). The applicable source categories included in the budgets include vehicle emissions (including exhaust, brake wear, and tire wear), and entrained dust from vehicle travel over paved and unpaved roads. With respect to unpaved road dust, the budgets include only those emissions generated by vehicle travel over city- and county-owned unpaved roads, not canal roads, farm roads or those owned by the U.S. Bureau of Land Management or the U.S. Forest Service. In addition, the budgets apply to the entire County, including the portion of the County that lies outside of the PM_{10} nonattainment area.[99] As noted previously, an estimated 95% of the vehicle activity within the County occurs within the PM_{10} nonattainment area, and thus, the budgets reasonably correspond to the nonattainment area even though they are county-wide values. The 2016 and 2030 annual average day conformity budgets for PM_{10} are provided in Table 5.

TABLE 5—TRANSPORTATION CONFORMITY BUDGETS FOR THE PM_{10} NAAQS IN IMPERIAL COUNTY

[PM_{10} tpd, annual average, county-wide]

Source	2016	2030
Tire Wear, Brake Wear and Exhaust	0.4	0.5
Paved Road Dust	1.2	1.5
Unpaved City-County Road Dust	18.4	16.8
Total	20.0	18.8
Motor Vehicle Emission Budget[a]	20	19

[a] Rounded up to the nearest integer.
Source: Imperial PM_{10} Plan, Table 4–5.

CARB developed the on-road mobile portion of the emissions inventory for the maintenance plan using California's on-road mobile source emission projection model, EMFAC2014, and vehicle activity data provided by SCAG from its 2016 RTP/SCS. The EMFAC2014 model calculated tire wear, brake wear, and exhaust emissions. Paved road dust emissions were estimated using AP–42 with California-specific silt loading data.[100] The unpaved road dust emissions were estimated using CARB's methodology 7.10, updated in 2012 for non-farm roads.

As discussed in the March 10, 2006 final Transportation Conformity rulemaking, the conformity rule does not include an exception for PM_{10} for paved and unpaved road dust emissions to be determined significant, like the exception for such emissions in $PM_{2.5}$ analyses in 40 CFR 93.102(b)(3). The EPA intends for road dust emissions to be included in all conformity analyses of direct PM_{10} emissions because fugitive dust from roadways and other sources dominate PM_{10} emissions inventories. The budgets in the Imperial PM_{10} Plan, therefore, include paved and unpaved road emissions.

Regional PM_{10} emissions analyses for transportation conformity determinations in PM_{10} nonattainment and maintenance areas must account for highway and transit project construction-related fugitive PM_{10} emissions if the control strategy or maintenance plan identifies such emissions as a contributor to the nonattainment problem, but are not required to do so if such emissions are not identified as a contributor to the nonattainment problem.[101] [102] Emissions estimates developed for the Imperial PM_{10} Plan show that fugitive PM_{10} emissions from highway and transit project construction represent approximately 0.2% and 0.3% of the total annual-average daily PM_{10} emissions in 2016 and 2030, respectively.[103] Based on these emissions estimates, the Imperial PM_{10} Plan concludes that fugitive PM_{10} emissions from highway and transit project construction are not a contributor to the nonattainment problem and thus need not be accounted for in regional emissions analyses for transportation conformity determinations made for the Imperial PM_{10} nonattainment area. Consequently, the budgets in the Imperial PM_{10} Plan do not reflect highway or transit project construction-related fugitive dust.

We evaluated the budgets against our adequacy criteria in 40 CFR 93.118(e)(4) and (5) as part of our review of the budget's approvability and expect to complete the adequacy review of the budgets concurrent with our final action on the Imperial PM_{10} Plan. The EPA is not required under its transportation conformity rule to find budgets

[99] The Imperial PM_{10} plan (at 4–6) indicates that the budgets are derived from PM_{10} emissions estimates and projections within the PM_{10} nonattainment area rather than the entire County. However, we understand that the budgets reflect county-wide emissions estimates and projections. The county-wide basis for the budgets does not, however, affect the geographic area for which transportation conformity determinations must be made with respect to PM_{10}. The applicable geographic area for such determinations remains the Imperial Valley Planning Area portion of Imperial County.

[100] AP–42 is an EPA document that includes a compilation of emission factors.

[101] 40 CFR 93.122(e).

[102] Fugitive PM_{10} emissions associated with road and transit construction are not required to be included in conformity unless the state identifies construction-related fugitive dust as a contributor to the nonattainment problem per 93.122(e).

[103] Imperial PM_{10} Plan, Table 4–4.

adequate prior to proposing approval of them.[104] Today, the EPA is announcing that the adequacy process for these budgets begins, and the public has 30 days to comment on their adequacy, per the transportation conformity rule at 40 CFR 93.118(f)(2)(i) and (ii).

As documented in the separate memorandum included in the docket for this rulemaking, we preliminarily conclude that the budgets in the Imperial PM_{10} Plan meet each adequacy criterion.[105] While adequacy and approval are two separate actions, reviewing the budgets in terms of the adequacy criteria informs the EPA's decision to propose to approve the budgets. We have completed our detailed review of the Imperial PM_{10} Plan and are proposing herein to approve the maintenance plan including the demonstration of maintenance of the PM_{10} NAAQS in the area through year 2030. We have also reviewed the budgets in the Imperial PM_{10} Plan and found that they are consistent with the maintenance demonstration for which we are proposing approval, are clearly identified and precisely quantified, are based on control measures that have already been adopted and implemented, and meet all other applicable statutory and regulatory requirements including the adequacy criteria in 40 CFR 93.118(e)(4) and (5). Moreover, we agree with the conclusion in the Imperial PM_{10} Plan that highway and transit project construction-related PM_{10} emissions are not a contributor to the nonattainment problem in the Imperial PM_{10} nonattainment area and need not be accounted for in regional emissions analyses for transportation conformity determinations for this area. For these reasons, the EPA proposes to approve the 2016 and 2030 motor vehicle emissions budgets in the Imperial PM_{10} Plan. At the point when we either finalize the adequacy process or approve the budgets as proposed (whichever occurs first; note that they could also occur concurrently per 40 CFR 93.118(f)(2)(iii)), the budgets must be used by the SCAG (*i.e.,* the MPO for this area) for transportation conformity determinations for the Imperial PM_{10} nonattainment area.

The transportation conformity rule allows us to limit the approval of budgets, and CARB requested that we limit the duration of our approval of the budgets in the Imperial PM_{10} Plan to the period before the effective date of the EPA's adequacy finding for any subsequently submitted budgets.[106] [107] However, we will consider the State's request to limit an approval of its budgets only if the request includes the following elements: [108]

- An acknowledgement and explanation as to why the budgets under consideration have become outdated or deficient;
- A commitment to update the budgets as part of a comprehensive SIP update; and
- A request that the EPA limit the duration of its approval to the time when new budgets have been found to be adequate for transportation conformity purposes.

Because CARB's request does not address these elements, we cannot at this time propose to limit the duration of our approval of the submitted budgets. In order to limit the approval, we would need the information described above in order to determine whether such limitation is reasonable and appropriate in this case. If CARB provides the necessary information, we intend to review it and take appropriate action. If we propose to limit the duration of our approval of the budgets in the Imperial PM_{10} Plan, we will provide the public an opportunity to comment. The duration of the approval of the budgets, however, would not be limited until we complete such a rulemaking.

6. Conclusion

Based on the review presented above of the various elements of the maintenance plan portion of the Imperial PM_{10} Plan, we are proposing to approve the Imperial PM_{10} Plan as a revision to the California SIP. In doing so, we find that the Imperial PM_{10} Plan, submitted by CARB by letter dated February 6, 2019, satisfies the requirements of section 175A of the Act. If finalized as proposed, our approval of the Imperial PM_{10} Plan will satisfy the criterion for redesignation under CAA section 107(d)(3)(E)(iv).

V. Proposed Actions and Request for Public Comment

Under CAA section 110(k)(3), and for the reasons set forth above, the EPA is proposing to approve the Imperial PM_{10} Plan submitted by CARB by letter dated February 6, 2019, as a revision to the California SIP. In so doing, the EPA is proposing to approve the BACM demonstration and attainment inventory included as part of the Imperial PM_{10} Plan as meeting the requirements of CAA sections 189(b)(1)(B) and 172(c)(3), respectively. We are proposing to approve the maintenance demonstration and contingency provisions as meeting all applicable requirements for maintenance plans and related contingency provisions in CAA section 175A. The EPA is also proposing to approve the motor vehicle emissions budgets for 2016 and 2030 (shown in Table 5 above) for transportation conformity purposes because we find they meet all applicable criteria for such budgets including the adequacy criteria under 40 CFR 93.118(e).

In addition, under CAA section 107(d)(3)(D), we are proposing to approve the state's request to redesignate the Imperial PM_{10} nonattainment area to attainment for the PM_{10} NAAQS. We are doing so based on our conclusion that the area has met, or will meet as part of this action, all the criteria for redesignation under CAA section 107(d)(3)(E). More specifically, we propose to find the following: That the Imperial PM_{10} nonattainment area has attained the PM_{10} standard based on the most recent three-year period (2016–2018) of quality-assured, certified, and complete PM_{10} data; that relevant portions of the California SIP are, or will be as part of this action, fully approved; that the improvement in air quality is due to permanent and enforceable reductions in emissions; that California has met all requirements applicable to the Imperial PM_{10} nonattainment area with respect to section 110 and part D of the CAA if we finalize our approvals of the BACM demonstration and the attainment inventory in the Imperial PM_{10} Plan, as proposed herein; and that the Imperial PM_{10} nonattainment area will have a fully approved maintenance plan meeting the requirements of CAA section 175A if we finalize our approval of it, also as proposed herein.

In connection with the above proposed approvals and determinations, and as authorized under CAA section 189(e), we are proposing to determine that PM_{10} precursors do not contribute significantly to PM_{10} exceedances in the Imperial PM_{10} nonattainment area based

[104] Under the transportation conformity rule, the EPA may review the adequacy of submitted budgets simultaneously with the EPA's approval or disapproval of the submitted control strategy or maintenance plan. 40 CFR 93.118(f)(2).

[105] Memorandum dated November 13, 2019, from Karina O'Connor (EPA), to Rulemaking Docket ID EPA–R09–OAR–2019–0654, Subject: ''Adequacy Documentation for Plan Motor Vehicle Emissions Budgets in October 2018 Imperial PM_{10} Plan.''

[106] 40 CFR 93.118(e)(1).

[107] Letter dated February 6, 2019, from Richard W. Corey, Executive Officer, California Air Resources Board, to Michael Stoker, Regional Administrator, EPA, Region IX.

[108] 67 FR 69141 (November 15, 2002), limiting our prior approval of budgets in certain California SIPs.

on the information included in Appendix A of the Imperial PM_{10} Plan.

We are soliciting comments on these proposed actions. We will accept comments from the public on this proposal for 30 days following publication of this proposal in the **Federal Register** and will consider these comments before taking final action.

VI. Statutory and Executive Order Reviews

Under the CAA, redesignation of an area to attainment and the accompanying approval of a maintenance plan under section 107(d)(3)(E) are actions that affect the status of a geographic area and do not impose any additional regulatory requirements on sources beyond those imposed by state law. Redesignation to attainment does not in and of itself create any new requirements, but rather results in the applicability of requirements contained in the CAA for areas that have been redesignated to attainment. Moreover, 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 CAA. Accordingly, these proposed actions merely propose to approve a State plan and redesignation request as meeting federal requirements and do not impose additional requirements beyond those imposed by state law. For these reasons, these proposed actions:

- Are 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);
- Are not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Are 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.*);
- Do 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);
- Do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Are not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1987);
- Are not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Are 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
- Do 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 State plan for which the EPA is proposing approval does not 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 proposed rule, as it relates to the maintenance plan, 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, the proposed redesignation would apply to Indian country within the nonattainment area. In those areas of Indian country, the proposed redesignation action will not result in the relaxation of measures and programs currently in place to protect air quality 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 EPA has invited the Torres Martinez Desert Cahuilla Indians and the Quechan Tribe of the Fort Yuma Indian Reservation, who have lands within the Imperial PM_{10} nonattainment area, to consult on today's proposed action.

List of Subjects

40 CFR Part 52

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

40 CFR Part 81

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

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

Dated: March 26, 2020.

John Busterud,

Regional Administrator, Region IX.

[FR Doc. 2020–06818 Filed 4–1–20; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket Nos. 20–35, 17–105; FCC 20–19; FRS 16586]

Records of Cable Operator Interests in Video Programming; Modernization of Media Regulation Initiative

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission seeks comment on whether to eliminate or modify the Commission's rules requiring that cable operators maintain records in their online public inspection files regarding the nature and extent of their attributable interests in video programming services, as well as information regarding cable operators' carriage of such vertically integrated video programming services on cable systems in which they have an attributable interest.

DATES: Comments due on or before May 4, 2020; reply comments due on or before May 18, 2020.

FOR FURTHER INFORMATION CONTACT: Chad Guo, *Chad.Guo@fcc.gov,* or 202–418–0652.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking (*NPRM*), FCC 20–19, in MB Docket Nos. 20–35, 17–105, adopted and released on March 2, 2020. The complete text of this document is available electronically via the search function on the FCC's Electronic Document Management System (EDOCS) web page at *https://apps.fcc.gov/edocs_public/* (*https://apps.fcc.gov/edocs_public/*). The complete document is available for inspection and copying in the FCC Reference Information Center, 445 12th Street SW, Room CY–A257, Washington, DC 20554 (for hours of operation, see *https://www.fcc.gov/general/fcc-reference-information-center*). To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* (mail to: *fcc504@fcc.gov*) or call the FCC's

Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Synopsis

1. In this Notice of Proposed Rulemaking (NPRM), the Commission seeks comment on whether to eliminate or modify section 76.1710 of the Commission's rules, which requires that cable operators maintain records in their online public inspection files regarding the nature and extent of their attributable interests in video programming services. The rule also requires that their online public inspection file contain information regarding cable operators' carriage of such vertically integrated video programming services on cable systems in which they have an attributable interest. The NPRM refers herein to both parts of this rule collectively as the ''cable operator interests in video programming recordkeeping'' requirement. The Commission also seeks comment on whether to eliminate or modify section 76.1700(a)(7), which lists cable operator interests in video programming as one of the records to be maintained by cable system operators in their public inspection file. In addition, the Commission seeks comment on whether to eliminate or modify Note 2 to section 76.504, which cross-references section 76.1710. In conjunction with the Commission's Modernization of Media Regulation Initiative (Media Modernization), parties have urged the Commission to re-examine several categories of information in the online public inspection file that may be outdated, including records regarding cable operators' interests in video programming. The Commission's analysis of this rule indicates that its original purpose was to aid in the compliance of a Commission regulation that was reversed and remanded over eighteen years ago by the U.S. Court of Appeals for the District of Columbia Circuit. Accordingly, the Commission seeks comment on whether to eliminate or modify this rule. Through this NPRM, the Commission advances its efforts to modernize its media regulations and eliminate outdated or unnecessary requirements.

Background

2. The Commission originally adopted the cable operator interests in video programming recordkeeping requirement in 1993 as a method of monitoring compliance with the Commission's cable channel occupancy limits, which restricted the number of channels that could be occupied on a vertically integrated cable system by video programmers in which the cable operator had an attributable interest. The Commission's channel occupancy limits placed a 40% cap on the number of channels that could be occupied on a vertically integrated cable system (with up to 75 channels) by video programmers in which the cable operator had an attributable interest. For systems with more than 75 channels, the rule required that at least 45 channels be devoted to unaffiliated programming. The Commission adopted channel occupancy limits consistent with section 11 of the Cable Television Consumer Protection and Competition Act of 1992. Under the recordkeeping requirement, cable operators are required to maintain in their public inspection files, for a period of at least three years, records regarding the nature and extent of their attributable interests in all video programming services as well as information regarding their carriage of such vertically integrated video programming services on cable systems in which they also have an attributable interest. The Commission initially proposed to enforce channel occupancy limits through a process of certification whereby cable operators would certify annually to the Commission that their cable systems are in compliance with the channel occupancy limits but, after receiving comments, the Commission determined that the recordkeeping requirement would be a preferable and less burdensome approach. The Commission stated that such records would enable local franchise authorities to aid the Commission in monitoring compliance with the channel occupancy limits in their respective franchise areas. Specifically, the Commission asserted that a franchise authority could request to inspect a local cable operator's records should the franchise authority have questions as to whether the cable operator was in violation of the channel occupancy limits. After such inspection, if a franchise authority believed that a violation existed, it could file a complaint with the Commission. The Commission also stated that other parties seeking to report potential violations of the channel occupancy limits could also contact the local franchise authority or report the matter directly to the Commission.

3. The Commission reorganized its public file rules in 1999 to reduce the regulatory burden faced by cable operators with regard to the recordkeeping requirements. At that time, the cable operator interests in video programming recordkeeping requirement was moved from the channel occupancy limits provision in Subpart J of Part 76 of the Commission's rules—where it was originally placed upon adoption—to its own section in Subpart U, which consolidated for ease of administration the documents to be maintained by multichannel video and cable television services for public inspection.

4. In 2001, the channel occupancy limits were reversed and remanded to the Commission by the U.S. Court of Appeals for the D.C. Circuit. The court found that the Commission failed to justify its channel occupancy limits as not burdening substantially more speech than necessary. However, despite that decision, the cable operator interests in video programming recordkeeping requirement has remained part of the public file requirements for cable operators. The Commission has sought comment on reinstituting the channel occupancy limits but, to date, has found the record inadequate to support adopting a specific vertical limit on the ownership of video programming sources by owners of cable systems. The Commission transitioned the public file requirements for cable operators to an online format in 2016, when the Commission expanded the list of entities required to post public inspection files to the Commission's online database. Since then, the cable operator interests in video programming recordkeeping requirement has been part of the online public inspection file to be maintained by cable system operators.

5. In its comments to the Commission's Media Modernization proceeding, Verizon listed cable operator interests in video programming as one of several categories of information that should be eliminated from the online public inspection file. Verizon stated that such information is of no use or interest to consumers and, further, that few people access the public inspection file, given that it does not provide the kind of information typically sought by consumers. Verizon instead contended that the Commission can request this information, if needed, upon reasonable notice and time for production. No commenter in the Media Modernization proceeding argued in favor of retaining the cable operator interests in video programming recordkeeping requirement specifically or described the utility of such information in particular. UCC et al. argue for maintaining the online public inspection file as a whole but do not refer specifically to the cable operator

interests in video programming recordkeeping requirement.

Discussion

6. The Commission seeks comment on whether to eliminate or modify the cable operator interests in video programming recordkeeping rule. Specifically, as discussed below, the Commission seeks comment on whether there is any remaining purpose for this rule, other potential sources for this information, the burdens this requirement places on cable operators, and possible modifications to the rule.

7. The Commission notes that the cable operator interests in video programming recordkeeping requirement was adopted in order to assist in the enforcement of the Commission's cable channel occupancy limits. Given that those limits were reversed and remanded by the D.C. Circuit over eighteen years ago, should this requirement be eliminated? If not, what purpose does this rule serve today that would justify its retention?

8. The Commission seeks comment on whether and how this information regarding cable operator interests in video programming is used today, if at all. Do local franchising authorities, consumers, or other parties currently inspect the cable operator interests in video programming records in the online public inspection file? Are these records being utilized by local franchising authorities, consumers, or other parties to keep track of vertical integration? If so, for what purpose? The Commission notes that, as the recordkeeping requirement does not apply to other video programming distributors, the information in these records would only be useful for monitoring vertical integration in cable operators. Given the many video programming options from which consumers can choose today, have marketplace changes rendered this requirement less useful or relevant?

9. UCC *et al.,* assert generally that the online public inspection file database is used to research and analyze how the entities required to maintain such files are serving their communities and meeting their obligations under the Commission's rules. If evidence of a particular use exists, commenters are encouraged to cite specific examples of how the information is being used currently, or has been used recently, by any party for any related purpose. The Commission notes that, in the over 26 years since the requirement was adopted, it is aware of only one instance in which the rule has been invoked. The Commission is aware of only one complaint—which was subsequently withdrawn—alleging violation of the rule. In one other instance, the Commission discovered an apparent violation of the rule but only took action based on other public inspection file violations. Commenters should inform the Commission as to the utility of the rule in today's competitive media marketplace.

10. If the Commission were to eliminate the cable operator interest in video programming recordkeeping rule, the Commission seeks comment on whether the Commission or interested parties could access such information through other methods that would be more efficient or less burdensome for cable operators than compiling such information and placing it in a public inspection file. For example, in the past, the Commission has used information from various sources, such as cable company websites, published articles, and SNL Kagan, to identify affiliations between programming services and MVPDs for its Video Competition Reports. Would it be more cost effective for the Commission to undertake targeted information collections to acquire such information, if needed, as it does in the merger context? The Commission notes that it has collected information on the percentage of video programming channels attributed to cable operator merger applicants via information requests in the past. The Commission also seeks comment on whether and to what extent such information is redundant with or superfluous to information the Commission otherwise collects. For example, the Commission regularly seeks information regarding, and subsequently reports on, the state of vertical integration in the video programming marketplace as part of its report on competition, albeit at the MVPD industry level rather than focusing on individual cable operators. Can such information be found readily online? Is there a publicly available database for such information? If so, are such alternative sources accurate and current? Are there costs associated with accessing these alternative sources? And are these sources adequate substitutes for information provided directly by cable operators themselves?

11. The Commission also seeks comment on the regulatory burden for cable operators to file this information, including the amount of time and resources required to complete each filing. Notably, there is no standard form filed by cable operators pursuant to this rule, and the rule does not state how frequently cable operators should file or update their information, instead stating only that they must maintain records regarding the nature and extent of their interests in their file for a period of three years. How frequently are cable operators filing such information today? Is the information being provided and the filing frequency being adhered to consistent among different cable operators? Do the burdens and costs on cable operators outweigh the utility of the information? Do any burdens associated with this requirement place cable operators at a disadvantage vis-à-vis their video programming competitors?

12. If the Commission finds that the cable operator interests in video programming recordkeeping rule should be retained, the Commission seeks comment on whether modifications to the rule would be appropriate. If the Commission was to modify the rule, what changes should it make to reduce the burden on cable operators? For instance, should the Commission clarify how often cable operators need to update their information? Should the Commission retain part of rule that requires reporting of attributable interests but eliminate the part of the rule that requires reporting of carriage, given that channel lineup information is widely available elsewhere?

13. Finally, the Commission seeks information and data on the benefits and costs associated with possible elimination or modification of the cable operator interests in video programming recordkeeping rule. The Commission asks commenters supporting retention, modification, or elimination of the rule to explain the anticipated economic impact of any proposed action, including the impact on small and independent entities, and, where possible, to quantify benefits and costs of proposed actions and alternatives.

Procedural Matters

14. *Ex Parte Rules—Permit-But-Disclose.* This proceeding shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation

consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

15. *Filing Requirements—Comments and Replies.* Pursuant to sections 1.415 and 1.419 of the Commission's rules interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using ECFS. Commenting parties may file comments in response to this Notice in MB Docket No. 20–35; interested parties are not required to file duplicate copies in the additional dockets listed in the caption of this notice.

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing the ECFS: *http://apps.fcc.gov/ecfs/.*
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.
- Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St. SW, Room TW–A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of *before* entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW, Washington, DC 20554.

16. *Initial Regulatory Flexibility Act Analysis.* The Regulatory Flexibility Act of 1980, as amended (RFA), requires that a regulatory flexibility analysis be prepared for notice and comment rulemaking proceedings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

17. With respect to this Notice of Proposed Rulemaking, an Initial Regulatory Flexibility Analysis (IRFA) under the RFA is contained in the Appendix. Written public comments are requested on the IFRA and must be filed in accordance with the same filing deadlines as comments on this Notice of Proposed Rulemaking, with a distinct heading designating them as responses to the IRFA. In addition, a copy of this Notice of Proposed Rulemaking and the IRFA will be sent to the Chief Counsel for Advocacy of the SBA and will be published in the **Federal Register**.

18. *Paperwork Reduction Act.* This document seeks comment on whether the Commission should adopt new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens and pursuant to the Paperwork Reduction Act of 1995, Public Law 104–13, invites the general public and the Office of Management and Budget (OMB) to comment on these information collection requirements. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees.

19. *People with Disabilities.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

20. *Additional Information.* For additional information on this proceeding, please contact Chad Guo of the Media Bureau, Industry Analysis Division, *Chad.Guo@fcc.gov,* (202) 418–0652.

Initial Regulatory Flexibility Act Analysis

21. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this Initial Regulatory Flexibility Act Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in this *Notice of Proposed Rulemaking* (NPRM). The Commission requests written public comments on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments specified in the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the NPRM and IRFA (or summaries thereof) will be published in the **Federal Register**.

A. Need for, and Objectives of, the Proposed Rules

22. This NPRM seeks comment on whether to eliminate or modify the requirement that cable operators maintain records in their online public inspection file regarding the nature and extent of their attributable interests in all video programming services as well as information regarding their carriage of such vertically integrated video programming services on cable systems in which they have an attributable interest for a period of at least three years. An attributable interest is an ownership interest in, or relationship to, an entity that gives the interest holder a certain degree of influence or control over the entity as defined in the Commission's rules. Vertically integrated video programming is video programming carried by a cable system and produced by an entity in which the cable system's operator has an attributable interest. The rule's original

purpose was to aid in the enforcement of the Commission's channel occupancy limits, which have been reversed and remanded by the U.S. Court of Appeals for the D.C. Circuit. Eliminating or modifying this rule would reduce the burden of maintaining the public inspection file on cable operators.

B. Legal Basis

23. The proposed action is authorized under sections 1, 4(i), 4(j), 303(r), and 613 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 303(r), and 533.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

24. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rule revisions, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act (SBA). A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. Below, the Commission provides a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

25. *Cable Companies and Systems (Rate Regulation Standard).* The Commission has developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers nationwide. Industry data indicate that, of 4,200 cable operators nationwide, all but 9 are small under this size standard. In addition, under the Commission's rate regulation rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers. Industry data indicate that, of 4,200 systems nationwide, 3,900 have fewer than 15,000 subscribers, based on the same records. Thus, under this standard, the Commission estimates that most cable systems are small entities.

26. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' As of 2018, there were approximately 50,504,624 cable video subscribers in the United States. Accordingly, an operator serving fewer than 505,046 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Based on available data, the Commission finds that all but six incumbent cable operators are small entities under this size standard. The Commission notes that it neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million. Therefore the Commission is unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

27. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. . . . These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.'' The SBA size standard for this industry establishes as small, any company in this category which has annual receipts of $38.5 million or less. Census data for 2012 show that there were 367 firms that operated for that entire year. Of that number, 319 operated with annual receipts of less than $25 million a year. Thus, under this size standard, the majority of such businesses can be considered small entities.

28. *Motion Picture and Video Production.* These entities may be indirectly affected by the Commission's action. The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials.'' The Commission notes that establishments in this category may be engaged in various industries, including cable programming. The SBA has developed a small business size standard for this category, which is: Those having $32.5 million or less in annual receipts. Census data for 2012 show that there were 8,203 firms that that operated that year. Of that number, 8,075 had annual receipts of $24,999,999 or less. Thus, under this size standard, the majority of such businesses can be considered small entities.

29. *Motion Picture and Video Distribution.* The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and exhibitors.'' The Commission notes that establishments in this category may be engaged in various industries, including cable programming. The SBA has developed a small business size standard for this category, which is: those having $32.0 million or less in annual receipts. Census data for 2012 show that there were 307 firms that operated for that entire year. Of that number, 294 had annual receipts of $24,999,999 or less. Thus, under this size standard, the majority of such businesses can be considered small entities.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

30. The NPRM seeks comment on whether to eliminate or revise the recordkeeping requirement, in section 76.1710 of the Commission's rules, regarding cable operator interests in video programming. This rule requires cable operators maintain records in their online public inspection files regarding the nature and extent of their attributable interests in video programming services, as well as information regarding cable operators' carriage of such vertically integrated video programming services on cable systems in which they have an attributable interest. Elimination of these rules would reduce compliance requirements for cable operators. The NPRM also seeks comment on whether, if the rule is retained, it should be revised and, if so, how.

E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

31. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small

entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

32. The NPRM seeks comment on whether to eliminate or modify a current requirement that cable operators maintain records in their online public inspection file, specifically the cable operator interests in video programming recordkeeping requirement. Eliminating or modifying this obligation would reduce the overall public inspection file burden on cable operators. There could also be an impact on small independent video programmers to the extent any programmers relied on the public file in question for information that is not easily available elsewhere. The NPRM seeks comment on eliminating or modifying this public file requirement, including any comments that might oppose eliminating or modifying this requirement.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

33. None.

List of Subjects in 47 CFR Part 76

Cable Television, Reporting and recordkeeping requirements.

Federal Communications Commission.

Cecilia Sigmund,

Federal Register Liaison Officer.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 part 76 as follows:

PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

■ 1. The authority citation for part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

§ 76.504 [Amended]

■ 2. Amend § 76.504 by removing Note 2.

§ 76.1700 [Amended]

■ 3. Amend § 76.1700 by removing and reserving paragraph (a)(7).

§ 76.1710 [Removed and reserved]

■ 4. Remove and reserve § 76.1710.

[FR Doc. 2020–06631 Filed 4–1–20; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 20

[Docket No. FWS–HQ–MB–2019–0004; FF09M21200–201–FXMB1231099BPP0]

RIN 1018–BD89

Migratory Bird Hunting; Proposed Migratory Bird Hunting Regulations on Certain Federal Indian Reservations and Ceded Lands for the 2020–21 Season

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The U.S. Fish and Wildlife Service (hereinafter, Service or we) proposes special migratory bird hunting regulations for certain Tribes on Federal Indian reservations, off-reservation trust lands, and ceded lands for the 2020–21 migratory bird hunting season.

DATES: *Written Comments:* You must submit comments on the proposed regulations by May 4, 2020.

Information Collection Requirements: If you wish to comment on the information collection requirements in this proposed rule, please send your comments and suggestions on this information collection by June 1, 2020 to: Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, MS: PRB/PERMA (JAO/1N), Falls Church, VA 22041–3803 (mail); or *Info_Coll@fws.gov* (email).

ADDRESSES: *Written Comments:* You may submit comments on the proposals by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments on Docket No. FWS–HQ–MB–2019–0004.
- *U.S. mail or hand delivery:* Public Comments Processing, Attn: FWS–HQ–MB–2019–0004, U.S. Fish and Wildlife Service; MS: PRB/PERMA (JAO/1N); 5275 Leesburg Pike; Falls Church, VA 22041–3803.

We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see Public Comments, below, for more information).

Information Collection Requirements: Send your comments and suggestions on the information collection requirements to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, MS: PRB/PERMA (JAO/1N), Falls Church, VA 22041–3803 (mail); or *Info_Coll@fws.gov* (email). Please reference OMB Control Number 1018–0171 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: Jerome Ford, U.S. Fish and Wildlife Service, Department of the Interior, (202) 208–1050.

SUPPLEMENTARY INFORMATION:

Process for the Annual Migratory Game Bird Hunting Regulations

As part of the Department of the Interior's retrospective regulatory review, we developed a schedule for migratory game bird hunting regulations that is more efficient and provides hunting season dates much earlier than was possible under the old process. Under the new process, we develop proposed hunting season frameworks for a given year in the fall of the prior year. We then finalize those frameworks a few months later, thereby enabling the State agencies to select and publish their season dates in early summer. We provided a detailed overview of the new process in the August 3, 2017, **Federal Register** (82 FR 36308).

Special Migratory Bird Hunting Regulations for Indian Tribes

We developed the guidelines for establishing special migratory bird hunting regulations for Indian Tribes in response to tribal requests for recognition of their reserved hunting rights and, for some Tribes, recognition of their authority to regulate hunting by both tribal and nontribal hunters on their reservations. The guidelines include possibilities for:

(1) On-reservation hunting by both tribal and nontribal hunters, with hunting by nontribal hunters on some reservations to take place within Federal frameworks but on dates different from those selected by the surrounding State(s);

(2) On-reservation hunting by tribal members only, outside of the usual Federal frameworks for season dates and length, and for daily bag and possession limits; and

(3) Off-reservation hunting by tribal members on ceded lands, outside of usual framework dates and season length, with some added flexibility in daily bag and possession limits.

In all cases, the regulations established under the guidelines must

be consistent with the March 10 to September 1 closed season mandated by the 1916 Convention between the United States and Great Britain (for Canada) for the Protection of Migratory Birds (Treaty). The guidelines apply to those Tribes having recognized reserved hunting rights on Federal Indian reservations (including off-reservation trust lands) and on ceded lands. They also apply to establishing migratory bird hunting regulations for nontribal hunters on all lands within the exterior boundaries of reservations where Tribes have full wildlife management authority over such hunting or where the Tribes and affected States otherwise have reached agreement over hunting by nontribal hunters on lands owned by non-Indians within the reservation.

Tribes usually have the authority to regulate migratory bird hunting by nonmembers on Indian-owned reservation lands, subject to Service approval. The question of jurisdiction is more complex on reservations that include lands owned by non-Indians, especially when the surrounding States have established or intend to establish regulations governing hunting by non-Indians on these lands. In such cases, we encourage the Tribes and States to reach agreement on regulations that would apply throughout the reservations. When appropriate, we will consult with a Tribe and State with the aim of facilitating an accord. We also will consult jointly with tribal and State officials in the affected States where Tribes wish to establish special hunting regulations for tribal members on ceded lands. Because of past questions regarding interpretation of what events trigger the consultation process, as well as who initiates it, we provide the following clarification.

We routinely provide copies of **Federal Register** publications pertaining to migratory bird management to all State Directors, Tribes, and other interested parties. It is the responsibility of the States, Tribes, and others to notify us of any concern regarding any feature(s) of any regulations. When we receive such notification, we will initiate consultation.

Our guidelines provide for the continued harvest of waterfowl and other migratory game birds by tribal members on reservations where such harvest has been a customary practice. We do not oppose this harvest, provided it does not take place during the closed season defined by the Treaty, and does not adversely affect the status of the migratory bird resource. Before developing the guidelines, we reviewed available information on the current status of migratory bird populations, reviewed the current status of migratory bird hunting on Federal Indian reservations, and evaluated the potential impact of such guidelines on migratory birds. We concluded that the impact of migratory bird harvest by tribal members hunting on their reservations is minimal.

One area of interest in Indian migratory bird hunting regulations relates to hunting seasons for nontribal hunters on dates that are within Federal frameworks, but which are different from those established by the State(s) where the reservation is located. A large influx of nontribal hunters onto a reservation at a time when the season is closed in the surrounding State(s) could result in adverse population impacts on one or more migratory bird species. The guidelines make this unlikely, and we may modify regulations or establish experimental special hunts, after evaluation of information obtained by the Tribes.

We conclude the guidelines provide appropriate opportunity to accommodate the reserved hunting rights and management authority of Indian Tribes while ensuring that the migratory bird resource receives necessary protection. The conservation of this important international resource is paramount. Further, the guidelines should not be viewed as inflexible. In this regard, we note that they have been employed successfully since 1985. We conclude they have been tested adequately, and, therefore, we made them final beginning with the 1988–89 hunting season (53 FR 31612, August 18, 1988). We should stress here, however, that use of the guidelines is not mandatory, and no action is required if a Tribe wishes to observe the hunting regulations established by the State(s) in which the reservation is located.

Regulations Schedule for 2020

On October 15, 2019, we published a proposal to amend title 50 of the Code of Federal Regulations (CFR) at part 20 (84 FR 55120). The proposal provided a background and overview of the migratory bird hunting regulations process, and addressed the establishment of seasons, limits, and other regulations for hunting migratory game birds under §§ 20.101 through 20.107, 20.109, and 20.110 of subpart K. This document is the second in a series of proposed and final rules for migratory game bird hunting regulations. Major steps in the 2020–21 regulatory cycle relating to open public meetings and **Federal Register** notifications were illustrated in the diagram at the end of the October 15, 2019, proposed rule. For this regulatory cycle, we have combined elements of the document that is described in the diagram as Supplemental Proposals with the document that is described as Proposed Season Frameworks.

On October 8–9, 2019, we held open meetings with the Flyway Council Consultants, at which the participants reviewed information on the current status of migratory game birds and developed recommendations for the 2020–21 regulations for these species.

On March 19, 2020, we published in the **Federal Register** (85 FR 15870) the proposed frameworks for the 2020–21 season migratory bird hunting regulations.

Population Status and Harvest

Each year we publish various species status reports that provide detailed information on the status and harvest of migratory game birds, including information on the methodologies and results. These reports are available at the address indicated under **FOR FURTHER INFORMATION CONTACT** or from our website at *https://www.fws.gov/birds/surveys-and-data/reports-and-publications/population-status.php.*

We used the following annual reports published in August 2019 in the development of proposed frameworks for the migratory bird hunting regulations: Adaptive Harvest Management, 2020 Hunting Season; American Woodcock Population Status, 2019; Band-tailed Pigeon Population Status, 2019; Migratory Bird Hunting Activity and Harvest During the 2017–18 and 2018–19 Hunting Seasons; Mourning Dove Population Status, 2019; Status and Harvests of Sandhill Cranes, Mid-continent, Rocky Mountain, Lower Colorado River Valley and Eastern Populations, 2019; and Waterfowl Population Status, 2019.

Our long-term objectives continue to include providing opportunities to harvest portions of certain migratory game bird populations and to limit harvests to levels compatible with each population's ability to maintain healthy, viable numbers. Having taken into account the zones of temperature and the distribution, abundance, economic value, breeding habits, and times and lines of flight of migratory birds, we believe that the proposed hunting seasons provided for herein are compatible with the current status of migratory bird populations and long-term population goals. Additionally, we are obligated to, and do, give serious consideration to all information we receive during the public comment period.

Hunting Season Proposals From Indian Tribes and Organizations

For the 2020–21 hunting season, we received requests from 26 Tribes and Indian organizations. In this proposed rule, we respond to these 26 requests and also evaluate anticipated requests for 6 Tribes from whom we usually hear but from whom we have not yet received proposals. We actively solicit regulatory proposals from other tribal groups that are interested in working cooperatively for the benefit of waterfowl and other migratory game birds. We encourage Tribes to work with us to develop agreements for management of migratory bird resources on tribal lands.

The proposed frameworks for flyway regulations were published in the **Federal Register** on March 19, 2020 (85 FR 15870). As previously discussed, no action is required by Tribes wishing to observe migratory bird hunting regulations established by the State(s) where they are located. The proposed regulations for the 32 Tribes that meet the established criteria or have recently proposed seasons are shown below.

(a) Confederated Salish and Kootenai Tribes, Flathead Indian Reservation, Pablo, Montana (Tribal and Nontribal Hunters)

For the past several years, the Confederated Salish and Kootenai Tribes and the State of Montana have entered into cooperative agreements for the regulation of hunting on the Flathead Indian Reservation. The State and the Tribes are currently operating under a cooperative agreement signed in 1990, which addresses fishing and hunting management and regulation issues of mutual concern. This agreement enables all hunters to utilize waterfowl hunting opportunities on the reservation.

As in the past, tribal regulations for nontribal hunters would be at least as restrictive as those established for the Pacific Flyway portion of Montana. Goose, duck, and coot season dates would also be at least as restrictive as those established for the Pacific Flyway portion of Montana. Shooting hours for waterfowl hunting on the Flathead Reservation are sunrise to sunset. Steel shot or other federally approved nontoxic shots are the only legal shotgun loads on the reservation for waterfowl or other game birds.

For tribal members, the Tribe proposes outside frameworks for ducks and geese of September 1, 2020, through March 9, 2021. Daily bag and possession limits were not proposed for tribal members.

The requested season dates and bag limits are similar to past regulations. Harvest levels are not expected to change significantly. Standardized check station data from the 1993–94 and 1994–95 hunting seasons indicated no significant changes in harvest levels and that the large majority of the harvest is by nontribal hunters.

We propose to approve the Tribes' request for special migratory bird regulations for the 2020–21 hunting season.

(b) Fond du Lac Band of Lake Superior Chippewa Indians, Cloquet, Minnesota (Tribal Members Only)

Since 1996, the Service and the Fond du Lac Band of Lake Superior Chippewa Indians have cooperated to establish special migratory bird hunting regulations for tribal members. The Fond du Lac's proposal covers land set apart for the band under the Treaties of 1837 and 1854 in northeastern and east-central Minnesota and the Band's Reservation near Duluth.

The band's proposal for 2020–21 is essentially the same as that approved last year. The proposed 2020–21 waterfowl hunting season regulations for Fond du Lac are as follows:

Ducks

A. 1854 and 1837 Ceded Territories:
Season Dates: Begin September 1 and end November 30, 2020.
Daily Bag Limit: 18 ducks, including no more than 12 mallards (only 3 of which may be hens), 9 black ducks, 9 scaup, 9 wood ducks, 9 redheads, 9 pintails, and 9 canvasbacks.

B. Reservation:
Season Dates: Begin September 1 and end November 30, 2020.
Daily Bag Limit: 12 ducks, including no more than 8 mallards (only 2 of which may be hens), 6 black ducks, 6 scaup, 6 redheads, 6 pintails, 6 wood ducks, and 6 canvasbacks.

Mergansers

A. 1854 and 1837 Ceded Territories:
Season Dates: Begin September 1 and end November 30, 2020.
Daily Bag Limit: 15 mergansers, including no more than 6 hooded mergansers.

B. Reservation:
Season Dates: Begin September 1 and end November 30, 2020.
Daily Bag Limit: 10 mergansers, including no more than 4 hooded mergansers.

Canada Geese: All Areas

Season Dates: Begin September 1 and end November 30, 2020.
Daily Bag Limit: 20 geese.

Sandhill Cranes: 1854 and 1837 Ceded Territories Only

Season Dates: Begin September 1 and end November 30, 2020.
Daily Bag Limit: Two sandhill cranes. A crane carcass tag is required prior to hunting.

Tundra and Trumpeter Swans: Reservation Only

Season Dates: Begin September 1 and end November 30, 2020.
Daily Bag Limit: Two swans. Swan carcass tags are required prior to hunting.

Coots and Common Moorhens (Common Gallinules): All Areas

Season Dates: Begin September 1 and end November 30, 2020.
Daily Bag Limit: 20 coots and common moorhens, singly or in the aggregate.

Sora and Virginia Rails: All Areas

Season Dates: Begin September 1 and end November 30, 2020.
Daily Bag Limit: 25 sora and Virginia rails, singly or in the aggregate.

Common Snipe: All Areas

Season Dates: Begin September 1 and end November 30, 2020.
Daily Bag Limit: Eight common snipe.

Woodcock: All Areas

Season Dates: Begin September 1 and end November 30, 2020.
Daily Bag Limit: Three woodcock.

Mourning Dove: All Areas

Season Dates: Begin September 1 and end November 30, 2020.
Daily Bag Limit: 30 mourning doves.

The following general conditions apply:

1. While hunting waterfowl, a tribal member must carry on his/her person a valid Ceded Territory License.
2. Shooting hours for migratory birds are one-half hour before sunrise to one-half hour after sunset.
3. Except as otherwise noted, tribal members will be required to comply with tribal codes that will be no less restrictive than the provisions of Chapter 10 of the Model Off-Reservation Code. Except as modified by the Service rules adopted in response to this proposal, these amended regulations parallel Federal requirements in 50 CFR part 20 as to hunting methods, transportation, sale, exportation, and other conditions generally applicable to migratory bird hunting.
4. Band members in each zone will comply with State regulations providing for closed and restricted waterfowl hunting areas.

5. There are no possession limits for migratory birds. For purposes of enforcing bag limits, all migratory birds in the possession or custody of band members on ceded lands will be considered to have been taken on those lands unless tagged by a tribal or State conservation warden as having been taken on-reservation. All migratory birds that fall on reservation lands will not count as part of any off-reservation bag or possession limit.

The band anticipates harvest will be fewer than 500 ducks and geese, and fewer than 10 sandhill cranes.

We propose to approve the request for special migratory bird hunting regulations for the Fond du Lac Band of Lake Superior Chippewa Indians.

(c) Grand Traverse Band of Ottawa and Chippewa Indians, Suttons Bay, Michigan (Tribal Members Only)

In the 1995–96 migratory bird seasons, the Grand Traverse Band of Ottawa and Chippewa Indians and the Service first cooperated to establish special regulations for waterfowl. The Grand Traverse Band is a self-governing, federally recognized Tribe located on the west arm of Grand Traverse Bay in Leelanau County, Michigan. The Grand Traverse Band is a signatory Tribe of the Treaty of 1836. We have approved special regulations for tribal members of the 1836 treaty's signatory Tribes on ceded lands in Michigan since the 1986–87 hunting season.

For the 2020–21 season, the Tribe requests that the tribal member duck season run from September 1, 2020, through January 20, 2021. A daily bag limit of 35 would include no more than 8 pintail, 4 canvasback, 5 hooded merganser, 8 black ducks, 10 wood ducks, 8 redheads, and 20 mallards (only 10 of which may be hens).

For Canada and snow geese, the Tribe proposes a September 1, 2020, through February 15, 2021, season. For white-fronted geese and brant, the Tribe proposes a September 20 through December 30, 2020, season. The daily bag limit for Canada and snow geese would be 15, and the daily bag limit for white-fronted geese, including brant, would be 5 birds. We further note that, based on available data (of major goose migration routes), it is unlikely that any Canada geese from the Southern James Bay Population will be harvested by the Tribe.

For woodcock, the Tribe proposes a September 1 through November 14, 2020, season. The daily bag limit will not exceed five birds. For mourning doves, snipe, and rails, the Tribe proposes a September 1 through November 14, 2020, season. The daily bag limit would be 25 mourning dove, 10 snipe, and 10 rail.

For sandhill crane, the Tribe proposes a September 1 through November 14, 2020, season. The daily bag limit would be 2 birds and a season limit of 10 birds.

For snipe and rails, the Tribe proposes a September 1 through November 14, 2020, season. The daily bag limit would be 10 birds per species.

Shooting hours would be from one-half hour before sunrise to one-half hour after sunset. All other Federal regulations contained in 50 CFR part 20 would apply. The Tribe proposes to monitor harvest closely through game bag checks, patrols, and mail surveys. Harvest surveys from the 2013–14 hunting season indicated that approximately 30 tribal hunters harvested an estimated 100 ducks and 45 Canada geese.

We propose to approve the Grand Traverse Band of Ottawa and Chippewa Indians 2020–21 special migratory bird hunting proposal.

(d) Great Lakes Indian Fish and Wildlife Commission, Odanah, Wisconsin (Tribal Members Only)

Since 1985, various bands of the Lake Superior Tribe of Chippewa Indians have exercised judicially recognized, off-reservation hunting rights for migratory birds in Wisconsin. The specific regulations were established by the Service in consultation with the Wisconsin Department of Natural Resources and the Great Lakes Indian Fish and Wildlife Commission (GLIFWC), an intertribal agency exercising delegated natural resource management and regulatory authority from its member Tribes in portions of Wisconsin, Michigan, and Minnesota. Beginning in 1986, a Tribal season on ceded lands in the western portion of the Michigan Upper Peninsula was developed in coordination with the Michigan Department of Natural Resources. We have approved regulations for Tribal members in both Michigan and Wisconsin since the 1986–87 hunting season. In 1987, GLIFWC requested, and we approved, regulations to permit Tribal members to hunt on ceded lands in Minnesota, as well as in Michigan and Wisconsin. The States of Michigan and Wisconsin originally concurred with the regulations, although both Wisconsin and Michigan have raised various concerns over the years. Minnesota did not concur with the original regulations, stressing that the State would not recognize Chippewa Indian hunting rights in Minnesota's treaty area until a court with jurisdiction over the State acknowledges and defines the extent of these rights. In 1999, the U.S. Supreme Court upheld the existence of the tribes' treaty reserved rights in *Minnesota* v. *Mille Lacs Band,* 199 S. Ct. 1187 (1999).

We acknowledge all of the States' concerns, but point out that the U.S. Government has recognized the Indian treaty reserved rights, and that acceptable hunting regulations have been successfully implemented in Minnesota, Michigan, and Wisconsin. Consequently, in view of the above, we have approved regulations since the 1987–88 hunting season on ceded lands in all three States. In fact, this recognition of the principle of treaty reserved rights for band members to hunt and fish was pivotal in our decision to approve a 1991–92 season for the 1836 ceded area in Michigan. Since then, in the 2007 Consent Decree, the 1836 Treaty Tribes and the Michigan Department of Natural Resources and Environment established court-approved regulations pertaining to off-reservation hunting rights for migratory birds.

For 2020, GLIFWC proposes off-reservation special migratory bird hunting regulations on behalf of the member Tribes of the Voigt Intertribal Task Force of GLIFWC (for the 1837 and 1842 Treaty areas in Wisconsin and Michigan), the Mille Lacs Band of Ojibwe and the six Wisconsin Bands (for the 1837 Treaty area in Minnesota), and the Bay Mills Indian Community (for the 1836 Treaty area in Michigan). Member Tribes of the Task Force are as follows:

Wisconsin	Minnesota	Michigan
Bad River Band of the Lake Superior Tribe of Chippewa Indians.	Mille Lacs Band of Chippewa Indians	Lac Vieux Desert Band of Chippewa Indians
Lac Courte Oreilles Band of Lake Superior Chippewa Indians.	Fond du Lac Band of Lake Superior Chippewa Indians.	Keweenaw Bay Indian Community.
Lac du Flambeau Band of Lake Superior Chippewa Indians..		

Wisconsin	Minnesota	Michigan
Red Cliff Band of Lake Superior Chippewa Indians		
St. Croix Chippewa Indians of Wisconsin		
Sokaogon Chippewa Community (Mole Lake Band)		

This year, GLIFWC proposes to continue certain experimental regulatory changes approved during the 2017–18 season but first implemented in 2018 (83 FR 5037, February 5, 2018). First, in the 1837 and 1842 Treaty Areas, GLIFWC allows up to 50 Tribal hunters to use electronic calls for any open season under a limited and experimental design under a special Tribal permit. In addition to obtaining a special permit, the Tribal hunter is required to complete and submit a hunt diary for each hunt where electronic calls were used. Second, GLIFWC allows the take of migratory birds (primarily waterfowl) with the use of hand-held nets, hand-held snares, and/or capture of birds by hand in the 1837 and 1842 Treaty Areas. This use of nets, snares, or hand-capture includes the take of birds at night. Both the use of electronic calls and the use of nets, snares, or hand-capture are considered 3-year experimental seasons. We propose to approve the continuation of all these experimental proposals again this year. For more specific discussion on these regulatory changes, we refer the reader to the August 27, 2017, and February 5, 2018, rules (82 FR 39716 and 83 FR 5037).

Under GLIFWC's proposed 2020–21 regulations, GLIFWC expects total ceded territory harvest to be approximately 2,000 to 3,000 ducks, 400 to 600 geese, 50 sandhill cranes, and 30 swans, which is roughly similar to anticipated levels in the previous year.

Recent GLIFWC harvest surveys (1996–98, 2001, 2004, 2007–08, 2011, 2012, and 2015) indicate that tribal off-reservation waterfowl harvest has averaged fewer than 1,100 ducks and 250 geese annually. In the latest survey year for which we have specific results (2018), an estimated 197 hunters hunted a total of 1,480 days and harvested 1,980 ducks (1.4 ducks per day) and 495 geese. The greatest number of ducks reported harvested in a single day was 12, while the highest number of geese reported taken on a single outing was 17. Mallards, wood ducks, and blue-winged teal composed about the greatest percentage of the duck harvest. Thirty-one sandhill cranes were reported harvested in 2018. Nine trumpeter swans were harvested in the 2019–20 season. The Tribe is proposing the threshold level of trumpeter swan harvest which would trigger emergency closure of the swan season from 10 to 20. About 92 percent of the estimated hunting days took place in Wisconsin, with the remainder occurring in Michigan. As in past years, most hunting took place in or near counties with reservations.

The proposed 2020–21 waterfowl hunting season regulations apply to all treaty areas (except where noted) for GLIFWC as follows:

Ducks

Season Dates: Begin September 1 and end December 31, 2020.

Daily Bag Limit: 50 ducks in the 1837 and 1842 Treaty Area; 30 ducks in the 1836 Treaty Area.

Mergansers

Season Dates: Begin September 1 and end December 31, 2020.

Daily Bag Limit: 10 mergansers.

Geese

Season Dates: Begin September 1 and end December 31, 2020. In addition, any portion of the ceded territory that is open to State-licensed hunters for goose hunting outside of these dates will also be open concurrently for tribal members.

Daily Bag Limit: 20 geese in aggregate.

Other Migratory Birds

A. Coots and Common Moorhens (Common Gallinules):

Season Dates: Begin September 1 and end December 31, 2020.

Daily Bag Limit: 20 coots and common moorhens (common gallinules), singly or in the aggregate.

B. Sora and Virginia Rails:

Season Dates: Begin September 1 and end December 31, 2020.

Daily Bag and Possession Limits: 20, singly, or in the aggregate, 25.

C. Common Snipe:

Season Dates: Begin September 1 and end December 31, 2020.

Daily Bag Limit: 16 common snipe.

D. Woodcock:

Season Dates: Begin September 4 and end December 31, 2020.

Daily Bag Limit: 10 woodcock.

E. Mourning Dove: 1837 and 1842 Ceded Territories only.

Season Dates: Begin September 1 and end November 29, 2020.

Daily Bag Limit: 15 mourning doves.

F. Sandhill Cranes:

Season Dates: Begin September 1 and end December 31, 2020.

Daily Bag Limit: 5 cranes and no seasonal bag limit in the 1837 and 1842 Treaty areas; 3 crane and no seasonal bag limit in the 1836 Treaty area.

G. Swans: 1837 and 1842 Ceded Territories only.

Season Dates: Begin September 1 and end December 31, 2020.

Daily Bag Limit: 5 swans. All harvested swans must be registered by presenting the fully-feathered carcass to a tribal registration station or GLIFWC warden. If the total number of trumpeter swans harvested reaches 20, the swan season will be closed by emergency tribal rule.

General Conditions

A. All tribal members will be required to obtain a valid tribal waterfowl hunting permit.

B. Except as otherwise noted, tribal members will be required to comply with tribal codes that will be no less restrictive than the model ceded territory conservation codes approved by Federal courts in the *Lac Courte Oreilles* v. *State of Wisconsin (Voigt)* and *Mille Lacs Band* v. *State of Minnesota* cases. Chapter 10 in each of these model codes regulates ceded territory migratory bird hunting. Both versions of Chapter 10 parallel Federal requirements as to hunting methods, transportation, sale, exportation, and other conditions generally applicable to migratory bird hunting. They also automatically incorporate by reference the Federal migratory bird regulations adopted in response to this proposal.

C. Particular regulations of note include:

1. Nontoxic shot will be required for all waterfowl hunting by tribal members.

2. Tribal members in each zone will comply with tribal regulations providing for closed and restricted waterfowl hunting areas. These regulations generally incorporate the same restrictions contained in parallel State regulations.

3. There are no possession limits, with the exception of 2 swans (in the aggregate) and 25 rails (in the aggregate). For purposes of enforcing bag limits, all migratory birds in the possession and custody of tribal members on ceded lands will be considered to have been taken on those lands unless tagged by a

tribal or State conservation warden as taken on reservation lands. All migratory birds that fall on reservation lands will not count as part of any off-reservation bag or possession limit.

4. The baiting restrictions included in the respective section 10.05(2)(h) of the model ceded territory conservation codes will be amended to include language which parallels that in place for nontribal members as published at 64 FR 29799, June 3, 1999.

5. There are no shell limit restrictions.

6. Hunting hours are from 30 minutes before sunrise to 30 minutes after sunset, except that, within the 1837 and 1842 Ceded Territories, hunters may use non-mechanical nets or snares that are operated by hand to take those birds subject to an open hunting season at any time (see #8 below for further information). Hunters shall also be permitted to capture, without the aid of other devices (*i.e.,* by hand) and immediately kill birds subject to an open season, regardless of the time of day.

7. An experimental application of electronic calls will be implemented in the 1837 and 1842 Ceded Territories. Up to 50 tribal hunters will be allowed to use electronic calls. Individuals using these devices will be required to obtain a special permit; they will be required to complete a hunt diary for each hunt where electronic calls are used; and they will be required to submit the hunt diary to the Commission within 2 weeks of the end of the season in order to be eligible to obtain a permit for the following year. Required information will include the date, time, and location of the hunt; number of hunters; the number of each species harvested per hunting event; if other hunters were in the area, any interactions with other hunters; and other information deemed appropriate. Diary results will be summarized and documented in a Commission report, which will be submitted to the Service. Barring unforeseen results, this experimental application would be replicated for 3 years (through the 2020–21 season), after which a full evaluation would be completed.

8. Within the 1837 and 1842 Ceded Territories, tribal members will be allowed to use non-mechanical, hand-operated nets (*i.e.,* throw/cast nets or hand-held nets typically used to land fish) and hand-operated snares, and may chase and capture migratory birds without the aid of hunting devices (*i.e.,* by hand). At this time, non-attended nets or snares shall not be authorized under this regulation. Tribal members using nets or snares to take migratory birds, or taking birds by hand, will be required to obtain a special permit; they will be required to complete a hunt diary for each hunt where these methods are used; and they will be required to submit the hunt diary to the Commission within 2 weeks of the end of the season in order to be eligible to obtain a permit to net migratory birds for the following year. Required information will include the date, time, and location of the hunt; number of hunters; the number of each species harvested per hunting event; and other information deemed appropriate. Diary results will be summarized and documented in a Commission report, which will be submitted to the Service. Barring unforeseen results, this experimental application would be replicated for 3 years (through the 2020–21 season), after which a full evaluation would be completed.

We propose to approve the above GLIFWC regulations for the 2020–21 hunting season.

(e) Jicarilla Apache Tribe, Jicarilla Indian Reservation, Dulce, New Mexico (Tribal Members and Nontribal Hunters)

The Jicarilla Apache Tribe has had special migratory bird hunting regulations for tribal members and nonmembers since the 1986–87 hunting season. The Tribe owns all lands on the reservation and has recognized full wildlife management authority. In general, the proposed seasons would be more conservative than allowed by the Federal frameworks of last season and by States in the Pacific Flyway.

The Tribe proposes a 2020–21 waterfowl and Canada goose season beginning October 3, 2020, and a closing date of November 30, 2020. Daily bag and possession limits for waterfowl would be the same as Pacific Flyway States. The Tribe proposes a daily bag limit for Canada geese of two. Other regulations specific to the Pacific Flyway guidelines for New Mexico would be in effect.

During the Jicarilla Game and Fish Department's 2017–18 season, estimated duck harvest was 82. The species composition included mainly mallards, gadwall, and bufflehead. The estimated harvest of geese was six birds.

The proposed regulations are essentially the same as were established last year. The Tribe anticipates the maximum 2020–21 waterfowl harvest would be around 200 ducks and 20 geese.

We propose to approve the Tribe's requested 2020–21 hunting seasons.

(f) Kalispel Tribe, Kalispel Reservation, Usk, Washington (Tribal Members and Nontribal Hunters)

The Kalispel Reservation was established by Executive Order in 1914, and currently comprises approximately 4,600 acres. The Tribe owns all Reservation land and has full management authority. The Kalispel Tribe has a fully developed wildlife program with hunting and fishing codes. The Tribe enjoys excellent wildlife management relations with the State. The Tribe and the State have an operational memorandum of understanding with emphasis on fisheries but also for wildlife.

We have yet to hear from the Kalispel Tribe. The nontribal member seasons described below would pertain to a 176-acre waterfowl management unit and 800 acres of reservation land with a guide for waterfowl hunting. The Tribe is utilizing this opportunity to rehabilitate an area that needs protection because of past land use practices, as well as to provide additional waterfowl hunting in the area. Beginning in 1996, the requested regulations also included a proposal for Kalispel-member-only migratory bird hunting on Kalispel-ceded lands within Washington, Montana, and Idaho.

The Kalispel Tribe usually proposes tribal and nontribal member waterfowl seasons. The Tribe usually requests that both duck and goose seasons open at the earliest possible date and close on the latest date under Federal frameworks.

For nontribal hunters on Tribally managed lands, the Tribe usually requests the seasons open at the earliest possible date and remain open, for the maximum amount of open days. The Tribe usually requests a season for ducks run September 21–22 and September 28–29, 2020, and from October 1, 2020, to January 8, 2021. In that period, nontribal hunters would be allowed to hunt approximately 107 days. Hunters should obtain further information on specific hunt days from the Kalispel Tribe.

For nontribal hunters on Tribally managed lands, the Tribe also usually requests a season for geese run September 21–22 and September 28–29, 2020, and from October 1, 2020, to January 8, 2021. Total number of days should not exceed 107. Nontribal hunters should obtain further information on specific hunt days from the Tribe. Daily bag and possession limits would be the same as those for the State of Washington.

The Tribe reports past nontribal harvest of 1.5 ducks per day. Under the proposal, the Tribe expects harvest to be

similar to last year, that is, fewer than 100 geese and 200 ducks.

All other State and Federal regulations contained in 50 CFR part 20, such as use of nontoxic shot and possession of a signed migratory bird hunting and conservation stamp, would be required.

For tribal members on Kalispel-ceded lands, the Kalispel Tribe usually proposes season dates for ducks of October 1, 2020, through January 31, 2021, and for geese of September 10, 2020, through January 31, 2021. Daily bag and possession limits would parallel those in the Federal regulations contained in 50 CFR part 20.

The Tribe reports that there was no tribal harvest. Under the proposal, the Tribe expects harvest to be fewer than 200 birds for the season with fewer than 100 geese. Tribal members would be required to possess a signed Federal migratory bird stamp and a tribal ceded lands permit.

We propose to approve the Kalispel Tribe regulations, upon receipt of their proposal and if these dates conform to Federal flyway frameworks for the Pacific Flyway.

(g) Klamath Tribe, Chiloquin, Oregon (Tribal Members Only)

The Klamath Tribe currently has no reservation, per se. However, the Klamath Tribe has reserved hunting, fishing, and gathering rights within its former reservation boundary. This area of former reservation, granted to the Klamaths by the Treaty of 1864, is over 1 million acres. Tribal natural resource management authority is derived from the Treaty of 1864, and carried out cooperatively under the judicially enforced Consent Decree of 1981. The parties to this Consent Decree are the Federal Government, the State of Oregon, and the Klamath Tribe. The Klamath Indian Game Commission sets the seasons. The tribal biological staff and tribal regulatory enforcement officers monitor tribal harvest by frequent bag checks and hunter interviews.

For the 2020–21 seasons, the Tribe requests proposed season dates of October 5, 2020, through January 31, 2021. Daily bag limits would be 9 for ducks, 9 for geese, and 9 for coot, with possession limits twice the daily bag limit. Shooting hours would be one-half hour before sunrise to one-half hour after sunset. Steel shot is required.

Based on the number of birds produced in the Klamath Basin, this year's harvest would be similar to last year's. Information on tribal harvest suggests that more than 70 percent of the annual goose harvest is local birds produced in the Klamath Basin.

We propose to approve those 2020–21 special migratory bird hunting regulations.

(h) Leech Lake Band of Ojibwe, Cass Lake, Minnesota (Tribal Members Only)

The Leech Lake Band of Ojibwe is a federally recognized Tribe located in Cass Lake, Minnesota. The reservation employs conservation officers to enforce conservation regulations. The Service and the Tribe have cooperatively established migratory bird hunting regulations since 2000.

For the 2020–21 season, the Tribe requests a duck season starting on September 12 and ending December 31, 2020, and a goose season to run from September 12 through December 31, 2020. Daily bag limits for ducks would be 10, including no more than 5 pintail, 5 canvasback, and 5 black ducks. Daily bag limits for geese would be 10. Possession limits would be twice the daily bag limit. Shooting hours are one-half hour before sunrise to one-half hour after sunset.

The annual harvest by tribal members on the Leech Lake Reservation is estimated at 250 to 500 birds.

We propose to approve the Leech Lake Band of Ojibwe's requested 2020–21 special migratory bird hunting season.

(i) Little River Band of Ottawa Indians, Manistee, Michigan (Tribal Members Only)

The Little River Band of Ottawa Indians (LRBOI) is a self-governing, federally recognized Tribe located in Manistee, Michigan, and a signatory Tribe of the Treaty of 1836. We have approved special regulations for tribal members of the 1836 treaty's signatory Tribes on ceded lands in Michigan since the 1986–87 hunting season. Ceded lands are located in Lake, Mason, Manistee, and Wexford Counties. The Band proposes regulations to govern the hunting of migratory birds by Tribal members within the 1836 Ceded Territory as well as on the Band's Reservation.

LRBOI proposes a duck and merganser season from September 1, 2020, through January 31, 2021. A daily bag limit of 12 ducks would include no more than 2 pintail, 2 canvasback, 3 black ducks, 3 wood ducks, 3 redheads, 6 mallards (only 2 of which may be a hen), 1 bufflehead, and 1 hooded merganser. Possession limits would be twice the daily bag limit.

For coots and gallinules, the Tribe proposes a September 14, 2020, through January 31, 2021, season. Daily bag limits would be five coot and five gallinule.

For white-fronted geese, ross geese, snow geese, and brant, the Tribe proposes a September 7 through December 9, 2020, season. Daily bag limits would be five geese.

For Canada geese only, the Tribe proposes a September 1, 2020, through January 31, 2021, season with a daily bag limit of five. The possession limit would be twice the daily bag limit.

For snipe, woodcock, rails, and mourning doves, the Tribe proposes a September 1 to November 14, 2020, season. The daily bag limit would be 10 common snipe, 5 woodcock, 10 rails, and 10 mourning doves. Possession limits for all species would be twice the daily bag limit.

For sandhill crane, the Tribe proposes a September 1, through December 31, 2020, season with a daily bag limit of five. The possession limit would be twice the daily bag limit.

The Tribe monitors harvest through mail surveys. General conditions are as follows:

A. All tribal members will be required to obtain a valid tribal resource card and 2020–21 hunting license.

B. Except as modified by the Service rules adopted in response to this proposal, these amended regulations parallel all Federal regulations contained in 50 CFR part 20. Shooting hours will be from one-half hour before sunrise to sunset.

C. Particular regulations of note include:

(1) Nontoxic shot will be required for all waterfowl hunting by tribal members.

(2) Tribal members in each zone will comply with tribal regulations providing for closed and restricted waterfowl hunting areas. These regulations generally incorporate the same restrictions contained in parallel State regulations.

D. Tribal members hunting in Michigan will comply with tribal codes that contain provisions parallel to Michigan law regarding duck blinds and decoys.

We plan to approve Little River Band of Ottawa Indians' 2020–21 special migratory bird hunting seasons.

(j) The Little Traverse Bay Bands of Odawa Indians, Petoskey, Michigan (Tribal Members Only)

The Little Traverse Bay Bands of Odawa Indians (LTBB) is a self-governing, federally recognized Tribe located in Petoskey, Michigan, and a signatory Tribe of the Treaty of 1836. We have approved special regulations for tribal members of the 1836 treaty's

signatory Tribes on ceded lands in Michigan since the 1986–87 hunting season.

For the 2020–21 season, the LTBB proposes regulations similar to those of other Tribes in the 1836 treaty area. The LTBB proposes the regulations to govern the hunting of migratory birds by tribal members on the LTBB reservation and within the 1836 Treaty Ceded Territory. The tribal member duck and merganser season would run from September 1, 2020, through January 31, 2021. A daily bag limit of 20 ducks and 10 mergansers would include no more than 5 hen mallards, 5 pintail, 5 canvasback, 5 scaup, 5 hooded merganser, 5 black ducks, 5 wood ducks, and 5 redheads.

For Canada geese, the LTBB proposes a September 1, 2020, through February 8, 2021, season. The daily bag limit for Canada geese would be 20 birds. We further note that, based on available data (of major goose migration routes), it is unlikely that any Canada geese from the Southern James Bay Population would be harvested by the LTBB. Possession limits are twice the daily bag limit.

For woodcock, the LTBB proposes a September 1 to December 1, 2020, season. The daily bag limit will not exceed 10 birds. For snipe, the LTBB proposes a September 1 to December 31, 2020, season. The daily bag limit will not exceed 15 birds. For mourning doves, the LTBB proposes a September 1 to November 14, 2020, season. The daily bag limit will not exceed 15 birds. For Virginia and sora rails, the LTBB proposes a September 1 to December 31, 2020, season. The daily bag limit will not exceed 20 birds per species. For coots and gallinules, the LTBB proposes a September 1 to December 31, 2020, season. The daily bag limit will not exceed 20 birds per species. The possession limit will not exceed 2 days' bag limit for all birds.

The LTBB also proposes a sandhill crane season to begin September 1 and end December 1, 2020. The daily bag limit will not exceed two birds. The possession limit will not exceed two times the bag limit.

All other Federal regulations contained in 50 CFR part 20 would apply.

Harvest surveys from the 2016–17 hunting season indicated that approximately 8 hunters harvested 10 different waterfowl species. No sandhill cranes were reported harvested during the 2016–17 season. The LTBB proposes to monitor harvest closely through game bag checks, patrols, and mail surveys. In particular, the LTBB proposes monitoring the harvest of Southern James Bay Canada geese and sandhill cranes to assess any impacts of tribal hunting on the population.

We propose to approve the Little Traverse Bay Bands of Odawa Indians' requested 2020–21 special migratory bird hunting regulations.

(k) Lower Brule Sioux Tribe, Lower Brule Reservation, Lower Brule, South Dakota (Tribal Members and Nontribal Hunters)

The Lower Brule Sioux Tribe first established tribal migratory bird hunting regulations for the Lower Brule Reservation in 1994. The Lower Brule Reservation is about 214,000 acres in size and is located on and adjacent to the Missouri River, south of Pierre. Land ownership on the reservation is mixed, and until recently, the Lower Brule Tribe had full management authority over fish and wildlife via a memorandum of agreement (MOA) with the State of South Dakota. The MOA provided the Tribe jurisdiction over fish and wildlife on reservation lands, including deeded and U.S. Army Corps of Engineers-taken lands. For the 2020–21 season, the two parties have come to an agreement that provides the public a clear understanding of the Lower Brule Sioux Wildlife Department license requirements and hunting season regulations. The Lower Brule Reservation waterfowl season is open to tribal and nontribal hunters.

For the 2020–21 migratory bird hunting season, the Lower Brule Sioux Tribe proposes a nontribal member duck, merganser, and coot season length of 97 days, or the maximum number of days allowed by Federal frameworks in the High Plains Management Unit for this season. The Tribe proposes a duck season from October 3, 2020, through January 7, 2021. The daily bag limit would be six birds or the maximum number that Federal regulations allow, including no more than two hen mallard and five mallards total, two pintail, two redhead, two canvasback, three wood duck, three scaup, and one mottled duck. Two bonus blue-winged teal are allowed during October 3–18, 2020. The daily bag limit for mergansers would be five, only two of which could be a hooded merganser. The daily bag limit for coots would be 15. Possession limits would be three times the daily bag limits.

The Tribe's proposed nontribal-member Canada goose season would run from October 24, 2020, through February 7, 2021 (107-day season length), with a daily bag limit of six Canada geese. The Tribe's proposed nontribal member white-fronted goose season would run from October 24, 2020, through January 19, 2021, with daily bag and possession limits concurrent with Federal regulations. The Tribe's proposed nontribal-member light goose season would run from October 24, 2020, through February 7, 2021, and February 8 through March 10, 2021. The light goose daily bag limit would be 20 or the maximum number that Federal regulations allow with no possession limits.

The Tribe proposes a dove season for non-Tribal members from September 1 through November 29, 2020. The dove daily bag limit would be 15.

For tribal members, the Lower Brule Sioux Tribe proposes a duck, merganser, and coot season from September 1, 2020, through March 10, 2021. The daily bag limit would be six ducks, including no more than two hen mallard and five mallards total, one pintail, two redheads, two canvasback, three wood ducks, three scaup, two bonus teal during the first 16 days of the season, and one mottled duck or the maximum number that Federal regulations allow. The daily bag limit for mergansers would be five, only two of which could be hooded mergansers. The daily bag limit for coots would be 15. Possession limits would be three times the daily bag limits.

The Tribe's proposed Canada goose season for tribal members would run from September 1, 2020, through March 10, 2021, with a daily bag limit of six Canada geese. The Tribe's proposed white-fronted goose tribal season would run from September 1, 2020, through March 10, 2021, with a daily bag limit of two white-fronted geese or the maximum number that Federal regulations allow. The Tribe's proposed light goose tribal season would run from September 1, 2020, through March 10, 2021. A conservation order will also occur March 10, through May 1, 2021. The light goose daily bag limit would be 20 or the maximum number that Federal regulations allow, with no possession limits.

The Tribe proposes a dove season for Tribal members from September 1, 2020, through January 31, 2021. The dove daily bag limit would be 15.

In the 2018 season, nontribal members harvested 430 geese and 743 ducks. In the 2018 season, duck harvest species composition was primarily mallard (70 percent), green-winged teal (6 percent), and gadwall (5 percent). Tribal members harvested approximately 58 ducks and 115 geese in 2018.

The Tribe anticipates a duck and goose harvest similar to those of the previous years. All basic Federal regulations contained in 50 CFR part 20, including the use of nontoxic shot, Migratory Bird Hunting and

Conservation Stamps, etc., would be observed by the Tribe's proposed regulations. In addition, the Lower Brule Sioux Tribe has an official Conservation Code that was established by Tribal Council Resolution in June 1982 and updated in 1996.

We plan to approve the Tribe's requested regulations for the Lower Brule Reservation if the nontribal members seasons' dates fall within final Federal flyway frameworks.

(l) Lower Elwha Klallam Tribe, Port Angeles, Washington (Tribal Members Only)

Since 1996, the Service and the Point No Point Treaty Tribes, of which Lower Elwha was one, have cooperated to establish special regulations for migratory bird hunting. The Tribes are now acting independently, and it is our understanding that the Lower Elwha Klallam Tribe would like to establish migratory bird hunting regulations for tribal members for the 2020–21 season. The Tribe has a reservation on the Olympic Peninsula in Washington State and is a successor to the signatories of the Treaty of Point No Point of 1855.

For the 2020–21 season, we have yet to hear from the Lower Elwha Klallam Tribe. The Tribe usually requests special migratory bird hunting regulations for ducks (including mergansers), geese, coots, band-tailed pigeons, snipe, and mourning doves. The Lower Elwha Klallam Tribe usually requests a duck and coot season from September 13 to January 4. The daily bag limit will be seven ducks, including no more than two hen mallards, one pintail, one canvasback, and two redheads. The daily bag and possession limit on harlequin duck will be one per season. The coot daily bag limit will be 25. The possession limit will be twice the daily bag limit, except as noted above.

For geese, the Tribe usually requests a season from September 13 to January 4. The daily bag limit will be four, including no more than three light geese. The season on Aleutian Canada geese will be closed.

For brant, the Tribe usually proposes to close the season.

For mourning doves, band-tailed pigeon, and snipe, the Tribe usually requests a season from September 1 to January 11, with a daily bag limit of 10, 2, and 8, respectively. The possession limit will be twice the daily bag limit.

All Tribal hunters authorized to hunt migratory birds are required to obtain a tribal hunting permit from the Lower Elwha Klallam Tribe pursuant to tribal law. Hunting hours would be from one-half hour before sunrise to sunset. Only steel, tungsten-iron, tungsten-polymer, tungsten-matrix, and tin shot are allowed for hunting waterfowl. It is unlawful to use or possess lead shot while hunting waterfowl.

The Tribe typically anticipates harvest to be fewer than 10 birds. Tribal reservation police and Tribal fisheries enforcement officers have the authority to enforce these migratory bird hunting regulations.

The Service proposes to approve the special migratory bird hunting regulations for the Lower Elwha Klallam Tribe, upon receipt of their proposal.

(m) Lummi Nation Tribal Community, Bellingham, Washington (Tribal Members Only)

This year, the Service and the Lummi Nation Tribal Community began cooperating to establish special regulations for migratory bird hunting. The Lummi Nation Tribal Community is a federally recognized Indian Tribe. The Lummi Reservation is situated to the west of Bellingham and to the south of Ferndale, Washington, and was established by the Treaty of Point Elliott of January 22, 1855.

For the 2020–21 season, the Tribal Community requests to establish a migratory bird hunting season on all areas that are open and unclaimed and consistent with the meaning of the treaty. The Tribe proposes their duck (including mergansers and coot) and goose seasons run from September 1, 2020, to March 9, 2021. The daily bag limit on ducks is 20. The daily bag limit for coot is 25. For geese, the daily bag limit is 10. The season on brant runs from September 1, 2020, to March 9, 2021. The daily bag limit is five.

The Tribe proposes the snipe season run from September 1, 2020, to March 9, 2021. The daily bag limit for snipe is 15. The Tribe proposes the mourning dove season run from September 1, 2020, to March 9, 2021. The daily bag limit for mourning dove is 15. The Tribe proposes the band-tailed pigeon season run from September 1, 2020, to March 9, 2021. The daily bag limit for band-tailed pigeon is three. The Lummi Nation Tribal Community requests possession limits to be twice the daily bag limits, except coot is three times the daily bag limit.

The Community anticipates that the regulations will result in the harvest of approximately 600 ducks and 200 geese. The Lummi utilize a report card and permit system to monitor harvest and will implement steps to limit harvest where conservation is needed. All tribal regulations will be enforced by tribal fish and game officers.

We propose to approve these 2020–21 special migratory bird hunting regulations.

(n) Makah Indian Tribe, Neah Bay, Washington (Tribal Members Only)

The Makah Indian Tribe and the Service have been cooperating to establish special regulations for migratory game birds on the Makah Reservation and traditional hunting land off the Makah Reservation since the 2001–02 hunting season. Lands off the Makah Reservation are those contained within the boundaries of the State of Washington Game Management Units 601–603.

The Makah Indian Tribe proposes a duck and coot hunting season from September 26, 2020, to January 31, 2021. The daily bag limit is seven ducks, including no more than seven mallards (only two hen mallard), two canvasback, one pintail, three scaup, and two redhead. The daily bag limit for coots is 25. The Tribe has a year-round closure on wood ducks and harlequin ducks. Shooting hours for all species of waterfowl are one-half hour before sunrise to sunset.

For geese, the Tribe proposes that the season open on September 26, 2020, and close January 31, 2021. For brant, the Tribe proposes that the season open on December 19, 2020, and close January 24, 2021. The daily bag limit for geese is four and two brant (when open). The Tribe notes that there is a year-round closure on dusky Canada geese.

For band-tailed pigeons, the Tribe proposes that the season open September 15 and close December 31, 2020. The daily bag limit for band-tailed pigeons is two.

The Tribe anticipates that harvest under this regulation will be relatively low since there are no known dedicated waterfowl hunters and any harvest of waterfowl or band-tailed pigeons is usually incidental to hunting for other species, such as deer, elk, and bear. The Tribe expects fewer than 50 ducks and 10 geese to be harvested during the 2020–21 migratory bird hunting season.

All other Federal regulations contained in 50 CFR part 20 would apply. The following restrictions are also proposed by the Tribe:

(1) As per Makah Ordinance 44, only shotguns may be used to hunt any species of waterfowl. Additionally, shotguns must not be discharged within 0.25 mile of an occupied area.

(2) Hunters must be eligible, enrolled Makah tribal members and must carry their Indian Treaty Fishing and Hunting Identification Card while hunting. No tags or permits are required to hunt waterfowl.

(3) The Cape Flattery area is open to waterfowl hunting, except in designated wilderness areas, or within 1 mile of Cape Flattery Trail, or in any area that is closed to hunting by another ordinance or regulation.

(4) The use of live decoys and/or baiting to pursue any species of waterfowl is prohibited.

(5) Steel or bismuth shot only for waterfowl is allowed; the use of lead shot is prohibited.

(6) The use of dogs is permitted to hunt waterfowl.

The Service proposes to approve the Makah Indian Tribe's requested 2020–21 special migratory bird hunting regulations.

(o) Muckleshoot Indian Tribe, Auburn, Washington (Tribal Members Only)

The Muckleshoot Tribe is a federally recognized Tribe with reserved hunting rights under the Treaty of Medicine Creek 1854 and Treaty of Point Elliott 1855. Hunting occurs within the treaty areas as well as on lands traditionally hunted by the Muckleshoot Indian Tribe.

The Muckleshoot Indian Tribe proposes a duck and coot hunting season from September 1, 2020, to March 10, 2021. The daily bag limit is seven ducks, including no more than two hen mallard, two canvasback, two pintail, three scaup, two redhead, two scoter, two long-tailed duck, and two goldeneye. The daily bag limit for coots is 25. The Tribe has a limit on harlequin ducks of one per season.

For geese, the Tribe proposes that the season open on September 1, 2020, and close March 10, 2021. The daily bag limit for geese is 4 Canada geese, 6 light geese, 10 white-fronted geese, and 2 brant. The Tribe notes that there is a year-round closure on dusky Canada geese.

For band-tailed pigeons, mourning dove, and snipe, the Tribe proposes that the season open September 1, 2020, and close March 10, 2021. The daily bag limits are 2, 15, and 8, respectively.

The Tribe anticipates that harvest under this regulation will be relatively low since no known harvest has occurred over the past 20 years, and there are no known dedicated waterfowl or other migratory bird hunters. Harvest will be for personal cultural and subsistence purposes. We anticipate fewer than 100 ducks and 100 geese may be harvested.

All other Federal regulations contained in 50 CFR part 20 would apply. The following restrictions are also proposed by the Tribe:

(1) Hunting can occur on reservation and off reservation on lands where the Tribe has treaty-reserved hunting rights, or has documented traditional use.

(2) Shooting hours for all species of waterfowl are one-half hour before sunrise to one-half after sunset.

(3) Hunters must be eligible enrolled Muckleshoot Tribal members and must carry their Tribal identification while hunting.

(4) Tribal members hunting migratory birds must also have a combined Migratory Bird Hunting Permit and Harvest Report Card.

(5) The use of live decoys and/or baiting to pursue any species of waterfowl is prohibited.

(6) Hunting for migratory birds is with shotgun only. Only steel, tungsten-iron, tungsten-polymer, tungsten-matrix, and tin shot are allowed for hunting waterfowl. It is unlawful to use or possess lead shot while hunting waterfowl.

The Service proposes to approve the Muckleshoot Indian Tribe's 2020–21 special migratory bird hunting regulations.

(p) Navajo Nation, Navajo Indian Reservation, Window Rock, Arizona (Tribal Members and Nontribal Hunters)

Since 1985, we have established uniform migratory bird hunting regulations for tribal members and nonmembers on the Navajo Indian Reservation (in parts of Arizona, New Mexico, and Utah). The Navajo Nation owns almost all lands on the reservation and has full wildlife management authority.

For the 2020–21 season, the Navajo Nation requests the earliest opening dates and longest duck, merganser, Canada goose, and coot seasons, and the same daily bag and possession limits allowed to Pacific Flyway States under final Federal frameworks for tribal and nontribal members.

For both mourning dove and band-tailed pigeons, the Navajo Nation usually proposes seasons of September 1–30, 2020, with daily bag limits of 10 and 5, respectively. Possession limits would be twice the daily bag limits.

The Nation requires tribal members and nonmembers to comply with all basic Federal migratory bird hunting regulations in 50 CFR part 20 pertaining to shooting hours and manner of taking. In addition, each waterfowl hunter age 16 or older must carry on his/her person a valid Migratory Bird Hunting and Conservation Stamp (Duck Stamp), which must be signed in ink across the face. Special regulations established by the Navajo Nation also apply on the reservation.

The Tribe anticipates a total harvest of fewer than 500 mourning doves; fewer than 10 band-tailed pigeons; fewer than 1,000 ducks, coots, and mergansers; and fewer than 1,000 Canada geese for the 2020–21 season. The Tribe measures harvest by mail survey forms. Through the established Navajo Nation Code, titles 17 and 18, and 23 U.S.C. 1165, the Tribe will take action to close the season, reduce bag limits, or take other appropriate actions if the harvest is detrimental to the migratory bird resource.

We propose to approve the Navajo Nation's 2020–21 special migratory bird hunting regulations.

(q) Oneida Tribe of Indians of Wisconsin, Oneida, Wisconsin (Tribal Members Only)

Since 1991–92, the Oneida Tribe of Indians of Wisconsin and the Service have cooperated to establish uniform regulations for migratory bird hunting by tribal and nontribal hunters within the original Oneida Reservation boundaries. Since 1985, the Oneida Tribe's Conservation Department has enforced the Tribe's hunting regulations within those original reservation limits. The Oneida Tribe also has a good working relationship with the State of Wisconsin, and the majority of the seasons and limits are the same for the Tribe and Wisconsin.

For the 2020–21 season, the Tribe submitted a proposal requesting special migratory bird hunting regulations. For ducks, the Tribe's proposal describes the general outside dates as being September 12 through December 6, 2020. The Tribe proposes a daily bag limit of six birds, which could include no more than six mallards (three hen mallards), six wood ducks, one redhead, two pintails, and one hooded merganser.

For geese, the Tribe requests a season between September 1 and December 31, 2020, with a daily bag limit of five Canada geese. If a quota of 500 geese is attained before the season concludes, the Tribe will recommend closing the season early.

For woodcock, the Tribe proposes a season between September 1 and November 1, 2020, with a daily bag and possession limit of two and four, respectively.

For mourning dove, the Tribe proposes a season between September 1 and November 1, 2020, with a daily bag and possession limit of 10 and 20, respectively.

The Tribe proposes shooting hours be one-half hour before sunrise to 15 minutes after sunset. Nontribal hunters hunting on the Reservation or on lands under the jurisdiction of the Tribe must comply with all State of Wisconsin

regulations, including shooting hours of one-half hour before sunrise to sunset, season dates, and daily bag limits. Tribal members and nontribal hunters hunting on the Reservation or on lands under the jurisdiction of the Tribe must observe all basic Federal migratory bird hunting regulations found in 50 CFR part 20, with the following exceptions: Oneida members would be exempt from the purchase of the Migratory Bird Hunting and Conservation Stamp (Duck Stamp); and shotgun capacity is not limited to three shells.

The Service proposes to approve the 2020–21 special migratory bird hunting regulations for the Oneida Tribe of Indians of Wisconsin.

(r) Point No Point Treaty Council Tribes, Kingston, Washington (Tribal Members Only)

We are establishing uniform migratory bird hunting regulations for tribal members on behalf of the Point No Point Treaty Council Tribes, consisting of the Port Gamble S'Klallam and Jamestown S'Klallam Tribes. The two tribes have reservations and ceded areas in northwestern Washington State and are the successors to the signatories of the Treaty of Point No Point of 1855. These proposed regulations would apply to tribal members both on and off reservations within the Point No Point Treaty Areas; however, the Port Gamble S'Klallam and Jamestown S'Klallam Tribal season dates differ only where indicated below.

For the 2020–21 season, we have yet to hear from the Point No Point Treaty Council for either the Jamestown S'Klallam or Port Gamble S'Klallam Tribes. For ducks, the Jamestown S'Klallam Tribe season would usually open September 1, 2020, and close March 10, 2021, and coots would open September 7, 2020, and close February 2, 2021. The Port Gamble S'Klallam Tribes duck and coot seasons would usually open from September 1, 2020, to March 10, 2021. The daily bag limit would be seven ducks, including no more than two hen mallards, one canvasback, one pintail, two redhead, and four scoters. The daily bag limit for coots would be seven. The daily bag limit and possession limit on harlequin ducks would be one per season. The daily possession limits are double the daily bag limits except where noted.

For geese, the Point No Point Treaty Council usually proposes the season open on September 7, 2020, and close March 10, 2021, for the Jamestown S'Klallam Tribe, and open on September 1, 2020, and close March 10, 2021, for the Port Gamble S'Klallam Tribe. The daily bag limits for Canada geese, light geese, and white-fronted geese would be 5, 3, and 10, respectively. The Council notes that there is a year-round closure on dusky Canada geese. For brant, the Council usually proposes the season open on November 9, 2020, and close January 31, 2021, for the Port Gamble S'Klallam Tribe, and open on January 11 and close January 26, 2021, for the Jamestown S'Klallam Tribe. The daily bag limit for brant would be two.

For band-tailed pigeons, the Port Gamble S'Klallam Tribe season would usually open September 1, 2020, and close March 10, 2021. The Jamestown S'Klallam Tribe season would usually open September 7, 2020, and close January 20, 2021. The daily bag limit for band-tailed pigeons would be two. For snipe, the Port Gamble S'Klallam Tribe season would usually open September 1, 2020, and close March 10, 2021. The Jamestown S'Klallam Tribe season would usually open September 7, 2020, and close March 10, 2021. The daily bag limit for snipe would be eight. For mourning dove, the Port Gamble S'Klallam Tribe season would usually open September 1, 2020, and close January 31, 2021. The Jamestown S'Klallam Tribe would usually open September 7, 2020, and close January 20, 2021. The daily bag limit for mourning dove would be 10.

The Tribe anticipates a total harvest of fewer than 100 birds for the 2020–21 season. The tribal fish and wildlife enforcement officers have the authority to enforce these tribal regulations.

We propose to approve the Point No Point Treaty Council Tribe's upon receipt of their 2020–21 special migratory bird season proposal.

(s) Saginaw Tribe of Chippewa Indians, Mt. Pleasant, Michigan (Tribal Members Only)

The Saginaw Tribe of Chippewa Indians is a federally recognized, self-governing Indian Tribe, located on the Isabella Reservation lands bound by Saginaw Bay in Isabella and Arenac Counties, Michigan.

For ducks, mergansers, and common snipe, the Tribe proposes outside dates as September 1, 2020, through January 31, 2021. The Tribe proposes a daily bag limit of 20 ducks, which could include no more than 5 each of the following: Hen mallards, wood duck, black duck, pintail, red head, scaup, and canvasback. The merganser daily bag limit is 10, with no more than 5 hooded mergansers and 16 for common snipe.

For geese, coot, gallinule, sora, and Virginia rail, the Tribe requests a season from September 1, 2020, to January 31, 2021. The daily bag limit for geese is 20, in the aggregate. The daily bag limit for coot, gallinule, sora, and Virginia rail is 20 in the aggregate.

For woodcock and mourning dove, the Tribe proposes a season between September 1, 2020, and January 31, 2021, with daily bag limits of 10 and 25, respectively.

For sandhill crane, the Tribe proposes a season between September 1, 2020, and January 31, 2021, with a daily bag limit of one.

All Saginaw Tribe members exercising hunting treaty rights are required to comply with Tribal Ordinance 11. Hunting hours would be from one-half hour before sunrise to one-half hour after sunset. All other regulations in 50 CFR part 20 apply, including the use of only nontoxic shot for hunting waterfowl.

The Service proposes to approve the request for 2020–21 special migratory bird hunting regulations for the Saginaw Tribe of Chippewa Indians.

(t) Sauk-Suiattle Indian Tribe, Darrington, Washington (Tribal Members Only)

We have yet to hear from the Sauk-Suiattle Indian Tribe (SSIT), but it is our understanding that the SSIT will request a 2020–21 hunting season on all open and unclaimed lands under the Treaty of Point Elliott of January 22, 1855. The Tribe's reservation is located in Darrington, Washington, just west of the North Cascade Mountain range in Skagit County on the Sauk and Suiattle Rivers. The Tribe owns and manages all the land on the reservation and some lands surrounding or near the reservation in Skagit and Snohomish Counties. All of the lands that are Tribal or Reservation lands are closed for non-Tribal hunting, unless opened by an SSIT Special Regulation.

The Tribe usually proposes special migratory bird hunting regulations for ducks, geese, brant, and coot with outside dates of September 1 through January 31. The Tribe usually proposes a daily bag limit of 10 ducks, 5 geese, 5 brant, and 25 coot.

Hunting hours would be from one-half hour before sunrise to one-half hour after sunset. All other regulations in 50 CFR part 20 apply, including the use of only nontoxic shot for hunting waterfowl.

The Service proposes to approve the request for 2020–21 special migratory bird hunting regulations for the Sauk-Suiattle Indian Tribe, upon receipt of their proposal.

(u) Sault Ste. Marie Tribe of Chippewa Indians, Sault Ste. Marie, Michigan (Tribal Members Only)

The Sault Ste. Marie Tribe of Chippewa Indians is a federally recognized, self-governing Indian Tribe, distributed throughout the eastern Upper Peninsula and northern Lower Peninsula of Michigan. The Tribe has retained the right to hunt, fish, trap, and gather on the lands ceded in the Treaty of Washington (1836).

The Tribe proposes special migratory bird hunting regulations. For ducks, mergansers, and common snipe, the Tribe proposes outside dates as September 15 through December 31, 2020. The Tribe proposes a daily bag limit of 20 ducks, which could include no more than 10 mallards (5 hen mallards), 5 wood duck, 5 black duck, and 5 canvasbacks. The merganser daily bag limit is 10 in the aggregate and 16 for common snipe.

For geese, teal, coot, gallinule, sora, and Virginia rail, the Tribe requests a season from September 1 to December 31, 2020. The daily bag limit for geese is 20 in the aggregate. The daily bag limit for coot, teal, gallinule, sora, and Virginia rail is 20 in the aggregate.

For woodcock, the Tribe proposes a season between September 2 and December 1, 2020, with a daily bag and possession limit of 10 and 20, respectively.

For mourning dove, the Tribe proposes a season between September 1 and November 14, 2020, with a daily bag and possession limit of 10 and 20, respectively.

In 2018, the total estimated waterfowl hunters were 4,183, who harvested approximately 1,520 ducks. All Sault Ste. Marie Tribe members exercising hunting treaty rights within the 1836 Ceded Territory are required to submit annual harvest reports including date of harvest, number and species harvested, and location of harvest. Hunting hours would be from one-half hour before sunrise to one-half hour after sunset. All other regulations in 50 CFR part 20 apply, including the use of only nontoxic shot for hunting waterfowl.

The Service proposes to approve the request for 2020–21 special migratory bird hunting regulations for the Sault Ste. Marie Tribe of Chippewa Indians.

(v) Shoshone–Bannock Tribes, Fort Hall Indian Reservation, Fort Hall, Idaho (Nontribal Hunters)

Almost all of the Fort Hall Indian Reservation is tribally owned. The Tribes claim full wildlife management authority throughout the reservation, but the Idaho Fish and Game Department has disputed tribal jurisdiction, especially for hunting by nontribal members on reservation lands owned by non-Indians. As a compromise, since 1985, we have established the same waterfowl hunting regulations on the reservation and in a surrounding off-reservation State zone. The regulations were requested by the Tribes and provided for different season dates than in the remainder of the State. We agreed to the season dates because they would provide additional protection to mallards and pintails. The State of Idaho concurred with the zoning arrangement. We have no objection to the State's use of this zone again in the 2020–21 hunting season, provided the duck and goose hunting season dates are the same as on the reservation.

In a proposal for the 2020–21 hunting season, the Shoshone–Bannock Tribes request a continuous duck (including mergansers and coots) season, with the maximum number of days and the same daily bag and possession limits permitted for Pacific Flyway States under the final Federal frameworks. The Tribes propose a duck and coot season with, if the same number of hunting days is permitted as last year, an opening date of October 3, 2020, and a closing date of January 19, 2021. The Tribes anticipate harvest will be about 7,500 ducks.

The Tribes also request a continuous goose season with the maximum number of days and the same daily bag and possession limits permitted in Idaho under Federal frameworks. The Tribes propose that, if the same number of hunting days is permitted as in previous years, the season would have an opening date of October 3, 2020, and a closing date of January 19, 2021. The Tribes anticipate harvest will be about 5,000 geese.

The Tribes request a common snipe season with the maximum number of days and the same daily bag and possession limits permitted in Idaho under Federal frameworks. The Tribes propose that, if the same number of hunting days is permitted as in previous years, the season would have an opening date of October 3, 2020, and a closing date of January 19, 2021.

Nontribal hunters must comply with all basic Federal migratory bird hunting regulations in 50 CFR part 20 pertaining to shooting hours, use of steel shot, and manner of taking. Special regulations established by the Shoshone–Bannock Tribes also apply on the reservation.

We note that the requested regulations are nearly identical to those of last year, and we propose to approve them for the 2020–21 hunting season if the seasons' dates fall within the final Federal flyway frameworks (applies to nontribal hunters only).

(w) Skokomish Tribe, Shelton, Washington (Tribal Members Only)

Since 1996, the Service and the Point No Point Treaty Tribes, of which the Skokomish Tribe was one, have cooperated to establish special regulations for migratory bird hunting. The Tribes have been acting independently since 2005. The Tribe has a reservation on the Olympic Peninsula in Washington State and is a successor to the signatories of the Treaty of Point No Point of 1855.

The Skokomish Tribe requests a duck and coot season from September 16, 2020, to February 28, 2021. The daily bag limit is seven ducks, including no more than two hen mallards, one pintail, one canvasback, and two redheads. The daily bag and possession limit on harlequin duck is one per season. The coot daily bag limit is 25. The possession limit is twice the daily bag limit, except as noted above.

For geese, the Tribe requests a season from September 16, 2020, to February 28, 2021. The daily bag limit is four, including no more than three light geese. The season on Aleutian Canada geese is closed. For brant, the Tribe proposes a season from November 1, 2020, to February 15, 2021, with a daily bag limit of two. The possession limit is twice the daily bag limit.

For mourning doves, band-tailed pigeon, and snipe, the Tribe requests a season from September 16, 2020, to February 28, 2021, with a daily bag limit of 10, 2, and 8, respectively. The possession limit is twice the daily bag limit.

All Tribal hunters authorized to hunt migratory birds are required to obtain a tribal hunting permit from the Skokomish Tribe pursuant to tribal law. Hunting hours would be from one-half hour before sunrise to sunset. Only steel, tungsten-iron, tungsten-polymer, tungsten-matrix, and tin shot are allowed for hunting waterfowl. It is unlawful to use or possess lead shot while hunting waterfowl.

The Tribe anticipates harvest to be fewer than 150 birds. The Skokomish Public Safety Office enforcement officers have the authority to enforce these migratory bird hunting regulations.

We propose to approve the Skokomish Tribe's 2020–21 migratory bird hunting season.

(x) Spokane Tribe of Indians, Spokane Indian Reservation, Wellpinit, Washington (Tribal Members Only)

The Spokane Tribe of Indians wishes to establish waterfowl seasons on their reservation for its membership to access as an additional resource. An established waterfowl season on the reservation will allow access to a resource for members to continue practicing a subsistence lifestyle.

The Spokane Indian Reservation is located in northeastern Washington State. The reservation comprises approximately 157,000 acres. The boundaries of the Reservation are the Columbia River to the west, the Spokane River to the south (now Lake Roosevelt), Tshimikn Creek to the east, and the 48th Parallel as the north boundary. Tribal membership comprises approximately 2,300 enrolled Spokane Tribal Members.

These proposed regulations would allow Tribal Members, spouses of Spokane Tribal Members, and first-generation descendants of a Spokane Tribal Member with a tribal permit and Federal Migratory Bird Hunting and Conservation Stamp an opportunity to utilize the reservation and ceded lands for waterfowl hunting. These regulations would also benefit tribal membership through access to this resource throughout Spokane Tribal ceded lands in eastern Washington. By Spokane Tribal Referendum, spouses of Spokane Tribal Members and children of Spokane Tribal Members not enrolled are allowed to harvest game animals within the Spokane Indian Reservation with the issuance of hunting permits.

The Tribe requests to establish duck seasons that would run from September 2, 2020, through January 31, 2021. The tribe is requesting the daily bag limit for ducks to be consistent with final Federal frameworks. The possession limit is twice the daily bag limit.

The Tribe proposes a season on geese starting September 2, 2020, and ending on January 31, 2021. The Tribe is requesting the daily bag limit for geese to be consistent with final Federal frameworks. The possession limit is twice the daily bag limit.

Based on the quantity of requests the Spokane Tribe of Indians has received, the Tribe anticipates harvest levels for the 2020–21 season for both ducks and geese to be fewer than 100 total birds, with goose harvest at fewer than 50. Hunter success will be monitored through mandatory harvest reports returned within 30 days of the season closure.

We propose to approve the Spokane Tribe's requested 2020–21 special migratory bird hunting regulations.

(y) Squaxin Island Tribe, Squaxin Island Reservation, Shelton, Washington (Tribal Members Only)

The Squaxin Island Tribe of Washington and the Service have cooperated since 1995, to establish special tribal migratory bird hunting regulations. These special regulations apply to tribal members on the Squaxin Island Reservation, located in western Washington near Olympia, and all lands within the traditional hunting grounds of the Squaxin Island Tribe.

For the 2020–21 season, we have yet to hear from the Squaxin Island Tribe. The Tribe usually requests to establish duck and coot seasons that would run from September 1 through January 15. The daily bag limit for ducks would be five per day and could include only one canvasback. The season on harlequin ducks is closed. For coots, the daily bag limit is 25. For snipe, the Tribe usually proposes that the season start on September 15 and end on January 15. The daily bag limit for snipe would be eight. For band-tailed pigeon, the Tribe usually proposes that the season start on September 1 and end on December 31. The daily bag limit would be five. The possession limit would be twice the daily bag limit.

The Tribe usually proposes a season on geese starting September 15 and ending on January 15. The daily bag limit for geese would be four, including no more than two snow geese. The season on Aleutian and cackling Canada geese would be closed. For brant, the Tribe usually proposes that the season start on September 1 and end on December 31. The daily bag limit for brant would be two. The possession limit would be twice the daily bag limit.

We propose to approve the Tribe's 2020–21 special migratory bird hunting regulations, upon receipt of their proposal.

(z) Stillaguamish Tribe of Indians, Arlington, Washington (Tribal Members Only)

The Stillaguamish Tribe of Indians and the Service have cooperated to establish special regulations for migratory game birds since 2001. For the 2020–21 season, the Tribe requests regulations to hunt all open and unclaimed lands under the Treaty of Point Elliott of January 22, 1855, including their main hunting grounds around Camano Island, Skagit Flats, and Port Susan to the border of the Tulalip Tribes Reservation. Ceded lands are located in Whatcom, Skagit, Snohomish, and Kings Counties, and a portion of Pierce County, Washington. The Stillaguamish Tribe of Indians is a federally recognized Tribe and reserves the Treaty Right to hunt (*U.S.* v. *Washington*).

The Tribe proposes their duck (including mergansers and coot) and goose seasons run from October 1, 2020, to March 10, 2021. The daily bag limit on ducks (including sea ducks and mergansers) is 10 including no more than seven mallards, 3 pintail, 3 redhead, 3 scaup, and 3 canvasback. The daily bag limit for coot is 25. For geese, the daily bag limit is 6 Canada geese, 12 white-fronted geese, and 8 light geese. The season on brant is closed. Possession limits are three times the daily bag limits.

The Tribe proposes the snipe season run from October 1, 2020, to January 31, 2021. The daily bag limit for snipe is 10. Possession limit is two times the daily bag limit.

The Tribe proposes the swan season run from October 1, 2020, to January 31, 2021. The bag limit for swan is two per season.

Harvest is regulated by a punch card system. Tribal members hunting on lands under this proposal will observe all basic Federal migratory bird hunting regulations found in 50 CFR part 20, which will be enforced by the Stillaguamish Tribal law enforcement. Tribal members are required to use steel shot or a nontoxic shot as required by Federal regulations.

The Tribe anticipates a total harvest of 200 ducks, 100 geese, 50 mergansers, 100 coots, and 100 snipe. Anticipated harvest needs include subsistence and ceremonial needs. Certain species may be closed to hunting for conservation purposes, and consideration for the needs of certain species will be addressed.

The Service proposes to approve the Stillaguamish Tribe's request for 2020–21 special migratory bird hunting regulations.

(aa) Swinomish Indian Tribal Community, LaConner, Washington (Tribal Members Only)

In 1996, the Service and the Swinomish Indian Tribal Community began cooperating to establish special regulations for migratory bird hunting. The Swinomish Indian Tribal Community is a federally recognized Indian Tribe consisting of the Swinomish, Lower Skagit, Samish, and Kikialous. The Swinomish Reservation was established by the Treaty of Point Elliott of January 22, 1855, and lies in the Puget Sound area north of Seattle, Washington.

For the 2020–21 season, the Tribal Community requests to establish a migratory bird hunting season on all

areas that are open and unclaimed and consistent with the meaning of the treaty. The Tribe proposes their duck (including mergansers and coot) and goose seasons run from September 1, 2020, to March 9, 2021. The daily bag limit on ducks is 20. The daily bag limit for coot is 25. For geese, the daily bag limit is 10. The season on brant runs from September 1, 2020, to March 9, 2021. The daily bag limit is five.

The Tribe proposes the snipe season run from September 1, 2020, to March 9, 2021. The daily bag limit for snipe is 15. The Tribe proposes the mourning dove season run from September 1, 2020, to March 9, 2021. The daily bag limit for mourning dove is 15. The Tribe proposes the band-tailed pigeon season run from September 1, 2020, to March 9, 2021. The daily bag limit for band-tailed pigeon is three. The Swinomish Indian Tribal Community requests possession limits to be twice the daily bag limits, except coot is three times the daily bag limit.

The Community anticipates that the regulations will result in the harvest of approximately 600 ducks and 200 geese. The Swinomish utilize a report card and permit system to monitor harvest and will implement steps to limit harvest where conservation is needed. All tribal regulations will be enforced by tribal fish and game officers.

We propose to approve these 2020–21 special migratory bird hunting regulations.

(dd) The Tulalip Tribes of Washington, Tulalip Indian Reservation, Marysville, Washington (Tribal Members Only)

The Tulalip Tribes are the successors in interest to the Tribes and bands signatory to the Treaty of Point Elliott of January 22, 1855. The Tulalip Tribes' government is located on the Tulalip Indian Reservation just north of the City of Everett in Snohomish County, Washington. The Tribes or individual tribal members own all of the land on the reservation, and they have full wildlife management authority. All lands within the boundaries of the Tulalip Tribes Reservation are closed to nonmember hunting unless opened by Tulalip Tribal regulations.

For ducks, mergansers, coot, and snipe, the Tribe proposes seasons for tribal members from September 1, 2020, through February 28, 2021. Daily bag and possession limits would be 15 and 30 ducks, respectively, except that for blue-winged teal, canvasback, harlequin, pintail, and wood duck, the bag and possession limits would be the same as those established in accordance with final Federal frameworks. For coot, daily bag and possession limits are 25 and 75, respectively, and for snipe 8 and 24, respectively. Ceremonial hunting may be authorized by the Department of Natural Resources at any time upon application of a qualified tribal member. Such a hunt must have a bag limit designed to limit harvest only to those birds necessary to provide for the ceremony.

For geese, tribal members propose a season from September 1, 2020, through February 28, 2021. The goose daily bag and possession limits would be 10 and 30, respectively, except that the bag limits for cackling Canada geese and dusky Canada geese would be those established in accordance with final Federal frameworks. The daily bag and possession limits for black brant is 5 and 10, respectively.

All hunters on Tulalip Tribal lands are required to adhere to shooting hour regulations set at one-half hour before sunrise to sunset, special tribal permit requirements, and a number of other tribal regulations enforced by the Tribe. Each nontribal hunter 16 years of age and older hunting pursuant to Tulalip Tribes' Ordinance No. 67 must possess a valid Federal Migratory Bird Hunting and Conservation Stamp and a valid State of Washington Migratory Waterfowl Stamp. Each hunter must validate stamps by signing across the face.

Although the season length requested by the Tulalip Tribes appears to be quite liberal, harvest information indicates a total take by tribal and nontribal hunters of fewer than 1,000 ducks and 500 geese annually.

We propose to approve the Tulalip Tribe's request for 2020–21 special migratory bird hunting regulations.

(cc) Upper Skagit Indian Tribe, Sedro Woolley, Washington (Tribal Members Only)

The Upper Skagit Indian Tribe and the Service have cooperated to establish special regulations for migratory game birds since 2001. The Tribe has jurisdiction over lands within Skagit, Island, and Whatcom Counties, Washington. The Tribe issues tribal hunters a harvest report card that will be shared with the State of Washington.

For the 2020–21 season, the Tribe requests a duck season starting October 1, 2020, and ending February 28, 2021. The Tribe proposes a daily bag limit of 15 with a possession limit of 20. The Tribe requests a coot season starting October 1, 2020, and ending February 15, 2021. The coot daily bag limit is 20 with a possession limit of 30.

The Tribe proposes a goose season from October 1, 2020, to February 28, 2021, with a daily bag limit of 7 geese and a possession limit of 10. For brant, the Tribe proposes a season from November 1 to 10, 2020, with a daily bag and possession limit of two.

The Tribe proposes a mourning dove season between September 1 and December 31, 2020, with a daily bag limit of 12 and possession limit of 15.

The anticipated migratory bird harvest under this proposal would be 100 ducks, 5 geese, 2 brant, and 10 coots. Tribal members must have the tribal identification and tribal harvest report card on their person to hunt. Tribal members hunting on the Reservation will observe all basic Federal migratory bird hunting regulations found in 50 CFR part 20, except shooting hours would be 15 minutes before official sunrise to 15 minutes after official sunset.

We propose to approve the Tribe's 2020–21 special migratory bird hunting regulations.

(dd) Wampanoag Tribe of Gay Head, Aquinnah, Massachusetts (Tribal Members Only)

The Wampanoag Tribe of Gay Head is a federally recognized Tribe located on the island of Martha's Vineyard in Massachusetts. The Tribe has approximately 560 acres of land, which it manages for wildlife through its natural resources department. The Tribe also enforces its own wildlife laws and regulations through the natural resources department.

We have yet to hear from the Wampanoag Tribe of Gay Head. The Tribe usually proposes a duck season of October 8 through February 16. The Tribe usually proposes a daily bag limit of eight birds, which could include no more than four hen mallards, four mottled ducks, one fulvous whistling duck, four mergansers, three scaup, two hooded mergansers, three wood ducks, one canvasback, two redheads, two pintail, and four of all other species not listed. The season for harlequin ducks is usually closed. The Tribe usually proposes a teal (green-winged and blue) season of October 8 through February 16. A daily bag limit of 10 teal would be in addition to the daily bag limit for ducks.

For sea ducks, the Tribe usually proposes a season between October 1 and February 16, with a daily bag limit of seven, which could include no more than one hen eider and four of any one species unless otherwise noted above.

For Canada geese, the Tribe usually requests a season between September 3 and 15 and between October 22 and February 16, with a daily bag limit of eight Canada geese. For snow geese, the tribe usually requests a season between

September 3 and 13, and between November 19 and February 16, with a daily bag limit of 15 snow geese.

For woodcock, the Tribe usually proposes a season between October 8 and November 24, with a daily bag limit of three. For sora and Virginia rails, the Tribe usually requests a season of September 3 through November 3, with a daily bag limit of 5 sora and 10 Virginia rails. For snipe, the Tribe usually requests a season of September 3 through December 8, with a daily bag limit of eight.

Prior to 2012, the Tribe had 22 registered tribal hunters and estimates harvest to be no more than 15 geese, 25 mallards, 25 teal, 50 black ducks, and 50 of all other species combined. Tribal members hunting on the Reservation will observe all basic Federal migratory bird hunting regulations found in 50 CFR part 20. The Tribe requires hunters to register with the Harvest Information Program.

We propose to approve the Tribe's 2020–21 special migratory bird hunting regulations, upon receipt of their proposal.

(ee) White Earth Band of Ojibwe, White Earth, Minnesota (Tribal Members Only)

The White Earth Band of Ojibwe is a federally recognized tribe located in northwest Minnesota and encompasses all of Mahnomen County and parts of Becker and Clearwater Counties. The reservation employs conservation officers to enforce migratory bird regulations. The Tribe and the Service first cooperated to establish special tribal regulations in 1999.

The White Earth Band of Ojibwe requests a duck season to start September 12 and end December 13, 2020. For ducks, they request a daily bag limit of 10, including no more than 2 hen mallards, 2 pintail, and 2 canvasback. For mergansers, the Tribe proposes the season to start September 12 and end December 13, 2020. The merganser daily bag limit would be five, with no more than two hooded mergansers. For geese, the Tribe proposes an early season from September 1 through 25, 2020, and a late season from September 26 through December 13, 2020. The early season daily bag limit is 10 geese, and the late season daily bag limit is 5 geese.

For coots, the Tribe proposes a September 1 through November 30, 2020, season with daily bag limits of 20 coots. For snipe, woodcock, rail, and mourning dove, the Tribe proposes a September 1 through November 30, 2020, season with daily bag limits of 10, 10, 25, and 25, respectively. Shooting hours are one-half hour before sunrise to one-half hour after sunset. Nontoxic shot is required.

Based on past harvest surveys, the Tribe anticipates harvest of 1,000 to 2,000 Canada geese and 1,000 to 1,500 ducks. The White Earth Reservation Tribal Council employs four full-time conservation officers to enforce migratory bird regulations.

We propose to approve the Tribe's 2020–21 special migratory bird hunting regulations.

(ff) White Mountain Apache Tribe, Fort Apache Indian Reservation, Whiteriver, Arizona (Tribal Members and Nontribal Hunters)

The White Mountain Apache Tribe owns all reservation lands, and the Tribe has recognized full wildlife management authority.

The hunting zone for waterfowl is restricted and is described as: The length of the Black River west of the Bonito Creek and Black River confluence and the entire length of the Salt River forming the southern boundary of the reservation; the White River, extending from the Canyon Day Stockman Station to the Salt River; and all stock ponds located within Wildlife Management Units 4, 5, 6, and 7. Tanks located below the Mogollon Rim, within Wildlife Management Units 2 and 3, will be open to waterfowl hunting during the 2020–21 season. The length of the Black River east of the Black River/Bonito Creek confluence is closed to waterfowl hunting. All other waters of the reservation would be closed to waterfowl hunting for the 2020–21 season.

For nontribal and tribal hunters, the Tribe proposes a continuous duck, coot, merganser, gallinule, and moorhen hunting season, with an opening date of October 17, 2020, and a closing date of January 24, 2021. The Tribe proposes a daily duck (including mergansers) bag limit of seven, which may include no more than two redheads, two pintail, three scaup, seven mallards (including no more than two hen mallards), and two canvasback. The daily bag limit for coots, gallinules, and moorhens would be 25, singly or in the aggregate.

For geese, the Tribe proposes a season from October 17, 2020, through January 24, 2021. Hunting would be limited to Canada geese, and the daily bag limit would be three.

Season dates for band-tailed pigeons and mourning doves would start September 1 and end September 15, 2020, in Wildlife Management Unit 10 and all areas south of Y–70 and Y–10 in Wildlife Management Unit 7, only. Proposed daily bag limits for band-tailed pigeons and mourning doves would be 3 and 10, respectively.

Possession limits for the above species are twice the daily bag limits. Shooting hours would be from one-half hour before sunrise to sunset. There would be no open season for sandhill cranes, rails, and snipe on the White Mountain Apache lands under this proposal.

A number of special regulations apply to tribal and nontribal hunters, which may be obtained from the White Mountain Apache Tribe Game and Fish Department.

We plan to approve the White Mountain Apache Tribe's requested 2020–21 special migratory bird hunting regulations.

Public Comments

The Department of the Interior's policy is, whenever possible, to afford the public an opportunity to participate in the rulemaking process. Accordingly, we invite interested persons to submit written comments, suggestions, or recommendations regarding the proposed regulations. Before promulgating final migratory game bird hunting regulations, we will consider all comments we receive. These comments, and any additional information we receive, may lead to final regulations that differ from these proposals.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We will not accept comments sent by email or fax. We will not consider hand-delivered comments that we do not receive, or mailed comments that are not postmarked, by the date specified in **DATES**.

We will post all comments in their entirety—including your personal identifying information—on *http://www.regulations.gov.* 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.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Division of Migratory Bird

Management, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We will consider, but possibly may not respond in detail to, each comment. As in the past, we will summarize all comments we receive during the comment period and respond to them after the closing date in the preamble of a final rule.

Required Determinations

Based on our most current data, we are affirming our required determinations made in the October 15 proposed rule; for descriptions of our actions to ensure compliance with the following statutes and Executive Orders, see our October 15, 2019, proposed rule (84 FR 55120):

- National Environmental Policy Act Consideration;
- Endangered Species Act Consideration;
- Regulatory Flexibility Act;
- Small Business Regulatory Enforcement Fairness Act;
- Unfunded Mandates Reform Act;
- Executive Orders 12630, 12866, 12988, 13132, 13175, 13211, 13563, and 13771.

Paperwork Reduction Act

This proposed rule contains existing and new information collections. All information collections require approval under the Paperwork Reduction Act of 1995 (PRA, 44 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 Office of Management and Budget (OMB) control number. The OMB has reviewed and approved the information collection requirements associated with migratory bird surveys and the procedures for establishing annual migratory bird hunting seasons under the following OMB control numbers:

- 1018–0019, ''North American Woodcock Singing Ground Survey'' (expires 6/30/2021).
- 1018–0023, ''Migratory Bird Surveys, 50 CFR 20.20'' (expires 8/31/2020—includes Migratory Bird Harvest Information Program, Migratory Bird Hunter Surveys, Sandhill Crane Survey, and Parts Collection Survey).
- 1018–0171, ''Establishment of Annual Migratory Bird Hunting Seasons, 50 CFR part 20'' (expires 06/30/2021).

In accordance with the PRA and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on our proposal to renew OMB control number 1018–0171. 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.

Migratory game birds are those bird species so designated in conventions between the United States and several foreign nations for the protection and management of these birds. Under the Migratory Bird Treaty Act (16 U.S.C. 703–712), the Secretary of the Interior is authorized to determine when ''hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any * * * bird, or any part, nest, or egg'' of migratory game birds can take place, and to adopt regulations for this purpose. These regulations are written after giving due regard to ''the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds'' and are updated annually (16 U.S.C. 704(a)). This responsibility has been delegated to the Service as the lead Federal agency for managing and conserving migratory birds in the United States. However, migratory game bird management is a cooperative effort of State, Tribal, and Federal governments. Migratory game bird hunting seasons provide opportunities for recreation and sustenance; aid Federal, State, and tribal governments in the management of migratory game birds; and permit harvests at levels compatible with migratory game bird population status and habitat conditions.

The Service develops migratory game bird hunting regulations by establishing the frameworks, or outside limits, for season lengths, bag limits, and areas for migratory game bird hunting. Acknowledging regional differences in hunting conditions, the Service has administratively divided the Nation into four Flyways for the primary purpose of managing migratory game birds. Each Flyway (Atlantic, Mississippi, Central, and Pacific) has a Flyway Council, a formal organization generally composed of one member from each State and Province in that Flyway. The Flyway Councils, established through the Association of Fish and Wildlife Agencies, also assist in researching and providing migratory game bird management information for Federal, State, and Provincial governments, as well as private conservation entities and the general public.

We request the following information to establish annual migratory bird hunting seasons:

(1) Information Requested to Establish Annual Migratory Bird Hunting Seasons:

(A) Tribes that wish to use the guidelines to establish special hunting regulations for the annual migratory game bird hunting season are required to submit a proposal that includes:

(i) The requested migratory game bird hunting season dates and other details regarding the proposed regulations;

(ii) Harvest anticipated under the proposed regulations; and

(iii) Tribal capabilities to enforce migratory game bird hunting regulations.

(B) State and U.S. territory governments that wish to establish annual migratory game bird hunting seasons are required to provide the requested dates and other details for hunting seasons in their respective States or Territories.

(2) Reports: The following reports are requested from the States and are submitted either annually or every 3 years as explained in the following text.

(A) Reports from Experimental Hunting Seasons and Season Structure Changes:

Atlantic Flyway Council:

- Delaware—Experimental tundra swan season (yearly updates and final report)
- Florida—Experimental teal-only season (yearly updates and final report)

Mississippi Flyway Council:

- Alabama—Experimental sandhill crane season (yearly updates and final report)

Central Flyway Council:

- Nebraska—Experimental teal season (yearly updates and final report)
- New Mexico—Experimental sandhill crane season in Estancia Valley (yearly updates and final report)
- Wyoming—Split (3–way) season for Canada geese (final report only)

Pacific Flyway Council:

- California—Zones and split season for white-fronted geese (final report only)

(B) Additional State-specific Annual Reports:

State-specific:

- Arizona—Sandhill crane racial composition of the harvest conducted at 3-year intervals
- North Carolina and Virginia—Tundra swan harvest and hunter participation data
- Montana (Central Flyway portion), North Dakota, and South Dakota—Tundra swan harvest and hunter participation data (yearly)
- Montana (Pacific Flyway portion)—Swan harvest-monitoring program to measure species composition (yearly)
- Montana (Pacific Flyway portion), Utah, and Nevada—Swan harvest-

monitoring program to measure the species composition and report detailing swan harvest, hunter participation, reporting compliance, and monitoring of swan populations in designated hunt areas (yearly)

Reports and monitoring are used for a variety of reasons. Some are used to monitor species composition of the harvest for those areas where species intermingling can confound harvest management and potential overharvest of one species can be a management concern. Others are used to determine overall harvest for those species and/or areas that are not sampled well by our overall harvest surveys due to either the limited nature/area of the hunt or season or where the harvest needs to be closely monitored. Experimental season reports are used to determine whether the experimental season is achieving its intended goals and objectives, without causing unintended harm to other species and ultimately whether the experimental season should proceed to operational status. Most experimental seasons are 3-year trials with yearly reports and a final report. Most of the other reports and monitoring are conducted either annually or at 3-year intervals.

Title: Establishment of Annual Migratory Bird Hunting Seasons, 50 CFR part 20.

OMB Control Number: 1018–0171.

Service Form Number: None.

Type of Request: Extension of a currently approved collection.

Description of Respondents: State and Tribal governments.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: Annually.

Estimated Number of Annual Respondents: 82 (from 52 State governments and Territories and 30 Tribal governments).

Estimated Number of Annual Responses: 99 (includes State and Tribal governments and additional reports from States).

Average Completion Time per Response: Varies from 4 hours to 650 hours, depending on the activity.

Estimated Total Annual Burden Hours: 9,878.

Estimated Annual Non-hour Burden Cost: None.

As part of our continuing effort to reduce paperwork and respondent burdens, and in accordance with 5 CFR 1320.8(d)(1), we invite the public and other Federal agencies to comment on any aspect of this proposed information collection, including:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this 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, *e.g.,* permitting electronic submission of response.

Send your comments and suggestions on this information collection by the date indicated under *Information Collection Requirements* in **DATES** to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, MS: PRB/PERMA (JAO/1N), Falls Church, VA 22041–3803 (mail); or *Info_Coll@fws.gov* (email). Please reference OMB Control Number 1018–0171 in the subject line of your comments.

List of Subjects in 50 CFR Part 20

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

Authority

The rules that eventually will be promulgated for the 2020–21 hunting season are authorized under 16 U.S.C. 703–712 and 16 U.S.C. 742 a–j.

George Wallace,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2020–06797 Filed 4–1–20; 8:45 am]

BILLING CODE 4333–15–P

Notices

Federal Register

Vol. 85, No. 64

Thursday, April 2, 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

Rural Utilities Service

Announcement of Funding Availability, Loan Application Procedures, and Deadlines for the Rural Energy Savings Program (RESP)

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice of Solicitation of Applications (NOSA).

SUMMARY: The Rural Utilities Service (RUS), an Agency of the United States Department of Agriculture (USDA), is soliciting letters of intent for loan applications under the Rural Energy Savings Program (RESP), announcing the application process for those loans and deadlines for applications from eligible entities for funding in fiscal year (FY) 2020, until expended or further notice.

DATES: To be considered for this funding, applications under this NOSA will be accepted immediately. The RESP application process is described in detail pursuant to 7 CFR part 1719. In brief, the RESP is comprised of two steps:

Step 1: To be considered for financing, an Applicant seeking financing must submit a Letter of intent, in an electronic PDF (PDF) format not to exceed 10 Megabytes (10 MB) by electronic mail (email) to *RESP@USDA.GOV.* No paper letters of intent will be accepted. The Letters of intent will be queued as they are received. If it advances program and policy goals, RUS may consider loan applications from Eligible entities that have submitted Letters of intent under prior funding announcements but were not invited to proceed with a loan application.

Step 2: A RESP applicant that has been invited in writing by RUS to proceed with the loan application, will have up to ninety (90) days to complete and submit to RUS the documentation for a complete loan application. The ninety (90) day timeframe will begin on the date the RESP applicant receives RUS' Invitation to proceed. If the deadline to submit the completed loan application falls on Saturday, Sunday, or a Federal holiday, the application is due the next business day. The loan application package must be marked with the subject line ''Attention: Christopher McLean, Assistant Administrator for the Electric Program; RESP Loan Application.''

FOR FURTHER INFORMATION CONTACT: Robert Coates, Electric Program, Rural Utilities Service, Rural Development, United States Department of Agriculture, 1400 Independence Avenue SW, STOP 1568, Room 0257–S, Washington, DC 20250–1510; Telephone: (202) 260–5415; Email: *Robert.Coates@usda.gov.*

SUPPLEMENTARY INFORMATION: *Authority:* These loans are made available under the authority of Section 6407 of the Farm Security and Rural Investment Act of 2002, as amended, and the Rural Electrification Act of 1936, 7 U.S.C. 901 *et seq.*

General Information

The purpose of the RESP is to help rural families and small businesses achieve cost savings by providing loans to qualified consumers through eligible entities to implement durable cost-effective energy efficiency measures pursuant to 7 U.S.C. 8107a(a) of the RESP authorizing statute. The Secretary may use this funding to allow eligible entities to offer energy efficiency loans to customers in any part of their service territory in accordance to § 7 CFR part 1719. The Administrator may approve loans proposing to include these eligible activities for entities currently in the queue provided they still meet all of the application requirements. Additionally, subject to appropriations, funding for projects may be used to replace manufactured housing units with another manufactured housing unit if the replacement would be more cost effective in saving energy.

The Agency encourages applications that will support recommendations made in the Rural Prosperity Task Force report to help improve life in rural America, See, *www.usda.gov/ruralprosperity.* Applicants are encouraged to consider projects that provide measurable results in helping rural communities build robust and sustainable economies through strategic investments in infrastructure, partnerships and innovation. Key strategies include: Achieving e-Connectivity for rural America, developing the rural economy, harnessing technological innovation, supporting a rural workforce, and improving quality of life.

Application and Submission Information

Application Requirements: All requirements for submission of an application under the RESP are subject to 7 CFR part 1719.

Application Materials/Submission: The Letter of intent must be submitted by the Applicant in an electronic PDF (PDF) format not to exceed 10 Megabytes (10 MB) by electronic mail (email) to *RESP@USDA.GOV.* No paper letters of intent will be accepted. The completed loan application package must be submitted following the instructions that will be outlined in the RUS Invitation to proceed to the RESP Applicant. The loan application package must be marked with the subject line ''Attention: Christopher McLean, Assistant Administrator for the Electric Program; RESP Loan Application.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), OMB approved this information collection under OMB Control Number 0572–0151. This NOSA contains no new reporting or recordkeeping burdens under OMB control number 0572–0151 that would require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

USDA Non-Discrimination Statement

In accordance with Federal civil rights law and USDA civil rights regulations and policies, the USDA, its agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or

activity conducted or funded by USDA (not all bases apply to all programs).

Remedies and complaint filing deadlines vary by program or incident. Persons with disabilities who require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the Agency or USDA's TARGET Center at (202) 720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877–8339 (English) or (800) 845–6136 (Spanish).

Individuals who wish to file a Program Discrimination Complaint must complete the USDA Program Discrimination Complaint Form (PDF). To file a program discrimination complaint, you may obtain a complaint form by sending an email to *Cr-info@ascr.usda.gov* or calling (866) 632–9992 to request the form. A letter may also be written containing all of the information requested in the form. Send the completed complaint form or letter by mail to the U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue SW, Washington, DC 20250–9410, or email at *program.intake@usda.gov.* Additional information can be found online at *https://www.ascr.usda.gov/filing-programdiscrimination-complaint-usdacustomer.*

USDA is an equal opportunity provider, employer, and lender.

Chad Rupe,

Administrator, Rural Utilities Service.

[FR Doc. 2020–06341 Filed 4–1–20; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the North 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 (Commission) and the Federal Advisory Committee Act that the North Carolina Advisory Committee (Committee) will hold a meeting on Tuesday, April 14, 2020, from 12:00–1:00 p.m. EST for the purpose of discussing the committee's civil rights project.

DATES: The meeting will be held on Tuesday, April 14, 2020, from 12:00–1:00 p.m. EST.

Public Call Information: Dial: (888) 220–8474; Conference ID: 5152396.

FOR FURTHER INFORMATION CONTACT: Mallory Trachtenberg, DFO, at *mtrachtenberg@usccr.gov* or 312–353–8311.

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 Advisory Committee Management Unit, U.S. Commission on Civil Rights, 230 S. Dearborn, Suite 2120, Chicago IL 60604. They may also be emailed to Carolyn Allen at *callen@usccr.gov.* Persons who desire additional information may contact the Regional Programs Unit Office at (312) 353–8311.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Unit Office, 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, Indiana 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 Programs Unit Office at the above email or street address.

Agenda

I. Welcome and Roll Call
II. Announcements and Updates
III. Discussion:
  a. Discussion of Reappointments
  b. Discussion of Chair for the committee
  c. Civil Rights Project in Indiana
IV. Future Plans and Actions
V. Public Comment
VI. Adjournment

Dated: March 30, 2020.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2020–06918 Filed 4–1–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–351–842]

Certain Uncoated Paper From Brazil: Preliminary Results of Administrative Review of the Antidumping Duty Order; 2018–2019

AGENCY: Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) preliminarily finds that sales of certain uncoated paper (uncoated paper) from Brazil were made at less than normal value during the period of review (POR) March 1, 2018 through February 28, 2019. We invite interested parties to comment on these preliminary results.

DATES: Applicable April 1, 2020.

FOR FURTHER INFORMATION CONTACT: Jerry Huang or Justin Neuman, 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) 482–4047 or (202) 482–0486, respectively.

SUPPLEMENTARY INFORMATION:

Background

On May 29, 2019, Commerce initiated an administrative review of the antidumping duty order on uncoated paper from Brazil in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).[1] This review covers two producers/exporters of the subject merchandise: Suzano Papel e Celulose S.A. (Suzano) and International Paper do Brasil Ltda. (IP)/International Paper Exportadora Ltda. (IPEX) (collectively, International Paper).[2] For details regarding the events

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 84 FR 24743 (May 29, 2019).

[2] In the investigation, we determined that IP and IPEX constituted a single entity. Because no interested parties submitted comments on this issue, and in the absence of any new information regarding this finding, Commerce is continuing to find that IP and IPEX are affiliated, pursuant to sections 771(33)(E) and (F) of the Act, and are considered a single entity, pursuant to 19 CFR

that occurred subsequent to the initiation of the review, *see* the Preliminary Decision Memorandum.[3]

Pursuant to section 751(a)(3)(A) of the Act, Commerce determined that it was not practicable to complete the preliminary results of this review within 245 days and extended the preliminary results by 117 days, until March 27, 2020.[4]

Scope of the Order

The products covered by this order are certain uncoated paper products from Brazil. For a full description of the scope, *see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this review in accordance with section 751(a) of the Act. For a full description of the methodology underlying these preliminary results, *see* the Preliminary Decision Memorandum. A list of topics included in the Preliminary Decision Memorandum is included as an appendix to this notice. The Preliminary Decision Memorandum is a public document and is made available to the public via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov,* and is available to all parties in the Central Records Unit, Room B8024 of the main Commerce building. In addition, a complete version of the Preliminary Decision Memorandum is available at *http://enforcement.trade.gov/frn/.* The signed and electronic versions of the Preliminary Decision Memorandum are identical in content.

Preliminary Results of the Review

We preliminarily determine that the following weighted-average dumping margins exist for the respondents for the period March 1, 2018 through February 28, 2019:

Exporter/producer	Weighted-average dumping margin (percent)
Suzano Papel e Celulose S.A	17.05
International Paper do Brasil Ltda. and International Paper Exportadora Ltda	0.00

Assessment Rates

Upon completion of the final results, Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries. If International Paper's or Suzano's weighted-average dumping margin is not zero or *de minimis* (*i.e.,* less than 0.5 percent) in the final results of this review, we will calculate importer-specific *ad valorem* antidumping duty assessment rates based on the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those same sales in accordance with 19 CFR 351.212(b)(1). We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer-specific assessment rate calculated in the final results of this review is not zero or *de minimis.* If a respondent's weighted-average dumping margin is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.[5]

In accordance with Commerce's ''automatic assessment'' practice, for entries of subject merchandise during the POR produced by International Paper or Suzano for which the companies did not know that the merchandise was destined for the United States, we will instruct CBP to liquidate those entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[6]

We intend to issue liquidation instructions to CBP 15 days after publication of the final results of this review.

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the finals results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rates for International Paper and Suzano in the final results of review will be equal to the weighted-average dumping margin established in the final results of this administrative review; (2) for merchandise exported by producers or exporters not covered in this review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recently-completed segment of this proceeding in which they were reviewed; (3) if the exporter is not a firm covered in this review or the original investigation but the producer is, then the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the producer of the merchandise; (4) the cash deposit rate for all other producers or exporters will continue to be 27.11 percent,[7] the all-others rate established in the less-than-fair-value investigation. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Disclosure and Public Comment

We intend to disclose the calculations performed to parties within five days after public announcement of the preliminary results.[8] Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs no later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than seven days after the date for filing case briefs.[9] 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.[10] Case and rebuttal briefs should be filed using ACCESS [11] and must be served on interested parties.[12] Executive summaries should be limited to five pages total, including footnotes. Note that Commerce has temporarily modified certain of its

351.401(f). *See Certain Uncoated Paper From Brazil: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 80 FR 52029 (August 27, 2015), and accompanying Preliminary Decision Memorandum at ''Affiliation Determinations,'' unchanged in *Certain Uncoated Paper From Brazil: Final Determination of Sales at Less Than Fair Value,* 81 FR 3115 (January 20, 2016).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review of Certain Uncoated Paper from Brazil; 2018–2019,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See* Memorandum, ''Third Antidumping Duty Administrative Review of Certain Uncoated Paper from Brazil: Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review,'' dated November 25, 2019.

[5] *See* section 751(a)(2)(C) of the Act.

[6] For a full discussion of this practice, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[7] *See Certain Uncoated Paper from Australia, Brazil, Indonesia, the People's Republic of China, and Portugal: Amended Final Affirmative Antidumping Determinations for Brazil and Indonesia and Antidumping Duty Orders,* 81 FR 11174 (March 3, 2016).

[8] *See* 19 CFR 351.224(b).

[9] *See* 19 CFR 351.309(c)(1)(ii) and 351.309(d)(1).

[10] *See* 19 CFR 351.309(c)(2) and (d)(2).

[11] *See generally* 19 CFR 351.303.

[12] *See* 19 CFR 351.303(f).

requirements for serving documents containing business proprietary information, until May 19, 2020, unless extended.[13]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. An electronically filed document must be received successfully in its entirety by Commerce's electronic records system, ACCESS, by 5:00 p.m. Eastern Time within 30 days after the date of publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case and rebuttal briefs.

Final Results of Review

Unless otherwise extended, Commerce intends to issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(1).

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification to Interested Parties

This administrative review and notice are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213 and 351.221(b)(4).

Dated: March 27, 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. Product Comparisons
VI. Date of Sale
VII. Treatment of Re-Export Sales
VIII. Export Price/Constructed Export Price
IX. Normal Value
X. Currency Conversion
XI. Recommendation

[FR Doc. 2020–06915 Filed 4–1–20; 8:45 am]

BILLING CODE 3510–DS–P

[13] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 17006 (March 26, 2020).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–549–502]

Circular Welded Carbon Steel Pipes and Tubes From Thailand: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2018–2019

AGENCY: Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) preliminarily finds that Saha Thai Steel Pipe Public Co., Ltd., also known as Saha Thai Steel Pipe (Public) Co., Ltd. (collectively, Saha Thai), as well as 28 non-examined companies, did not make sales of subject merchandise at less than normal value during the period of review (POR) March 1, 2018 through February 28, 2019. We further preliminarily determine that K Line Logistics (K-Line) had no shipments during the POR. We invite interested parties to comment on these preliminary results.

DATES: Applicable April 2, 2020.

FOR FURTHER INFORMATION CONTACT: Toni Page, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1398.

SUPPLEMENTARY INFORMATION:

Background

In accordance with section 751(a)(2) of the Tariff Act of 1930, as amended (the Act), Commerce is conducting an administrative review of the antidumping duty order on circular welded carbon steel pipes and tubes (pipes and tubes) from Thailand. The POR is March 1, 2018 through February 28, 2019. This review includes 30 companies, including Saha Thai which Commerce selected for individual examination.

On December 2, 2019, Commerce extended the time for issuing the preliminary results of this review from 245 days to 333 days.[1] On February 26, 2020, we further extended the deadline for the preliminary results by an additional 29 days until March 27, 2020.[2] For a more complete description of the events between the initiation of this review and these preliminary results, *see* the Preliminary Decision Memorandum.[3]

Scope of the Order

The products covered by the antidumping order are pipes and tubes from Thailand. The subject merchandise has an outside diameter of 0.375 inches or more, but not exceeding 16 inches. For a full description of the scope of this order, *see* the Preliminary Decision Memorandum.[4]

Preliminary Determination of No Shipments

Based on an analysis of U.S. Customs and Border Protection (CBP) information, and comments provided by interested parties regarding the CBP data, Commerce preliminarily determines that K-Line had no shipments during the POR. For additional information regarding this determination, *see* the Preliminary Decision Memorandum.

Methodology

Commerce conducted this review in accordance with section 751(a)(2) of the Act. Export price is calculated in accordance with section 772 of the Act. Normal value is calculated in accordance with section 773 of the Act.

For a full description of the methodology underlying these preliminary results, *see* the Preliminary Decision Memorandum. A list of topics discussed in the Preliminary Decision Memorandum is attached in the appendix to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's

[1] *See* Memorandum, ''2018–2019 Antidumping Duty Administrative Review of Circular Welded Carbon Steel Pipes and Tubes from Thailand: Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review,'' dated December 2, 2019.

[2] *See* Memorandum, ''2018–2019 Antidumping Duty Administrative Review of Circular Welded Carbon Steel Pipes and Tubes from Thailand: Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review,'' dated February 26, 2020.

[3] *See* Memorandum, ''Circular Welded Carbon Steel Pipes and Tubes from Thailand: Decision Memorandum for the Preliminary Results of Antidumping Duty Administrative Review, and Preliminary Determination of No Shipments; 2018–2019,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See* Preliminary Decision Memorandum at ''Scope of the Order.''

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, the signed Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Preliminary Results of Review

Commerce preliminarily determines that the following weighted-average dumping margins exist for the period March 1, 2018 through February 28, 2019:

Producer or exporter	Weighted-average dumping margin (percent)
Saha Thai Steel Pipe Public Company, Ltd. (also known as Saha Thai Steel Pipe (Public) Company, Ltd.)	0.00
Apex International Logistics	0.00
Aquatec Maxcon Asia	0.00
Asian Unity Part Co., Ltd	0.00
Bis Pipe Fitting Industry Co., Ltd	0.00
Blue Pipe Steel Center	0.00
Blue Pipe Steel Center Co., Ltd	0.00
Chuhatsu (Thailand) Co., Ltd	0.00
CSE Technologies Co., Ltd	0.00
Expeditors International (Bangkok)	0.00
Expeditors Ltd	0.00
FS International (Thailand) Co., Ltd	0.00
Kerry-Apex (Thailand) Co., Ltd	0.00
Oil Steel Tube (Thailand) Co., Ltd	0.00
Otto Ender Steel Structure Co., Ltd	0.00
Pacific Pipe and Pump	0.00
Pacific Pipe Public Company Limited (also known as Pacific Pipe Company)	0.00
Panalpina World Transport Ltd	0.00
Polypipe Engineering Co., Ltd	0.00
Schlumberger Overseas S.A	0.00
Siam Fittings Co., Ltd	0.00
Siam Steel Pipe Co., Ltd	0.00
Sino Connections Logistics (Thailand) Co., Ltd	0.00
Thai Malleable Iron and Steel	0.00
Thai Oil Group	0.00
Thai Oil Pipe Co., Ltd	0.00
Thai Premium Pipe Co., Ltd	0.00
Vatana Phaisal Engineering Company	0.00
Visavakit Patana Corp., Ltd	0.00

Rate for Non-Examined Companies

The statute and Commerce's regulations do not address the establishment of a weighted-average dumping margin to be applied to companies not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in a less-than-fair-value (LTFV) investigation, for guidance when calculating the weighted-average dumping margin for companies which were not selected for individual examination in an administrative review. Under section 735(c)(5)(A) of the Act, the all-others rate is normally an amount equal to the weighted-average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero or *de minimis* (*i.e.,* less than 0.5 percent) margins, and any margins determined entirely on the basis of facts available. However, section 735(c)(5)(B) of the Act states that if the weighted-average dumping margins for all individually examined exporters or producers are zero, *de minimis,* or based entirely on facts available, then Commerce may use ''any reasonable method'' to establish the all-others rate, including averaging the weighted-average dumping margins for the individually examined companies.

Consistent with section 735(c)(5)(B) of the Act, we have determined that a reasonable method for determining the weighted-average dumping margin for each of the non-selected companies is to use the weighted-average dumping margin calculated for the mandatory respondent (*i.e.,* Saha Thai) in this administrative review. Although the weighted-average dumping margin calculated for Saha Thai is zero, this is the only contemporaneous rate, *i.e.,* calculated in this review, and, thus, Commerce has determined the weighted-average dumping margin for the non-examined companies to be zero.[5]

Disclosure and Public Comment

We intend to disclose the calculations performed to parties in this proceeding within five days after public announcement of the preliminary results in accordance with 19 CFR 351.224(b).

Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs not later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than seven days after the date for filing case briefs.[6] 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.[7] Case and rebuttal briefs should be filed using ACCESS[8] and must be served on interested parties.[9] Executive summaries should be limited to five pages total, including footnotes. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until May 19, 2020, unless extended.[10]

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 Commerce's electronic records system, ACCESS. An electronically filed document must be received successfully in its entirety in ACCESS by 5 p.m. Eastern Time within 30 days after the date of publication of this notice. Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised by each party in their respective case brief.

Commerce intends to issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, unless extended, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon completion of this administrative review, Commerce shall determine and CBP shall assess antidumping duties on all appropriate entries. If an examined respondent's weighted-average dumping margin is not zero or *de minimis* in the final results of this review, we will calculate

[5] *See Certain Lined Paper Products from India: Final Results of Antidumping Duty Administrative Review; 2016–2017,* 84 FR 23017 (May 21, 2019).

[6] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 17006, 17007 (March 26, 2020).

[7] *See* 19 CFR 351.303 (for general filing requirements).

[8] *See generally* 19 CFR 351.303.

[9] *See* 19 CFR 351.303(f).

[10] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 17006 (March 26, 2020).

importer-specific *ad valorem* assessment rates on the basis of the ratio of the total amount of dumping calculated for an importer's examined sales and the total entered value of such sales in accordance with 19 CFR 351.212(b)(1). For non-examined respondents, Commerce shall direct CBP to assess antidumping duties at an *ad valorem* rate equal to the company-specific weighted-average dumping margin determined in the final results of this review. Where either the respondent's weighted-average dumping margin is zero or *de minimis* within the meaning of 19 CFR 351.106(c), 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.

Commerce clarified its ''automatic assessment'' regulation on May 6, 2003.[11] This clarification applies to entries of subject merchandise during the POR produced by Saha Thai for which it did not know its merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.

We intend to issue instructions to CBP 15 days after publication of the final results of this review.

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review, as provided for by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for the companies under review will be equal to the weighted-average dumping margin established in the final results of this review (except, if that rate is *de minimis,* then the cash deposit rate will be zero); (2) for previously reviewed or investigated companies not listed above in the preliminary results of this review, including those for which Commerce may determine had no shipments during the POR, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding; (3) if the exporter is not a firm covered in this review or another completed segment of this proceeding, but the manufacturer is, then the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previously completed segment of this proceeding, then the cash deposit rate will be the all- others rate of 15.67 percent, established in the less-than-fair-value investigation.[12] These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this 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 to Interested Parties

We are issuing and publishing these preliminary results in accordance with sections 751(a)(1) and 777(i) of the Act, and 19 CFR 351.213(h) and 351.221(b)(4).

Dated: March 27, 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. Preliminary Determination of No Shipments
V. Comparison to Normal Value
VI. Particular Market Situation
VII. Product Comparisons
VIII. Discussion of Methodology
IX. Rates for Non-Examined Companies
X. Recommendation

[FR Doc. 2020–06911 Filed 4–1–20; 8:45 am]

BILLING CODE 3510–DS–P

[11] For a full discussion of this clarification, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[12] *See Antidumping Duty Order: Circular Welded Carbon Steel Pipes and Tubes from Thailand,* 51 FR 8341 (March 11, 1986).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–471–807]

Certain Uncoated Paper From Portugal: Preliminary Results of the Administrative Review of the Antidumping Duty Order; 2018–2019

AGENCY: Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) preliminarily finds that sales of certain uncoated paper (uncoated paper) from Portugal were made at less than normal value during the period of review (POR) March 1, 2018 through February 28, 2019. We invite interested parties to comment on these preliminary results.

DATES: Applicable April 2, 2020.

FOR FURTHER INFORMATION CONTACT: Kabir Archuletta, 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) 482–2593.

SUPPLEMENTARY INFORMATION:

Background

On May 29, 2019, Commerce initiated an administrative review of the antidumping duty order on uncoated paper from Portugal in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).[1] This review covers one producer/exporter of subject merchandise, The Navigator Company, S.A. (Navigator).[2] For details regarding the events that occurred subsequent to the initiation of the review, *see* the Preliminary Decision Memorandum.[3]

Pursuant to section 751(a)(3)(A) of the Act, Commerce determined that it was not practicable to complete the preliminary results of this review within the 245 days and extended the preliminary results by 117 days, until March 27, 2020.[4]

Scope of the Order

The products covered by this order are certain uncoated paper products

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 84 FR 24743 (May 29, 2019).

[2] *Id.,* 84 FR at 24745.

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the Administrative Review of the Antidumping Duty Order: Certain Uncoated Paper from Portugal; 2018–2019,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See* Memorandum, ''Certain Uncoated Paper from Portugal: Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review,'' dated November 15, 2019.

from Portugal. For a full description of the scope, *see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this review in accordance with section 751(a) of the Act. For a full description of the methodology underlying these preliminary results, *see* the Preliminary Decision Memorandum. A list of topics included in the Preliminary Decision Memorandum is included as an appendix to this notice. The Preliminary Decision Memorandum is a public document and is made available to the public via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov,* and is available to all parties in the Central Records Unit, Room B8024 of the main Commerce building. In addition, a complete version of the Preliminary Decision Memorandum is available at *http://enforcement.trade.gov/frn/.* The signed and electronic versions of the Preliminary Decision Memorandum are identical in content.

Preliminary Results of the Review

We preliminarily determine that the following weighted-average dumping margin exists for the period March 1, 2018 through February 28, 2019:

Exporter/producer	Weighted-average dumping margin (percent)
The Navigator Company, S.A	6.75

Assessment Rates

Upon completion of the final results, Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries. If Navigator's weighted-average dumping margin is not zero or *de minimis* (*i.e.,* less than 0.5 percent) in the final results of this review, we will calculate importer-specific *ad valorem* antidumping duty assessment rates based on the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those same sales in accordance with 19 CFR 351.212(b)(1). We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer-specific assessment rate calculated in the final results of this review is not zero or *de minimis.* If Navigator's weighted-average dumping margin is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.[5]

In accordance with Commerce's ''automatic assessment'' practice, for entries of subject merchandise during the POR produced by Navigator for which it did not know that the merchandise was destined for the United States, we will instruct CBP to liquidate those entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[6]

We intend to issue liquidation instructions to CBP 15 days after publication of the final results of this review.

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the finals results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for Navigator in the final results of review will be equal to the weighted-average dumping margin established in the final results of this administrative review; (2) for merchandise exported by producers or exporters not covered in this review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recently-completed segment of this proceeding in which they were reviewed; (3) if the exporter is not a firm covered in this review or the original investigation but the producer is, then the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the producer of the merchandise; (4) the cash deposit rate for all other producers or exporters will continue to be 7.80 percent,[7] the all-others rate established in the less-than-fair-value investigation. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Disclosure and Public Comment

We intend to disclose the calculations performed to parties within five days after public announcement of the preliminary results.[8] Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs no later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than seven days after the date for filing case briefs.[9] 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.[10] Case and rebuttal briefs should be filed using ACCESS [11] and must be served on interested parties.[12] Executive summaries should be limited to five pages total, including footnotes. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until May 19, 2020, unless extended.[13]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. An electronically-filed document must be received successfully in its entirety by Commerce's electronic records system, ACCESS, by 5:00 p.m. Eastern Time within 30 days after the date of publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case and rebuttal briefs.

Final Results of Review

Unless otherwise extended, Commerce intends to issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to

[5] *See* section 751(a)(2)(C) of the Act.

[6] For a full discussion of this practice, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[7] *See Certain Uncoated Paper from Australia, Brazil, Indonesia, the People's Republic of China, and Portugal: Amended Final Affirmative Antidumping Determinations for Brazil and Indonesia and Antidumping Duty Orders,* 81 FR 11174 (March 3, 2016).

[8] *See* 19 CFR 351.224(b).

[9] *See* 19 CFR 351.309(c)(1)(ii) and 351.309(d)(1).

[10] *See* 19 CFR 351.309(c)(2) and (d)(2).

[11] *See generally* 19 CFR 351.303.

[12] *See* 19 CFR 351.303(f).

[13] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 17006 (March 26, 2020).

section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(1).

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification to Interested Parties

This administrative review and notice are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213 and 351.221(b)(4).

Dated: March 27, 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. Product Comparisons
VI. Date of Sale
VII. Constructed Export Price
VIII. Normal Value
IX. Currency Conversion
X. Recommendation

[FR Doc. 2020–06910 Filed 4–1–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–814]

Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China: Preliminary Determination of No Shipments; 2018–2019

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that Solidbend Fittings & Flanges Sdn. Bhd. (Solidbend) made no shipments of subject merchandise during the period of review (POR) July 1, 2018 through June 30, 2019. We invite all interested parties to comment on these preliminary results.

DATES: Applicable April 2, 2020.

FOR FURTHER INFORMATION CONTACT: Genevieve Coen, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3251.

SUPPLEMENTARY INFORMATION:

Background

On September 9, 2019, Commerce initiated an administrative review of the antidumping duty order [1] on carbon steel butt-weld pipe fittings (butt-weld pipe fittings) from the People's Republic of China (China), in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act), with respect to one company, Solidbend.[2] On October 9, 2019, Solidbend certified it had no shipments of subject merchandise during the POR.[3] On October 18, 2019, we placed United States Customs and Border Protection (CBP) data on the record and invited comment from interested parties.[4] In December 2019, we confirmed Solidbend's no shipment claim with CBP.[5] Because Solidbend reported it has no shipments, several parties requested that Commerce rescind its review of Solidbend;[6] however, Solidbend did not withdraw its review request, and consistent with our practice, we have not rescinded this review with respect to Solidbend.[7]

Scope of the Order

The merchandise covered by the Order consists of certain carbon steel butt-weld pipe fittings, having an inside diameter of less than 14 inches, imported in either finished or unfinished form. These formed or forged pipe fittings are used to join sections in piping systems where conditions require permanent, welded connections, as distinguished from fittings based on other fastening methods (*e.g.,* threaded, grooved, or bolted fittings). Carbon steel butt-weld pipe fittings are currently classified under subheading 7307.93.30 of the HTSUS. The HTSUS subheading is provided for convenience and customs purposes. The written product description remains dispositive.

Preliminary Determination of No Shipments

On October 9, 2019, Solidbend timely filed a statement reporting that it made no shipments of subject merchandise to the United States during the POR.[8] We confirmed the claim from Solidbend with CBP. Based on this information, we preliminarily determine that Solidbend had no shipments during the POR.

Consistent with our practice, we are not preliminarily rescinding the review with respect to Solidbend. Rather, we will complete the review with respect to this company and issue appropriate instructions to CBP based on the final results of this review.[9]

Disclosure and Public Comment

Commerce has made no calculations as part of these preliminary results. Accordingly, there will be no disclosure of the calculations performed for these preliminary results of review in accordance with 19 CFR 351.224(b).

Commerce intends to issue the final results of this administrative review no later than 120 days after the date of publication of this notice, unless extended.[10]

Assessment Rates

Upon completion of this administrative review, Commerce shall determine, and CBP shall assess, antidumping duties on all appropriate entries. Pursuant to Commerce's practice in non-market economy cases, if Commerce continues to determine in the final results that Solidbend had no shipments of subject merchandise, Commerce will liquidate any suspended entries during the POR from Solidbend at the China-wide rate.[11] We intend to issue assessment instructions 15 days

[1] *See Antidumping Duty Order and Amendment to the Final Determination of Sales at Less Than Fair Value; Certain Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China,* 57 FR 29702 (July 6, 1992) (*Order*).

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 84 FR 47242 (September 9, 2019).

[3] *See* Solidbend's Letter, ''Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China, A–570–814: No Shipment Letter,'' dated October 9, 2019 (Solidbend No Shipment Certification).

[4] *See* Memorandum, ''Administrative Review of the Antidumping Duty Order of Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China: Release of Customs and Border Protection (CBP) Data Query,'' dated October 18, 2019.

[5] *See* Memorandum, ''Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China: Result of No Shipments Inquiry,'' dated December 10, 2019.

[6] *See* Tube Forgings, Mills, and Hackney's Letter, '' Certain Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China; Comment on Solidbend's No Shipment Letter,'' dated October 11, 2019; *see also* Weldbend's Letter, ''Certain Carbon Steel Butt-Weld Pipe Fittings from China: Comments on CBP Data,'' dated October 25, 2019.

[7] *See Certain Magnesia Carbon Bricks from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments, In Part; 2018–2019,* 85 FR 9735 (February 20, 2020) (*Magnesia Bricks*).

[8] *See* Solidbend No Shipment Certification.

[9] *See, e.g., Magnesia Bricks.*

[10] *See* section 751(a)(3)(A) of the Act and 19 CFR 351.213(h).

[11] For a full discussion of this practice, *see Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011).

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) For previously investigated or reviewed Chinese and non-Chinese exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recently-completed segment of this proceeding; (2) the cash deposit rate for all Chinese manufacturers or exporters of subject merchandise will continue to be 182.90 percent, the China-wide rate determined in the less-than-fair-value investigation; (3) for all non-Chinese exporters of subject merchandise that have not received their own rate, the cash deposit rate will be the rate applicable to the Chinese exporter that supplied that non-Chinese exporter.[12] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification Regarding Administrative Protective Order

This notice serves as a preliminary reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/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.

[12] *See Antidumping Duty Order and Amendment to the Final Determination of Sales at Less Than Fair Value; Certain Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China,* 57 FR 29702 (July 6, 1992).

Notification to Interested Parties

This administrative review and notice are issued and published in accordance with section 751(a)(1) of the Act.

Dated: March 25, 2020.

Jeffrey I. Kessler,

Assistant Secretary, for Enforcement and Compliance.

[FR Doc. 2020–06907 Filed 4–1–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Revised Information Collection; Comment Request; Survey To Collect Economic Data From Recreational Anglers Along the Atlantic Coast

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 June 1, 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 Scott Steinback, Economist, Northeast Fisheries Science Center, 166 Water St., Woods Hole, MA 02543. Tel: (508) 495–4701 or *scott.steinback@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for a revision to a currently approved information collection.

The objective of the original data collection effort under OMB Control Number 0648–0783 was to assess how changes in saltwater recreational fishing regulations affect angler effort, angler welfare, fishing mortality, and future stock levels. That data collection effort focused on anglers who fished for Atlantic cod and haddock off the Atlantic coast from Maine to Massachusetts. Under this revised information collection request, the objective remains the same, but a new survey will be added with the focus on anglers who fish for summer flounder and black sea bass along the Atlantic coast from Massachusetts to North Carolina.

Data collected from this survey will improve our ability to understand and predict how changes in management options and regulations may change fishing mortality and the number of trips anglers take for summer flounder and black sea bass. This data will allow fisheries managers to conduct updated and improved analysis of the socio-economic effects to recreational anglers and to coastal communities of proposed changes in fishing regulations. The recreational fishing community and regional fisheries management councils have requested more species-specific socio-economic studies of recreational fishing that can be used in the analysis of fisheries policies. This survey will address that stated need for more species-specific studies. The population consists of those anglers who fish in saltwater along the Atlantic coast from Massachusetts to North Carolina and who possess a license to fish. A sample of anglers will be drawn from state fishing license frames. The survey will be conducted using both mail and email to contact anglers and invite them to take the survey online. Anglers not responding to the online survey may receive a paper survey in the mail.

II. Method of Collection

The survey will be conducted using two modes: Mail and internet.

III. Data

OMB Control Number: 0648–0783.

Form Number(s): None.

Type of Review: Regular (revision of a currently approved information collection).

Affected Public: Individuals or households.

Estimated Number of Respondents: 2,000.

Estimated Time per Response: 15 minutes

Estimated Total Annual Burden Hours: 500 hours.

Estimated Total Annual Cost to Public: $0 in recordkeeping/reporting costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: March 30, 2020.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2020–06921 Filed 4–1–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; West Coast Region Vessel Monitoring System and Pre-Trip Reporting System Requirements

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 comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: To ensure consideration, written or on-line comments must be submitted on or before June 1, 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 Rachael Wadsworth, National Marine Fisheries Service West Coast Region (NMFS WCR), 7600 Sand Point Way NE, Building 1, Seattle, WA 98115; (562) 980–4036; *Rachael.Wadsworth@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Marine Fisheries Service West Coast Region Sustainable Fisheries Division (SFD) implemented both international and domestic regulations to require Vessel Monitoring Systems and pre-trip notifications on U.S. vessels fishing in the eastern Pacific Ocean (EPO). Further details on these regulations, authorizing laws, and proposed changes are described below.

International regulations: Collection of this information is necessary for the U.S. to satisfy its international obligations under the Convention for the Strengthening of the *Inter-American Tropical Tuna Commission* (IATTC), established by the 1949 Convention between the United States of America and the Republic of Costa Rica (Antigua Convention). As a Party to the Antigua Convention and a member of the IATTC, the United States is legally bound to implement decisions of the IATTC under the Tuna Conventions Act, as amended. At its 87th meeting in July 2014, the IATTC adopted Resolution C–14–02 (*Establishment of a Vessel Monitoring System*). Following this meeting, the National Marine Fisheries Service (NMFS) published a rule to implement VMS requirements and to require that commercial fishing vessels 24 meters or more in overall length and engaging in fishing activities for tuna or tuna-like species in the Convention Area (80 FR 60533). The international regulations are found at 50 CFR 300 Subpart C. There are no proposed changes to these regulations.

Domestic regulations: The *Magnuson-Stevens Fishery Conservation and Management Act* (MSA) established regional fishery management councils, including the Pacific Fishery Management Council (Pacific Council), to develop fishery management plans for fisheries in the U.S. exclusive economic zone (EEZ). These plans, if approved by the Secretary of Commerce, are implemented by Federal regulations, which are enforced by the National Oceanic and Atmospheric Administration's (NOAA's) NMFS and the U.S. Coast Guard (USCG) with the cooperation of state agencies to the extent possible. The Pacific Council submitted the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species (HMS FMP) for approval by the Secretary of Commerce. On February 4, 2004, the Secretary partially approved the HMS FMP. On April 7, 2004, NMFS published a final rule to implement the approved portions of the HMS FMP (69 FR 18444) including VMS and pre-trip call-in notifications for longline vessel owners and operators; this element became effective on February 10, 2005. On July 9, 2015, NMFS published a final rule to require the use of a NMFS-approved VMS and to institute a 48-hour pre-trip call-in notification requirement for drift gillnet (DGN) vessel owners/operators (80 FR 32465). The domestic regulations are found at 50 CFR 660 Subpart K. There are no proposed changes to these regulations.

The reports included in the regulations are further detailed below.

VMS vessel location reports: The VMS is an automated, satellite-based system that assists the NMFS Office of Law Enforcement (OLE) and the USCG in reliable and cost-effective monitoring of compliance with closed areas and pre-trip reporting requirements, such as those imposed for the purposes of placing observers on vessels. VMS vessel location reports are used to facilitate enforcement regarding commercial fishing vessel compliance with prohibited or restricted fishing areas in the EPO. The reports provide OLE and the USCG real-time vessel location and activity information. The VMS reports also can be used to check the accuracy of vessel position information reported by the vessel operator in the daily fishing logbooks required by the regulations.

Installation/activation reports are used to provide OLE with information about hardware installed and the communication service provider that will be used by the vessel operator. Specific information that links a permitted vessel with a certain

transmitting unit and communication service is necessary to ensure that automatic position reports will be received properly by NMFS and to identify the unique signature for each VMS unit. In the event that there are any problems, NMFS will need to have ready access to a database that links owner information with installation information. NMFS can then apply troubleshooting techniques and, as necessary, contact the vessel operator and discern whether the problem is associated with the transmitting hardware or the service provider. This is not expected to occur more than once per year.

Position reports are transmitted 24 hours per day and provide OLE and USCG with real-time vessel location and activity information. When an operator is aware that the transmission of automatic position reports has been interrupted, or when notified by OLE that automatic position reports are not being received, they must contact OLE and follow instructions provided.

''On/off reports'', also known as exemption reports, permit the vessel owner/operator to power off the VMS unit while the vessel is at port, or after the end of the fishing season, provided that the vessel owner/operator notifies OLE and receives OLE confirmation in advance of each such shutdown and each time the VMS unit is subsequently turned back on. These reports allow flexibility to fishery participants while providing OLE with the information needed to determine why a position report is not being received from the vessel.

Declaration Reports are only required under domestic regulations and are provided by vessel owners/operators to OLE before the vessel leaves port to fish in state or federal waters. These are used to determine which vessels may be at-sea at any given time and when to expect VMS position reports. NOAA Fisheries will retain control over the information collected and safeguard it from improper access, modification, and destruction, consistent with NOAA standards for confidentiality, privacy, and electronic information.

II. Method of Collection

VMS vessel location reports: Electronic VMS shipboard position is communicated between the shipboard VMS unit and the monitoring agency's fishery monitoring center. Position reports are transferred automatically at a specified frequency and received via a satellite communication system by NOAA.

Installation/activation reports: Written activation reports may be submitted via mail, facsimile, or email to the Special Agent in Charge (SAC), the point of contact for the OLE.

Pre-trip notification reports: These reports are submitted by telephone or email to NMFS or a designated observer service provider.

III. Data

OMB Control Number: 0648–0498.

Form Number(s): None.

Type of Review: Regular (extension of a current information collection).

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 49.

Estimated Time per Response: VMS Unit Install—4 hours; Annual Maintenance/Repair of VMS Unit—1 hour; Installation/Activation Reports—5 min; ''On-Off'' Reports—5 min; Pre-Trip Notifications—5 min.

Estimated Total Annual Burden Hours: 145 hours.

Estimated Total Annual Cost to Public: $113,175.

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,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2020–06919 Filed 4–1–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Davidson Fellowship

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 comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act (PRA) of 1995.

DATES: To ensure consideration, written or on-line comments must be submitted on or before June 1, 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 Chris Ellis, NOAA Office for Coastal Management, 2234 South Hobson Avenue, Charleston SC 29405, ((843) 740–1195), *chris.ellis@noaa.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Office for Coastal Management (OCM) in the National Ocean Service, National Oceanic and Atmospheric Administration, Department of Commerce is funding a new, two-year fellowship program called the ''FY20–21 Margaret A. Davidson Graduate Fellowship for the National Estuarine Research Reserve System'' (Davidson Fellowship). Funding is being made available through a competitive process to master's and doctoral students actively enrolled in a graduate program at an accredited university, through the use of a cooperative agreement to the university. The goals of the Davidson Fellowship are to build the next

generation of leaders in estuarine science and coastal management by affording qualified graduate students the opportunity to conduct collaborative science within the National Estuarine Research Reserve System; partake in professional development opportunities; and receive mentoring to support professional growth.

The National Estuarine Research Reserve System is a national program administered by the Office for Coastal Management. The National Estuarine Reserve System has an interest in balancing the needs of the natural environment and coastal economies and is one of the primary programs responsible for implementing the Coastal Zone Management Act. All Davidson Fellowship projects must be conducted in a research reserve and should be designed to contribute to one of the reserve's priority management areas, and thus enhance the scientific understanding of the natural or social science aspects of the research subject matter. One fellow is being selected in Spring 2020 for each of the 29 reserves for a two-year duration. Mentoring and professional development activities will be provided to build knowledge and skills needed to successfully contribute to the workforce responsible for the coast. These opportunities are also designed to create a strong network among the fellows during their tenure and into the early portion of their careers.

The purpose of this information collection is to gather information on the effectiveness of the Davidson Fellowship program in reaching the desired outcomes, so that we can adaptively manage and make continuous improvements to the program. This information collection will take place initially in Fall 2020, as the first cohort of fellows begins their program, and will gather information from selected fellows, their faculty advisors, contacts from each university's sponsored program office, reserve staff, and NOAA federal and contract staff supporting the Davidson Fellowship program. It will take place again in Fall 2022, as the second cohort of fellows begins their program and the first cohort of fellows finishes, and will gather information from selected fellows, their faculty advisors, contacts from each university's sponsored program office, reserve staff, and NOAA federal and contract staff supporting the Davidson Fellowship program.

More information on the fellowship can be found at this link: *Davidson Fellowship website*.

Program Authority: Section 315 of the Coastal Zone Management Act of 1972, as amended CZMA, 16 U.S.C. 1461, establishes the National Estuarine Research Reserve System (NERRS). 16 U.S.C. 1461 (e)(1)(B) authorizes the Secretary of Commerce to make grants to any coastal state or public or private person for purposes of supporting research and monitoring within a National Estuarine Research Reserve that are consistent with the research guidelines developed under subsection (c).

II. Method of Collection

Information will be collected via an online survey, using Survey Monkey software, sent only to those directly involved with the Davidson Fellowship (student fellows, universities receiving funding for fellows, research reserves hosting the fellows, and NOAA staff and contractors supporting the program).

III. Data

OMB Control Number: 0648–xxxx.

Form Number(s): None.

Type of Review: Regular submission, new information collection.

Affected Public: Those directly involved in the Davidson Fellowship—individuals (student fellows), academic institutions (universities receiving funding for student fellows), state government (research reserves), and federal government (NOAA staff supporting the program).

Estimated Number of Respondents: 500.

Estimated Time Per Response: 15 minutes.

Estimated Total Annual Burden Hours: 52 hours (155 hours total spread over three years).

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,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2020–06874 Filed 4–1–20; 8:45 am]

BILLING CODE 3510–08–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RTID 0648–XR112

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to U.S. Navy Construction

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

ACTION: Notice of issuance of Letter of Authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA), as amended, and implementing regulations, notification is hereby given that a Letter of Authorization (LOA) has been issued to the U.S. Navy (Navy) for the take of marine mammals incidental to construction activities at Naval Weapons Station Seal Beach, California.

DATES: Applicable from March 25, 2020 through March 25, 2025.

ADDRESSES: The LOA and supporting documentation are available online at: *www.fisheries.noaa.gov/action/incidental-take-authorization-us-navy-construction-ammunition-pier-and-turning-basin-naval.* In case of problems accessing these documents, please call the contact listed below (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Ben Laws, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Summary of Request

On February 24, 2020, we issued a final rule upon request from the Navy for authorization to take marine mammals incidental to construction activities (85 FR 10312). The Navy plans to construct a new ammunition pier at Naval Weapons Station Seal Beach. This construction will include use of impact and vibratory pile driving, including installation and removal of steel, concrete, and timber piles. The use of both vibratory and impact pile driving is expected to produce underwater sound at levels that have the potential to result in behavioral harassment of marine mammals.

Authorization

We have issued a LOA to Navy authorizing the take of marine mammals incidental to construction activities, as described above. Take of marine mammals will be minimized through the implementation of the following planned mitigation measures: (1) Required monitoring of the construction area to detect the presence of marine mammals before beginning construction activities; (2) shutdown of construction activities under certain circumstances to avoid injury of marine mammals; and (3) soft start for impact pile driving to allow marine mammals the opportunity to leave the area prior to beginning impact pile driving at full power. Additionally, the rule includes an adaptive management component that allows for timely modification of mitigation or monitoring measures based on new information, when appropriate. The Navy will submit reports as required.

Based on these findings and the information discussed in the preamble to the final rule, the activities described under this LOA will have a negligible impact on marine mammal stocks and will not have an unmitigable adverse impact on the availability of the affected marine mammal stock for subsistence uses.

Dated: March 30, 2020.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2020–06897 Filed 4–1–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Chesapeake Bay Watershed Environmental Literacy Indicator Tool.

OMB Control Number: 0648–0753.

Form Number(s): None.

Type of Request: Regular (revision of an existing collection).

Number of Respondents: 685.

Average Hours per Response: 1 hour.

Burden Hours: 229 hours.

Needs and Uses: The Chesapeake Bay Watershed Agreement of 2014 required monitoring of progress toward the environmental literacy goal: ''Enable students in the region to graduate with the knowledge and skills needed to act responsibly to protect and restore their local watersheds.'' NOAA, on behalf of the Chesapeake Bay Program, will ask the state education agencies for Maryland, Pennsylvania, Delaware, Virginia, West Virginia, and the District of Columbia to survey their local education agencies (LEAs) to determine: (1) LEA capacity to implement a comprehensive and systemic approach to environmental literacy education, (2) student participation in Meaningful Watershed Educational Experience during the school year, (3) sustainability practices at schools, and (4) LEA needs for improving environmental literacy education programming. LEAs (generally school districts, in some cases charter school administration) are asked to complete the survey on the status of their LEA on a set of key indicators for the four areas listed above. One individual from each LEA is asked to complete their survey once every two years. The results of the biennial ELIT survey will be analyzed and reported to the internal stakeholders of the Chesapeake Bay Watershed Agreement. Participating states will receive a summarized report of findings for the full watershed, a summary of findings for their state, and comparisons of results between states. These aggregated results will be used by the state agencies to understand progress of their school districts over time, and to inform decision-making about strategies and priorities for future work with school districts. The biennial reporting will also be used by the Chesapeake Bay Program to understand progress of school districts in the watershed, understand differences between jurisdictions, and guide strategy for providing targeted support in each state. The instrument has undergone minor changes since its last PRA approval process which include the removal of a number of questions. These changes result in a reduction in the time burden from 90 minutes to 60 minutes per response.

Affected Public: One representative from 685 local education agencies.

Frequency: Biennially.

Respondent's Obligation: Voluntary.

Legal Authority: U.S. Code: 42 U.S.C. 4321 *et seq.* Name of Law: National Environmental Policy Act.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and

entering either the title of the collection or the OMB Control Number 0648–0573.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2020–06873 Filed 4–1–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XR083]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to City and Borough of Juneau Downtown Waterfront Improvement Project

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

ACTION: Notice; modification of an incidental harassment authorization.

SUMMARY: On December 19, 2019, NMFS received a request from the City and Borough of Juneau (CBJ) to modify an incidental harassment authorization (IHA) that was issued to CBJ on May 16, 2019 to take small numbers of harbor seals, by harassment, incidental to the Juneau dock and harbor waterfront improvement project. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to modify the IHA. This modification includes changes to the prescribed mitigation and to the amount of authorized take by Level A harassment. The total amount of authorized taking remains the same. There are no changes to the activity, NMFS' findings, the effective dates of the issued IHA, or any other aspect of the IHA. NMFS will consider public comments prior to making any final decision on the requested modification of the authorization and agency responses will be summarized in the final notice of our decision.

DATES: This modified IHA is effective from the date of issuance through July 14, 2020.

FOR FURTHER INFORMATION CONTACT: Shane Guan, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the application and supporting documents, as well as the issued IHA, may be obtained online at: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth.

The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

History of Request

On October 25, 2018, CBJ submitted a request to NMFS requesting an IHA for the possible harassment of small numbers of harbor seals incidental to the City of Juneau Dock and Harbor waterfront improvement project in Juneau, Alaska. On March 5, 2019, NMFS published a **Federal Register** notice (84 FR 7880) for the proposed IHA. On May 16, 2019, NMFS issued an IHA to CBJ. On May 28, 2019, NMFS published a **Federal Register** notice (84 FR 24490) announcing the issuance of the IHA, which is valid from July 15, 2019, through July 14, 2020.

On December 19, 2019, NMFS received a request from CBJ to modify the 2019 IHA. CBJ subsequently submitted a revised IHA modification request on January 22, 2019, which NMFS determined to be adequate and complete. In the original IHA issued to CBJ, NMFS authorized 72 takes by Level A harassment and 3,454 takes by Level B harassment for harbor seals, and prescribed a shutdown distance of 130 m for impact driving of steel pipe piles. Prior to the start of in-water impact pile driving, CBJ conducted marine mammal abundance survey effort in the vicinity of the project area and found that there were significantly greater numbers of harbor seals present within the immediate vicinity of the construction site than previously estimated. The close proximity of the seals to the pile driving locations would preclude impact pile driving, due to the requirement to clear the 130-m shutdown zone prior to starting up. In addition, CBJ has determined that the high occurrence of harbor seals within the immediate vicinity of the construction site is likely lead to excessive shutdowns during pile driving, which would compromise the timely completion of CBJ's dock and harbor waterfront improvement project on time. CBJ asserts that this renders the prescribed 130-m shutdown zone impracticable, and on the basis of the new information provided by CBJ, NMFS concurs with this determination.

Therefore, CBJ requested to reduce the shutdown distance for impact pile driving from 130 m (as prescribed in the original IHA) to 25 m. As a direct result of this requested change, CBJ determined it necessary to request an increase in the amount of authorized incidents of take by Level A harassment from 72 to 324, while the total amount of authorized taking by harassment remains the same. The original 130-m shutdown zone was designed to avoid most Level A harassment, and was therefore based on the size of Level A harassment radius for impact pile driving. During construction conducted to date, CBJ has not exceeded the authorized amounts of take.

The scope of the project and potential effects to marine mammals in the area remain the same as analyzed previously for the issuance of the IHA in 2019 (84 FR 24490; May 28, 2019).

Comments and Responses

A notice of NMFS' proposal to modify the IHA was published in the **Federal Register** on February 7, 2020 (85 FR 7289). During the 30-day public comment period, NMFS received a comment letter from the Marine Mammal Commission (Commission). Specific comments and responses are provided below.

Comment 1: The Commission states that it is concerned that CBJ did not

conduct observations or provide the number of harbor seals that haul out at haulout site CF07A, which is one of the NMFS Marine Mammal Laboratory's (MML) recognized haulout sites and is closer to the project area. The Commission states that it is apparent that more than 43 harbor seals would be in that area. The Commission thus recommends that NMFS (1) consult with its MML to determine how many harbor seals haul out at haulout sites CF07A and CF10A, (2) if the number of seals observed by MML at CF10A is greater than 43, authorize that number of Level B harassment takes plus the number of seals observed at CF07A but, if the number of seals observed by MML at CF10A is less than 43 authorize 43 takes plus the number of seals observed at CF07A, and (3) refrain from reducing the Level B harassment takes by the Level A harassment takes.

Response: NMFS consulted with MML regarding harbor seal abundance in the vicinity of the project area. MML states that CF07A and CF10A are not considered as key haulout sites because no seals have been observed there for nearly 15 years (J. London, per. comm., 3 March 2020). MML further states that the Commission may be using outdated resources for MML's published waypoint database. Therefore, we believe the local abundance number of an average of 43 animals in the vicinity of the project location, which is based on more recent sightings, is the best available information regarding local occurrence of harbor seals. Additionally, NMFS does not agree with the Commission of including the Level A harassment takes within Level B harassment takes. Under the MMPA, marine mammal harassments are categorized either as Level A or Level B. If an animal is taken by Level A harassment, then it is not taken by Level B harassment.

Comment 2: The Commission notes that CBJ has yet to begin its pile driving activities, and recommends NMFS to extend the end date of the IHA to ensure that CBJ can finish the project by July 14, 2020, when the IHA expires.

Response: NMFS confirmed that CBJ should be able to complete the in-water pile driving activities before the expiration of the IHA. We therefore do not adopt the Commission's recommendation.

Comment 3: The Commission recommends that NMFS ensure that CBJ keeps a running tally of the total Level A and B harassment takes, given the prevalence of harbor seals in the project area and to fulfill condition 4(f) in the authorization.

Response: Condition 4(f) in the IHA issued to CBJ states, ''If a species for which authorization has not been granted, or a species for which authorization has been granted but the authorized takes are met, is observed approaching or within the monitoring zone, pile driving and removal activities must shut down immediately using delay and shut-down procedures.'' It is unclear how the Commission's recommendation is related to condition 4(f). Regarding the recommended requirement to ''keep a running tally,'' NMFS agrees that CBJ must ensure they do not exceed authorized takes. However, as we have now noted in multiple responses to this same comment, we disagree that inclusion of this specific requirement in IHA language is appropriate and we do not adopt the Commission's recommendation.

Description of the Proposed Activity and Anticipated Impacts

Detailed Description of the Action

The purpose of the CBJ's project is to improve the downtown waterfront area within Gastineau Channel in Juneau, Alaska, to accommodate the needs of the growing cruise ship visitor industry and its passengers while creating a waterfront that meets the expectations of a world-class facility. The project would meet the needs of an expanding cruise ship industry and its passengers by creating ample open space thereby decreasing congestion and improving pedestrian circulation.

The CBJ waterfront improvements project includes constructing a pile supported deck along the waterfront to meet the needs of an expanding cruise ship industry and its passengers by creating ample open space thereby decreasing congestion and improving pedestrian circulation. More details of the CBJ waterfront improvement project are provided in the **Federal Register** notice for the proposed IHA (84 FR 7880; March 5, 2019) and are not repeated here. There is no change from the description of the project activities that is provided in the **Federal Register** notice for the modification of the IHA.

A list of pile driving and removal activities is provided in Table 1. The total number of days that involve in-water pile driving is estimated to be 82 days.

Construction of the CBJ waterfront improvements project is planned between May 15, 2019 and August 31, 2020. The in-water portion of the construction work occurs from July 15, 2019, through July 14, 2020, and is covered under an IHA issued by NMFS on May 16, 2019 (84 FR 24490; May 28, 2019). CBJ has not started in-water pile driving, but is expected to do so as soon as the modified IHA is issued.

TABLE 1—SUMMARY OF IN-WATER PILE DRIVING ACTIVITIES

Method	Pile type and size	Total Number piles	Number piles/day	Pile driving/removal duration (sec.) per pile (vibratory) or strikes per pile (impact)	Work days
Vibratory pile removal	Timber piles, unknown diameter but assumed to be no more than 14-in.	100	10	900	10
Vibratory piling for supported dock	Steel piles, 16-in	* 42	5	5,400	9
Impact proofing for supported dock	Steel piles, 16-in	* 42	5	150	9
Vibratory piling for supported dock	Steel piles, 18-in	* 45	5	5,400	9
Impact proofing for supported dock	Steel piles, 18-in	* 45	5	150	9
Vibratory piling for temporary piles	Steel piles, 18-in	87	5	5,400	18
Vibratory pile removal for temporary piles	Steel piles, 18-in	87	5	900	18
Total		274			82

* Vibratory driving and impact proofing will occur on separate days.

Description of Marine Mammals

A description of the marine mammals in the area of the activities is found in the previous notice (84 FR 7880; March 5, 2019), which remains applicable to the issued IHA modification as well. NMFS is not aware of relevant new scientific information since issuance of the original IHA in May 2019.

A recent marine mammal monitoring effort conducted by CBJ in the project area showed more harbor seal occurrence at the pile driving location than previously expected. However, this information does not necessarily indicate an increase in the regional seal population.

Potential Effects on Marine Mammals and Their Habitat

A description of the potential effects of the specified activities on marine mammals and their habitat may be found in the previous notice (84 FR 7880; March 5, 2019), which remains valid and applicable to the issued IHA modification. NMFS is not aware of new information regarding potential effects.

Anticipated Impact on Subsistence Use

CBJ has contacted the Alaska Department of Fish and Game (ADF&G) regarding potential impact on subsistence use of marine mammal resources. CBJ was notified by ADF&G that the project area in Gastineau Channel is not a subsistence use area for harbor seals. Therefore, the project is not likely to adversely impact the availability of any marine mammal species or stocks that are used for subsistence purposes in the Juneau area.

Estimated Take

A detailed description of the methods and inputs used to estimate authorized take is found in the previous notice (84 FR 7880; March 5, 2019). The methods of estimating take by harassment from pile driving and pile removal activities for the original IHA are retained here. The source levels, days of operation, and marine mammal abundance remain unchanged from the previously issued IHA.

While the total number of harbor seal takes by harassment remain the same, the IHA modification allows an increase of Level A harassment due to the reduction of shutdown zone from impact pile driving and, therefore, a reduction in authorized incidents of take by Level B harassment. As stated in the **Federal Register** notice for the final IHA (84 FR 24490; May 28, 2019), the total take number was determined as follows:

Take = animal number in a typical day near the project area × operating days = 43 × 82 = 3,526.

The previously issued IHA required a shutdown distance of 130-m to avoid most Level A harassment, but included authorization of some minimal Level A harassment based on the possibility that harbor seals could enter the shutdown zone unnoticed. We assumed that four seals could enter the Level A harassment zone on each of the 18 days when impact pile driving would occur.

Marine mammal monitoring carried out by CBJ showed that an average of 18 different individual harbor seals could occur within the prescribed 130-m Level A harassment zone, and that they were unlikely to leave the area. Therefore, NMFS and CBJ agreed to adjust the number of Level A harassment calculation by:

Level A harassment = Daily average harbor seals within Level A harassment zone × Impact pile driving days = 18 × 18 = 324.

Subtracting the number of Level A harassment takes from the total take, we derive the number of Level B harassment at 3,202 seals.

A summary of modified estimated takes in relation to population percentage is provided in Table 2.

TABLE 2—ESTIMATED TAKE NUMBERS

Species	Estimated level A take	Estimated level B take	Estimated total take	Abundance
Harbor seal	324	3,202	3,526	9,478

Description of Mitigation, Monitoring and Reporting Measures

The mitigation, monitoring, and reporting measures prescribed remain the same except that for this IHA modification, the shutdown zone for impact pile driving is reduced to 25 m from the previously required 130 m.

The following additional measures are included in the original IHA:

• Establishment of Shutdown Zone—For all pile driving activities, CBJ will establish a shutdown zone. The purpose of a shutdown zone is generally to define an area within which shutdown of activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). For vibratory pile driving and pile removal, shutdown zone is established at 10 m from the pile, which is the same as described in the **Federal Register** notice of the issuance (84 FR 24490; May 28, 2019). As noted above, for impact pile driving, the shutdown zone is modified from 130 m to 25 m from the pile.

• Establishment of Monitoring Zones—CBJ must identify and establish Level A harassment zones. These zones are areas beyond the shutdown zones where animals may be exposed to sound levels that could result in permanent threshold shift (PTS). CBJ will also identify and establish Level B harassment disturbance zones which are areas where sound pressure levels (SPLs) equal or exceed 160 dB rms for impact driving and 120 dB rms during vibratory driving. Observation of monitoring zones enables observers to be aware of and communicate the presence of marine mammals in the project area and outside the shutdown zone and thus prepare for potential shutdowns of activity. NMFS has established monitoring protocols described in the **Federal Register** notice of the issuance (84 FR 24490; May 28, 2019) which are based on the distance and size of the monitoring and shutdown zones. These same protocols are contained in this issued IHA modification.

• Time Restrictions—Work may occur only during daylight hours, when visual monitoring of marine mammals can be conducted.

• Soft Start—The use of a soft start procedure is believed to provide additional protection to marine mammals by providing warning and/or giving marine mammals a chance to leave the area prior to the hammer operating at full capacity. For impact pile driving, contractors will be required to implement soft start procedures. Soft start is not required during vibratory pile driving and removal activities.

• Visual Marine Mammal Observation—Monitoring must be conducted by qualified protected species observers (PSOs), who are trained biologists, with minimum qualifications described in the **Federal Register** notice of the issuance of the original IHA (84 FR 24490; May 28,

2019). In order to effectively monitor the pile driving monitoring zones, a minimum of two PSOs must be positioned at the best practical vantage point(s). PSOs shall record specific information on the sighting forms as described in the **Federal Register** notice of the issuance of the original IHA (84 FR 24490; May 28, 2019). At the conclusion of the in-water construction work, CBJ will provide NMFS with a monitoring report which includes summaries of recorded takes and estimates of the total number of marine mammals that may have been harassed.

Determinations

The activities to be conducted by CBJ in the modified IHA are the same as those analyzed in the original IHA.

The reduction of shutdown zones for impact pile driving, and the resulting increase of Level A harassment of harbor seals do not change our original analysis and determination. Although some individual harbor seals are estimated to experience Level A harassment in the form of PTS if they stay within the Level A harassment zone during the entire pile driving for the day, the degree of injury is expected to be mild and is not likely to affect the reproduction or survival of the individual animals. Impact pile driving for each pile would last for approximately 30 minutes. After that, the contractor would take 5 to 30 minutes to start the next pile. In addition, it is expected that, if hearing impairment occurs, most likely the affected animal would lose a few decibels (dB) in its hearing sensitivity, which in most cases is not likely to affect its survival and recruitment. Hearing impairment that might occur for these individual animals would be limited to the dominant frequency of the noise sources, *i.e.,* in the low-frequency region below 2 kHz.

Under the majority of the circumstances, anticipated takes are expected to be limited to short-term Level B harassment. Harbor seals present in the vicinity of the action area and taken by Level B harassment would most likely show overt brief disturbance (startle reaction) and avoidance of the area from elevated noise levels during pile driving and pile removal. Given the limited estimated number of incidents of total harassment and the limited, short-term nature of the responses by the individuals, the impacts of the estimated take cannot be reasonably expected to, and are not reasonably likely to, rise to the level that they would adversely affect the species at the population level, through effects on annual rates of recruitment or survival.

There are no known important habitats, such as rookeries or haulouts, in the vicinity of the CBJ's waterfront improvement construction project. The project also is not expected to have significant adverse effects on affected marine mammals' habitat, including prey, as analyzed in detail in the **Federal Register** notice of the issuance of the existing IHA (84 FR 24490; May 28, 2019). In conclusion, there is no new information suggesting that our analysis or findings should change.

The estimated take of harbor seal would be 37 percent of the population, if each single take were a unique individual. However, this is highly unlikely because the harbor seal in the vicinity of the project area shows site fidelity to small areas for period of time that can extend between seasons, as discussed in detail in the **Federal Register** notice for the issuance of the existing IHA (84 FR 24490; May 28, 2019). The total number of harbor seals that is authorized to be taken has not changed. Based on the analysis contained herein of the activity (including the prescribed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS finds that small numbers of harbor seal will be taken relative to the population size of the affected species or stocks.

Based on the information contained here and in the referenced documents, NMFS has determined the following: (1) The required mitigation measures will affect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; and (4) CBJ's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action, and (5) appropriate monitoring and reporting requirements are included.

Endangered Species Act (ESA)

No incidental take of ESA-listed species is authorized or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action (*i.e.,* the issuance of an incidental harassment authorization) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (incidental harassment authorizations with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS determined that the issuance of the original IHA qualified to be categorically excluded from further NEPA review.

Authorization

As a result of these determinations, NMFS has issued a modification to an IHA to the City and Borough of Juneau for the Juneau Dock and Harbor waterfront improvement project in Juneau, Alaska, provided the previously described mitigation, monitoring, and reporting requirements are incorporated.

Dated: March 30, 2020.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2020–06904 Filed 4–1–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Antarctic Marine Living Resources Conservation and Management Measures.

OMB Control Number: 0648–0194.

Form Number(s): None.

Type of Request: Regular (revision of an existing collection).

Number of Respondents: 87.

Average Hours per Response: One hour to apply for a CEMP research permit; 1 hour to report on research; 28 hours to supply information on

potential new or exploratory fishing; 2 hours to apply for a harvesting permit; 5 minutes to transmit information by radio; 4 hours to install a vessel monitoring device (VMS); 2 hours for annual VMS maintenance; 45 minutes to mark a vessel; 40 minutes to mark buoys; 10 hours to mark pot gear; 6 minutes to mark trawl nets; 15 minutes to apply for a first receiver permit; 15 minutes to complete and submit a toothfish catch document; 15 minutes to apply for pre-approval of toothfish imports; 15 minutes to complete and submit re-export catch documents; 15 minutes to submit import tickets.

Burden Hours: 363.

Needs and Uses: This request is for revision of a currently approved information collection. As part of U.S. obligations to monitor and control the import, export, and re-export of Antarctic marine living resources, NOAA requires dealers to submit applications for pre-approval certifications of imports of frozen Patagonian and Antarctic toothfish (also referred to as Chilean sea bass) and reporting forms for air-shipped fresh imports of these species. These applications are currently available as fillable PDF forms. NOAA is revising this collection to allow these forms to be submitted in an on-line format. No other part of this collection will be revised.

The 1982 Convention on the Conservation of Antarctic Marine Living Resources (Convention) established the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR). The United States is a Contracting Party to the Convention. The Antarctic Marine Living Resources Convention Act (AMLRCA) directs and authorizes the United States to take actions necessary to meet its treaty obligations as a Contracting Party to the Convention. The regulations implementing AMLRCA are at 50 CFR part 300, subpart G. The record keeping and reporting requirements at 50 CFR part 300 form the basis for this collection of information. This collection of information concerns research in, and the harvesting and importation of, marine living resources from waters regulated by CCAMLR related to ecosystem research, U.S. harvesting permit application and/or harvesting vessel operators and to importers and re-exporters of Antarctic marine living resources. The collection is necessary in order for the United States to meet its treaty obligations as a contracting party to the Convention.

Affected Public: Business or other for profit organizations; not-for-profit institutions; individuals or households.

Frequency: Annually and on occasion.

Respondent's Obligation: Mandatory.

Legal Authority: Antarctic Marine Living Resources Convention Act, 16 U.S.C. 2431 *et seq.*

This information collection request may be viewed at reginfo.gov. Follow the instructions to view Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0648–0194.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2020–06872 Filed 4–1–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA095]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of revision of a public meeting.

SUMMARY: The New England Fishery Management Council (Council, NEFMC) will hold a two-day webinar meeting to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Due to federal and state travel restrictions and updated guidance from the Centers for Disease Control and Prevention regarding the new coronavirus, COVID–19, this meeting will be conducted entirely by webinar. The notice for this meeting was published on March 26, 2020 and is available at *https://www.federalregister.gov/documents/2020/03/26/2020-06263/new-england-fishery-management-council-public-meeting?utm_campaign=subscription+mailing+list&utm_source=federalregister.gov&utm_medium=email.* Since that time, the Council has added one important overarching agenda item and expanded the scope of two others. This notice alerts the public of the revised agenda.

DATES: The webinar meeting will be held on Tuesday and Wednesday, April 14 and 15, 2020, beginning at 9 a.m. on April 14 and 8:30 a.m. on April 15.

ADDRESSES: All meeting participants and interested parties can register to join the webinar at *https://register.gotowebinar.com/register/8766043774885604099.*

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950; telephone: (978) 465–0492; *www.nefmc.org.*

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492, ext. 113.

SUPPLEMENTARY INFORMATION:

Agenda

Tuesday, April 14, 2020

All items previously listed on Tuesday's agenda will proceed on schedule and can be viewed on the Council's website at *https://www.nefmc.org/calendar/april-2020-council-meeting.* However, in light of the unforeseen COVID–19 pandemic and the economic, social, and public health consequences that are rapidly unfolding, the Council also may discuss requests for emergency action that come up during the meeting. Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) authorizes the Secretary of Commerce to implement emergency regulations to address fishery emergencies.

Wednesday, April 15, 2020

All items previously listed on Wednesday's agenda will proceed on schedule, although the scope of two items has been expanded. First, under the Scallop Committee Report, the Council will discuss several different requests for emergency action that involve potential carryover of certain fishing year 2019 allocations into fishing year 2020. The Council still intends to approve the range of alternatives for Amendment 21 to the Atlantic Sea Scallop Fishery Management Plan. Secondly, the scope of the Council's discussion on recreational party/charter eVTRs has been expanded. Under this item, the Council will discuss and determine the appropriate mechanism to require recreational party/charter vessels to submit vessel trip reports (VTRs) electronically as eVTRs for all fisheries

managed by the New England Fishery Management Council. Potential options now include initiating an omnibus framework adjustment or requesting that NMFS use its authority under Section 305(b) of the MSA to extend the recently implemented commercial eVTR requirement to cover New England party/charter vessels. Finally, as indicated above under Tuesday's agenda, the Council may discuss other requests for emergency action that come up during the meeting in light of the unforeseen COVID–19 pandemic as allowed under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA).

Although non-emergency issues not contained on this agenda may come before the Council for discussion, those issues may not be the subject of formal action during this meeting. The public should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is being conducted entirely by webinar. Requests for auxiliary aids should be directed to Thomas A. Nies (see **ADDRESSES**) at least 5 days prior to the meeting date.

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

Dated: March 27, 2020.

Tracey L. Thompson,

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

[FR Doc. 2020–06815 Filed 4–1–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2020–OS–0037]

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary, Department of Defense (DoD).

ACTION: Notice of a modified System of Records.

SUMMARY: The Office of the Secretary of Defense (OSD) is modifying the System of Records, Mandatory Declassification Review Files, DWHS E05. This system was established to verify and declassify record requests from the public and to provide a resource to research historical data. Without the ability to review and declassify data in the Mandatory Declassification Review (MDR) Files System of Records, information in the system would not be releasable to the public and the DoD would not comply with the applicable regulations and laws. Updates to this system include administrative changes required by the Office of Management and Budget (OMB) Circular A–108, ''Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act,'' revised December 23, 2016. This modification includes changes to the system name, authorities, purpose, categories of records, routine uses, storage of records, retention and disposal of records, safeguards, records access procedures, contesting record procedures, notification procedures, and exemptions sections. In addition, the only exemption claimed for the system, (k)(1), is being deleted, since the system does not contain classified information. The records undergoing MDR are stored in a separate system, which is not a Privacy Act System of Records.

DATES: This System of Records modification is effective upon publication; however, comments on the Routine Uses will be accepted on or before May 4, 2020. The Routine Uses are effective at the close of the comment period.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

* *Federal Rulemaking 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 and docket number 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 *https://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Luz D. Ortiz, Chief, Records, Privacy and Declassification Division, 1155 Defense Pentagon, Washington, DC 20301–1155, or by phone at (571) 372–0478.

SUPPLEMENTARY INFORMATION: This System of Records is mandated by E.O. 13526, 32 CFR 2001.33, and DoD 5230.30–M which require the DoD to validate requests from members of the public requesting classified information. As a result, the DoD is required to identify the requested document or information record with sufficient specificity to enable the DoD to locate it with a reasonable amount of effort. Without this system, the DoD will not comply with these requirements. Also, the system allows the DoD to consider the sensitivity of the requested data to determine its releaseability and to address denials or appeals in a timely manner.

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 from the Defense Privacy, Civil Liberties, and Transparency Division website at *https://dpcld.defense.gov.*

The proposed systems reports, as required by the Privacy Act, 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 the 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).

Dated: March 30, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

SYSTEM NAME AND NUMBER:

Requestor Database for Office of the Secretary of Defense Mandatory Declassification Reviews, DWHS E05.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records, Privacy and Declassification Division, Executive Services Directorate, 6564 Loisdale Court, Springfield, VA 22150–1827.

SYSTEM MANAGER(S):

Chief, Records, Privacy, and Declassification Division, Executive Services Directorate, 4800 Mark Center Drive, Alexandria, VA 20350–3200. Email: *whs.mc-alex.esd.mbx.records-and-declassification@mail.mil;* Telephone 571–372–0496.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Executive Order 13526, Classified National Security Information; 32 CFR 2001.33, Mandatory Review for Declassification; Department of Defense Instruction 5200.01, DoD Information Security Program and Protection of Sensitive Compartmented Information

(SCI); Department of Defense Manual (DoDM) 5230.30–M, DoD Mandatory Declassification Review (MDR) Program; and DoDM 5200.01, Volume 1, DoD Information Security Program: Overview, Classification and Declassification, and DoDD 5110.04 Washington Headquarters Services (WHS).

PURPOSE(S) OF THE SYSTEM:

To process requests and/or appeals from individuals for the mandatory review of classified records for the purposes of releasing declassified material to the public and to provide a research resource of historical data on release of records to ensure consistency in subsequent actions. Data developed from this system is included in the annual report on the DoD's security classification management program to the National Archives and Records Administration's (NARA's) Information Security Oversight Office. This data also serves management's needs by providing information about the number of requests, the required type or category of records, and the average processing time.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals requesting MDR or appealing a MDR determination for access to records and information within the scope of the OSD.

CATEGORIES OF RECORDS IN THE SYSTEM:

Requester's name, address, source (organization of requester), source case number (if applicable), document classification rating, receipt date, response date, number of pages, OSD MDR case number and unclassified subject of the request.

RECORD SOURCE CATEGORIES:

The individual.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, as amended, the records contained herein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

a. To the NARA, Interagency Security Classification Appeals Panel (ISCAP) for the purpose of complying with Executive Order 13526, to review administrative agency policies and procedures and to facilitate the ISCAP's offering of mediation services to resolve disputes between persons making MDR requests and government agencies.

b. To contractors, grantees, experts, consultants, students, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for the federal government when necessary to accomplish an agency function related to this System of Records.

c. To foreign or international law enforcement, security, investigatory, or administrative authorities to comply with requirements imposed by, or to claim rights conferred in, international agreements and arrangements including those regulating the stationing and status in foreign countries of DoD military and civilian personnel.

d. To appropriate Federal, State, local, territorial, tribal, foreign, or international agencies for the purpose of counterintelligence activities authorized by U.S. law or Executive Order, or for the purpose of executing or enforcing laws designed to protect the national security or homeland security of the United States, including those relating to the sharing of records or information concerning terrorism, homeland security, or law enforcement.

e. To the appropriate Federal, State, local, territorial, tribal, foreign, or international law enforcement authority or other appropriate entity where a record, either alone or in conjunction with other information, indicates a violation or potential violation of law, whether criminal, civil, or regulatory in nature.

f. To any component of the Department of Justice for the purpose of representing the DoD, or its components, officers, employees, or members in pending or potential litigation to which the record is pertinent.

g. In an appropriate proceeding before a court, grand jury, or administrative or adjudicative body or official, when the DoD or other Agency representing the DoD determines that the records are relevant and necessary to the proceeding; or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant to the proceeding.

h. To the NARA for the purpose of records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

i. To a Member of Congress or staff acting upon the Member's behalf when the Member or staff requests the information on behalf of, and at the request of, the individual who is the subject of the record.

j. To appropriate agencies, entities, and persons when (1) the DoD suspects or confirms a breach of the System of Records; (2) the DoD determines as a result of the suspected or confirmed breach there is a risk of harm to individuals, the DoD (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 DoD's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

k. To another Federal agency or Federal entity, when the DoD 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:

Paper records and electronic storage media.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrieved by requester name and other pertinent information, such as organization or address, subject material describing the MDR item (including date), OSD MDR case number using computer indices, referring agency, or any combination of those fields.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Temporary. Cut off and destroy when no longer needed. Purge database when no longer needed for reference.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

The records are stored in a Defense Counterintelligence and Security Agency approved secure closed area requiring badge and PIN access. The system is password protected, with limited access and multiple levels of user restriction, including limited access to officials with a need-to-know. Paper records are maintained in security containers with access limited to officials with a need-to-know. All records are protected in accordance with the National Industrial Security Program Operating Manual.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this System of Records should address inquiries to the Office of the

Secretary of Defense/Joint Staff, Freedom of Information Act Requester Service Center, Office of Freedom of Information, 1155 Defense Pentagon, Washington, DC 20301–1155. Signed, written requests should include the name and number of this System of Records Notice along with the individual's name and address of the individual at the time the record was created. In addition, the requester must provide either a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: ''I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature).''

If executed within the United States, its territories, possessions, or commonwealths: ''I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).''

CONTESTING RECORD PROCEDURES:

The DoD rules for accessing records, contesting contents, and appealing initial agency determinations are contained in 32 CFR part 310, or may be obtained from the system manager.

NOTIFICATION PROCEDURES:

Individuals seeking to determine whether information about themselves is contained in this System of Records should address inquiries to Chief, Records, Privacy and Declassification Division, Executive Services Directorate, 4800 Mark Center Drive, Alexandria, VA 20350–3200. Signed, written requests should include the individual's name and address of the individual at the time the record would have been created, along with the name and number of this System of Records Notice. In addition, the requester must provide either a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: ''I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature).''

If executed within the United States, its territories, possessions, or commonwealths: ''I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).''

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

October 30, 2014, 79 FR 64584; October 28, 2011, 76 FR 66916; October 14, 2010, 75 FR 63160; March 28, 2007, 72 FR 14533; November 29, 2002, 67 FR 71147; February 22, 1993, 58 FR 10227.

[FR Doc. 2020–06914 Filed 4–1–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2020–HA–0038]

Proposed Collection; Comment Request

AGENCY: Office of the Assistant Secretary of Defense for Health Affairs, DoD.

ACTION: Information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Office of the Assistant Secretary of Defense for Health Affairs 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 June 1, 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 Defense Health Agency, TRICARE Health Plan (J–10), Attn: Mr. Mark Ellis, 7700 Arlington Boulevard, Falls Church, VA 22042 or call (703) 681–0039.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Continued Health Care Benefit Program, DD Form 2837; OMB Control Number 0720–XXXX (formerly 0704–0364).

Needs and Uses: The information collection requirement is necessary for individuals to apply for enrollment in the continued Health Care Benefit Program (CHCBP). The CHCBP is a program of temporary health care benefit coverage that is made available to eligible individuals who lose health care coverage under the Military Health System (MHS).

Affected Public: Individuals or Households.

Annual Burden Hours: 369.

Number of Respondents: 1,475.

Responses per Respondent: 1.

Annual Responses: 1,475.

Average Burden per Response: 15 minutes.

Frequency: On occasion.

Respondents are individuals who are or were beneficiaries of the Military Health System (MHS) and who desire to enroll in the CHCBP following their loss of entitlement to health care coverage in the MHS. These beneficiaries include the active duty service member or former service member (who, for purposes of this notice shall be referred to as ''service member''), an unmarried former spouse of a service member, an unmarried child of a service member who ceases to meet requirements for being considered a dependent, and a child placed for adoption or legal custody with the service member. In order to be eligible for health care coverage under CHCBP, an individual must first enroll in CHCBP. DD Form is used as the information collection instrument for that enrollment. The CHCBP is a legislatively mandated program and it is anticipated that the program will continue indefinitely.

Dated: March 30, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–06928 Filed 4–1–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2019–ICCD–0161]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; EZ-Audit: Electronic Submission of Financial Statements and Compliance Audits

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a revision of an existing information collection.

DATES: Interested persons are invited to submit comments on or before May 4, 2020.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection request by selecting ''Department of Education'' under ''Currently Under Review,'' then check ''Only Show ICR for Public Comment'' checkbox.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, 202–377–4018.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: EZ-Audit: Electronic Submission of Financial Statements and Compliance Audits.

OMB Control Number: 1845–0072.

Type of Review: A revision of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments; Individuals or Households; Private Sector *Total Estimated Number of Annual Responses:* 6,632.

Total Estimated Number of Annual Burden Hours: 6,603.

Abstract: eZ-Audit is a web-based process designed to facilitate the submission of compliance and financial statement audits, expedite the review of those audits by the Department, and provide more timely and useful information to public, non-profit and proprietary institutions regarding the Department's review. eZ-Audit establishes a uniform process under which all institutions submit directly to the Department any audit required under the Title IV, HEA program regulations. The revisions to this collection is a result of enhancements made to the current system to collect the compliance audits/financial statements in the appropriate format (*e.g.* revised question text and required uploads) from the foreign institutions that are required to submit audits in accordance to the Department's regulations and to allow electronic submission of compliance audits/financial statements from the entities identified above. Revisions to financial statements information are to meet the new borrower defense regulations.

Dated: March 30, 2020.

Kate Mullan,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer.

[FR Doc. 2020–06893 Filed 4–1–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2020–SCC–0016]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Loan Rehabilitation: Reasonable and Affordable Payments

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before May 4, 2020.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection request by selecting ''Department of Education'' under ''Currently Under Review,'' then check ''Only Show ICR for Public Comment'' checkbox.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, 202–377–4018.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Loan Rehabilitation: Reasonable and Affordable Payments.

OMB Control Number: 1845–0120.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 139,000.

Total Estimated Number of Annual Burden Hours: 139,000.

Abstract: Borrowers who have defaulted on their Direct Loan or FFEL Program loans may remove those loans from default through a process called rehabilitation. Loan rehabilitation requires the borrower to make 9 payments within 10 months. The payment amount is set according to one of two formulas. The second of the two formulas uses the information that is collected in this form. The form makes it easier for borrowers to complete through simplified language, and easier for loan holders through a uniform, common format.

Dated: March 30, 2020.

Kate Mullan,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division Office of Chief Data Officer.

[FR Doc. 2020–06899 Filed 4–1–20; 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 rate filings:

Docket Numbers: ER20–692–001.
Applicants: California Independent System Operator Corp.
Description: Compliance filing: 2020–03–27 Compliance Filing to Update Effective Dates to be effective 2/29/2020.
Filed Date: 3/27/20.
Accession Number: 20200327–5256.
Comments Due: 5 p.m. ET 4/17/20.

Docket Numbers: ER20–716–001.
Applicants: New York Independent System Operator, Inc.
Description: Tariff Amendment: Deficiency Response LS Power Formula Rate to be effective 5/27/2020.
Filed Date: 3/26/20.
ccession Number: 20200326–5227.
Comments Due: 5 p.m. ET 4/16/20.

Docket Numbers: ER20–739–001.
Applicants: ISO New England Inc.
Description: Tariff Amendment: ISO–NE Response to Def Notice Re: Schedule 17-Recovery of CIP Costs to be effective 3/6/2020.
Filed Date: 3/27/20.
Accession Number: 20200327–5053.
Comments Due: 5 p.m. ET 4/17/20.

Docket Numbers: ER20–1051–001.
Applicants: American Transmission Systems, Incorporated, PJM Interconnection, L.L.C.
Description: Tariff Amendment: ATSI submits Amendment to ECSA SA No. 5569 in ER20–1051 to be effective 4/21/2020.
Filed Date: 3/27/20.
Accession Number: 20200327–5208.
Comments Due: 5 p.m. ET 4/17/20.

Docket Numbers: ER20–1400–000.
Applicants: New England Power Company.
Description: Notice of Cancellation of Original G–33 Circuit Support Agreement of New England Power Company.
Filed Date: 3/26/20.
Accession Number: 20200326–5254.
Comments Due: 5 p.m. ET 4/16/20.

Docket Numbers: ER20–1401–000.
Applicants: Public Service Company of Colorado.
Description: 2019 Post-Retirement Benefits Other than Pensions of Public Service Company of Colorado.
Filed Date: 3/26/20.
Accession Number: 20200326–5261.
Comments Due: 5 p.m. ET 4/16/20.

Docket Numbers: ER20–1402–000.
Applicants: Pacific Gas and Electric Company.
Description: Notice of Termination of Wholesale Distribution Service Agreement (no. 2) of Pacific Gas and Electric Company.
Filed Date: 3/27/20.
Accession Number: 20200327–5047.
Comments Due: 5 p.m. ET 4/17/20.

Docket Numbers: ER20–1403–000.
Applicants: American Transmission Systems, Incorporated, PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: ATSI submits ECSA SA Nos. 5575 and 5576 to be effective 5/26/2020.
Filed Date: 3/27/20.
Accession Number: 20200327–5049.
Comments Due: 5 p.m. ET 4/17/20.
Docket Numbers: ER20–1404–000.
Applicants: Consolidated Edison Company of New York, New York Independent System Operator, Inc.
Description: § 205(d) Rate Filing: Interconnection Agreement (SA 2515) Con Edison and Orange & Rockland Utilities to be effective 3/30/2020.
Filed Date: 3/27/20.
Accession Number: 20200327–5067.
Comments Due: 5 p.m. ET 4/17/20.

Docket Numbers: ER20–1405–000.
Applicants: Massachusetts Electric Company.
Description: Notice of Cancellation of Interconnection Agreement (Rate Schedule No. 16) of Massachusetts Electric Company.
Filed Date: 3/27/20.
Accession Number: 20200327–5102.
Comments Due: 5 p.m. ET 4/17/20.

Docket Numbers: ER20–1406–000.
Applicants: Massachusetts Electric Company.
Description: Notice of Cancellation of Interconnection Agreement (Rate Schedule No. 62) of Massachusetts Electric Company.
Filed Date: 3/27/20.
Accession Number: 20200327–5108.
Comments Due: 5 p.m. ET 4/17/20.

Docket Numbers: ER20–1408–000.
Applicants: Niagara Mohawk Power Corporation.
Description: Notice of Cancellation of Interconnection Agreement (Rate Schedule No. 266) of Niagara Mohawk Power Corporation.
Filed Date: 3/27/20.
Accession Number: 20200327–5125.
Comments Due: 5 p.m. ET 4/17/20.
Docket Numbers: ER20–1409–000.
Applicants: Mid-Atlantic Interstate Transmission, LLC, PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: MAIT submits Four ECSAs, Service Agreement Nos. 5514, 5573, 5574, and 5577 to be effective 5/26/2020.
Filed Date: 3/27/20.
Accession Number: 20200327–5143.
Comments Due: 5 p.m. ET 4/17/20.

Docket Numbers: ER20–1410–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2020–03–27_Module D Tariff clean-up filing to be effective 3/1/2020.
Filed Date: 3/27/20.
Accession Number: 20200327–5162.
Comments Due: 5 p.m. ET 4/17/20.

Docket Numbers: ER20–1411–000.
Applicants: Duke Energy Florida, LLC.
Description: Tariff Cancellation: DEF–SECI Telogia Power—Notice of Cancellation of RS No. 189 to be effective 6/1/2020.
Filed Date: 3/27/20.
Accession Number: 20200327–5199.
Comments Due: 5 p.m. ET 4/17/20.

Docket Numbers: ER20–1413–000.
Applicants: Massachusetts Electric Company.
Description: § 205(d) Rate Filing: Filing of Small Generator Interconnection Agmt with Winchendon Hydroelectric to be effective 2/26/2020.
Filed Date: 3/27/20.
Accession Number: 20200327–5227.
Comments Due: 5 p.m. ET 4/17/20.

Docket Numbers: ER20–1414–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Revisions to the Tariff and OA re Hourly Differentiated Segmented Ramp Rates to be effective 1/5/2021.
Filed Date: 3/27/20.
Accession Number: 20200327–5238.
Comments Due: 5 p.m. ET 4/17/20.

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: March 27, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–06881 Filed 4–1–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER20–1395–000]

ND OTM LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of ND OTM 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 April 16, 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: March 27, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–06882 Filed 4–1–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER20–1399–000]

Rumford ESS, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding Rumford ESS, 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 April 16, 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: March 27, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–06883 Filed 4–1–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL20–36–000]

Bonneville Power Administration v. Avista Corporation; Notice of Complaint

Take notice that on March 26, 2020, pursuant to sections 206 and 306 of the Federal Power Act 16 U.S.C. 824e, and Rules 206 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206, Bonneville Power Administration (Complainants) filed a complaint against Avista Corporation

(Respondents), alleging that the Respondents' Revised Self-Supply BP imposes unjust, unreasonable, unduly discriminatory and preferential terms and conditions on Bonneville's self-supply of Operating Reserves, as more fully explained in the complaint.

The Complainants certifies that copies of the complaint were served on the contacts for the Respondents as listed on the Commission's list of Corporate Officials.

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. The Respondents' answer and all interventions, or protests must be filed on or before the comment date. The Respondents' answer, motions to intervene, and protests must be served on the Complainants'.

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.

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*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on April 15, 2020.

Dated: March 27, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–06885 Filed 4–1–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER20–1398–000]

Ocean State BTM, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Ocean State BTM, 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 April 16, 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: March 27, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–06880 Filed 4–1–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP15–8–000]

Northwest Pipeline LLC; Notice of Extension of Time Request

Take notice that on March 12, 2020, Northwest Pipeline LLC (Northwest) requested that the Federal Energy Regulatory Commission (Commission) grant an extension of time, until April 11, 2022, to construct and place into service the facilities for its Kalama Lateral Project authorized on April 11, 2016. The Kalama Lateral Project would enable Northwest to provide service to the proposed methanol facility of Northwest Innovation Works Kalama LLC (NWIW).

Northwest was initially required to construct the facilities and place them into service by April 11, 2018. On April 11, 2018, the Office of Energy Projects, by delegated order, extended the deadline through April 11, 2019. On April 10, 2019 the Office of Energy Projects, by delegated order, extended the deadline through April 11, 2020. Northwest now requests a two-year extension of this deadline through April 11, 2022. Northwest states that the basis for the previous extensions of time, as well as this one, are based upon permitting issues encountered by the NWIW methanol plant.

This notice establishes a 15-calendar day intervention and comment period deadline. Any person wishing to comment on the extension motion may do so. No reply comments or answers will be considered. If you wish to obtain legal status by becoming a party to the proceedings for this request, you should, on or before the comment date stated below, file 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 Natural Gas Act (18 CFR 157.10). However, only motions to intervene from entities that were party to the underlying proceeding will be accepted.

As a matter of practice, the Commission itself generally acts on requests for extensions of time to complete construction for NGA facilities when such requests are contested before order issuance. For those extension requests that are contested,[1] the Commission acting as a whole will aim to issue an order acting on the request within 45 days.[2] The Commission will address all arguments relating to whether the applicant has demonstrated there is good cause to grant the extension. The Commission will not consider arguments that re-litigate the issuance of the certificate order, including whether the Commission properly found the project to be in the public convenience and necessity and whether the Commission's environmental analysis for the certificate complied with the National Environmental Policy Act.[3] At the time a pipeline requests an extension of time, orders on certificates of public convenience and necessity are final and the Commission will not re-litigate their issuance. The OEP Director, or his or her designee, will act on all of those extension requests that are uncontested.

The extension request is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's website web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

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 three copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

[1] Contested proceedings are those where an intervenor disputes any material issue of the filing. 18 CFR 385.2201(c)(1) (2019).

[2] *Algonquin Gas Transmission, LLC,* 170 FERC ¶ 61,144, at P 40 (2020).

[3] Similarly, the Commission will not re-litigate the issuance of an NGA section 3 authorization, including whether a proposed project is not inconsistent with the public interest and whether the Commission's environmental analysis for the permit order complied with NEPA.

Comment Date: 5:00 p.m. Eastern Time on April 1, 2020.

Dated: March 17, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–06816 Filed 4–1–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RMI19–12–000]

Revisions to the Filing Process for Commission Forms; Notice Inviting Post-Technical Conference Comments

On March 24 through March 26, 2020, the Federal Energy Regulatory Commission (FERC or Commission) held a staff-led technical conference to discuss the draft FERC XBRL Taxonomy and related documents, as well as issues related to the transition to XBRL, including the implementation schedule.

All interested parties are invited to file post-technical conference comments on the topics discussed during the technical conference within 30 days from the date of this notice, *i.e.,* on or before April 27, 2020.[1] After reviewing the comments, the Commission will issue an order on technical conference and adopting the final taxonomy, protocols, implementation guide and other documents, and establishing an implementation schedule.

For more information about this notice, please contact Robert Hudson at *Robert.Hudson@ferc.gov* or (202) 502–6889, or email *XBRLFormsRefresh@ferc.gov.*

Dated: March 27, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–06884 Filed 4–1–20; 8:45 am]

BILLING CODE 6717–01–P

[1] On March 19, 2020, the Commission issued a notice extending due dates for certain non-statutory items until May 1, 2020. *Notice Granting Extension of Time,* Docket No. AD20–11–000 (Mar. 19, 2020). However, we request that interested parties submit any comments on the technical conference held in this proceeding by April 27, 2020.

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2017–0127; FRL–10006–34]

Inventory of Mercury Supply, Use, and Trade in the United States 2020 Report; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is announcing the availability of the 2020 mercury inventory report, which summarizes information on U.S. mercury supply, use, and trade required to be reported by rule directly from mercury manufacturers, importers, and processors. EPA was directed by Congress in the Frank R. Lautenberg Chemical Safety for the 21st Century Act (Lautenberg Act), which amended the Toxic Substances Control Act (TSCA), to carry out and publish in the **Federal Register** not later than April 1, 2017 and every three years thereafter, an inventory of mercury supply, use, and trade in the United States. The Lautenberg Act defines ''mercury'' as ''elemental mercury'' or ''a mercury compound.''

FOR FURTHER INFORMATION CONTACT:

For technical information contact: Thomas Groeneveld, National Program Chemicals Division, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 566–1188; email address: *groeneveld.thomas@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: TSCA-*Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Does this action apply to me?

This action applies to the public in general and may be of interest to a wide range of stakeholders including members of the public interested in elemental mercury or mercury compounds generally. Other topics of interest include the supply, use, or trade of elemental mercury or mercury compounds, including mercury-added products and manufacturing processes. As such, the Agency has not attempted to describe all the specific entities that may be interested in this action.

II. What is the agency's authority for this action?

TSCA section 8(b)(10), 15 U.S.C. 2507(b)(10), as amended by the Lautenberg Act of 2016, directs EPA to carry out and publish in the **Federal Register** not later than April 1, 2017, and every three years thereafter, an inventory of mercury supply, use, and trade in the United States. TSCA section 8(b)(10)(A) defines ''mercury'' as ''elemental mercury'' or ''a mercury compound'' (15 U.S.C. 2507(b)(10)(A)). In carrying out the mercury inventory, EPA is to ''identify any manufacturing processes or products that intentionally add mercury'' (15 U.S.C. 2607(b)(10)(C)(i)) and ''recommend actions, including proposed revisions of Federal law or regulations, to achieve further reductions in mercury use'' (15 U.S.C. 2607(b)(10)(C)(ii)).

III. What action is the agency taking?

EPA is announcing the availability of a report entitled ''Inventory of Mercury Supply, Use, and Trade in the United States: 2020 Report,'' which provides an inventory of mercury supply, use, and trade in the United States. This is the first report in which the supply, use, and trade of mercury is presented based on data collected by EPA under the final rule Mercury; Reporting Requirements for the TSCA Mercury Inventory, codified in 40 CFR part 713 (83 FR 30054, June 27, 2018)(FRL–9979–74). Persons subject to the reporting requirements in 40 CFR part 713 submitted information directly to EPA via the Mercury Electronic Reporting (MER) application, which is accessed through the Agency's Central Data Exchange (CDX). The deadline for reporting mercury information to EPA was July 1, 2019 for reporting activities that occurred in the calendar year 2018, and the inventory collection, reporting, and publication cycle will continue every three years thereafter.

IV. How can I access this report?

The 2020 inventory report may be found in the docket for this action and on the EPA Mercury website (*https://www.epa.gov/mercury*).

The docket for this action, identified by docket identification (ID) number EPA–HQ–OPPT–2017–0127, is available online at *http://www.regulations.gov* or in person at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets*.

(Authority: 15 U.S.C. 2607(b)(10)(B))

Dated: March 26, 2020.

Alexandra Dapolito Dunn,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2020–06877 Filed 4–1–20; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Sending Case Issuances Through Electronic Mail

AGENCY: Federal Mine Safety and Health Review Commission.

ACTION: Notice.

SUMMARY: On a temporary basis, the Federal Mine Safety and Health Review Commission will be sending its issuances through electronic mail and will not be monitoring incoming physical mail or facsimile transmissions.

DATES: Applicable: April 2, 2020.

FOR FURTHER INFORMATION CONTACT: Sarah Stewart, Deputy General Counsel, Office of the General Counsel, Federal Mine Safety and Health Review Commission, at (202) 434–9935; *sstewart@fmshrc.gov*.

SUPPLEMENTARY INFORMATION: Until April 30, 2020, case issuances of the Federal Mine Safety and Health Review Commission (FMSHRC), including inter alia notices, decisions, and orders, will be sent only through electronic mail. This includes notices, decisions, and orders described in 29 CFR 2700.4(b)(1), 2700.24(f)(1), 2700.45(e)(3), 2700.54, and 2700.66(a). Further, FMSHRC will not be monitoring incoming physical mail or facsimile described in Procedural Rule § 2700.5(c)(2). If possible, all filings should be e-filed as described in 29 CFR 2700.5(c)(1).

(Authority: 30 U.S.C. 823)

Dated: March 30, 2020.

Sarah L. Stewart,

Deputy General Counsel, Federal Mine Safety and Health Review Commission.

[FR Doc. 2020–06879 Filed 4–1–20; 8:45 am]

BILLING CODE 6735–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Youth Empowerment Information, Data Collection, and Exploration on Avoidance of Sex (IDEAS) (New Collection)

AGENCY: Office of Planning, Research and Evaluation, Administration for Children and Families, HHS.

ACTION: Request for public comment.

SUMMARY: The Office of Planning, Research and Evaluation (OPRE), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), proposes survey data collection activities as part of the Youth Empowerment IDEAS study.

DATES: *Comments due within 60 days of publication.* In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: Copies of the proposed collection of information can be obtained and comments may be forwarded by emailing *OPREinfocollection@acf.hhs.gov.* Alternatively, copies can also be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 330 C Street SW, Washington, DC 20201, Attn: OPRE Reports Clearance Officer. All requests, emailed or written, should be identified by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: OPRE/ACF/HHS proposes data collection activities as part of the Youth Empowerment IDEAS study. The goal of this project is to collect descriptive data that will inform educational topics and strategies for adolescent pregnancy prevention and youth health and well-being. The project will identify messages and themes that are most likely to resonate with youth. The project will inform hypotheses on how to increase the effectiveness of sex education approaches so that more youth avoid the risks associated with teen sex and teen pregnancy rates are reduced. To support these efforts, we seek approval from the Office of Management and Budget to collect survey information from youth and young adults ages 14–24 and of parents of teens ages 14–18 using an online panel that is based on a

probability-based sample of the U.S. population. We propose the following data collection instruments:

(1) *Parent Survey:* We will administer this as a web survey. Information collected through the Parent Survey will be used to report on demographics, the parent-child relationship, parents' attitudes and beliefs about youth sex education and sexual behaviors, and parental knowledge about youth sexual risk-taking.

(2) *Youth Survey:* We will administer a web survey in two parts to youth ages 14–18. Information collected on Part I of the survey will be used to report on demographics, the parent-child relationship, future aspirations, and attitudes and beliefs about youth sexual behavior. Information collected on Part II of the survey will include knowledge about sexual risk, experience with sex education, and sexual risk behaviors.

(3) *Young Adult Survey:* We will administer this to young adults ages 19–24 as a web survey. Topics align with the youth survey, but with slight wording changes to reflect the older population.

Respondents: The survey respondents are from an online panel of a probability-based sample of the U.S. population of parents of youth ages 14–18 and their youth ages 14–18 and of young adults ages 19–24.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents (total over request period)	Number of responses per respondent (total over request period)	Average burden per response (in hours)	Total burden (in hours)	Annual burden (in hours)
(1) Parent Survey	1,550	1	.333	516	172
(2) Part I Youth Survey	675	1	.333	225	75
(3) Part II Youth Survey	540	1	.333	180	60
(4) Young Adult Survey	775	1	.583	452	151

Estimated Total Annual Burden Hours: 458.

Comments: The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

(Authority: **SEC.** 510. [42 U.S.C. 710])

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2020–06867 Filed 4–1–20; 8:45 am]

BILLING CODE 4184–83–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; State Plan Child Support Collection and Establishment of Paternity Title IV–D OCSE–100 and OCSE–21–U4

AGENCY: Office of Child Support Enforcement, Administration for Children and Families, HHS.

ACTION: Request for public comment.

SUMMARY: The Office of Child Support Enforcement (OCSE), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), is requesting a three-year extension of the forms OCSE–21–U4: Transmittal and Notice of Approval of State Plan Material for: Title IV–D of the Social Security Act and OCSE–100: State Plan (OMB #0970–0017, expiration 7/31/2020).

DATES: *Comments due within 30 days of publication.* 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.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Email: *OIRA_SUBMISSION@OMB.EOP.GOV,* Attn: Desk Officer for the Administration for Children and Families.

Copies of the proposed collection may be obtained by emailing *infocollection@acf.hhs.gov.* Alternatively, copies can also be obtained by writing to the Administration for Children and Families, Office of Planning, Research, and Evaluation, 330 C Street SW, Washington, DC 20201, Attn: ACF Reports Clearance Officer. All requests, emailed or written, should be identified by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: OCSE has approved an IV–D state plan for each state. Federal regulations require states to amend their state plans only when necessary to reflect new or revised federal statutes, regulations, or material changes in any state laws, regulations, policies, or IV–D agency procedures. The requirement for submission of a state plan and plan amendments for the Child Support Enforcement Program is found in sections 452, 454, and 466 of the Social Security Act. OCSE made minor revisions to the OCSE–21–U4 to remove outdated language and add an option for states to electronically request or renew an exemption from the mandatory laws and procedures in Section 466 of the Social Security Act via the online state plan system. These revisions do not increase the burden of the OCSE–21–U4.

Respondents: State IV–D Agencies.

ANNUAL BURDEN ESTIMATES

Instrument	Total number of respondents	Total number of responses per respondent	Average burden hours per response	Total burden hours
State Plan (OCSE–100)	54	12	.5	324
State Plan Transmittal (OCSE–21–U4)	54	12	.25	162

Estimated Total Annual Burden Hours: 486.

(Authority: Sections 452, 454, and 466 of the Social Security Act)

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2020–06869 Filed 4–1–20; 8:45 am]

BILLING CODE 4184–41–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Advancing Translational Sciences; 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 Center for Advancing Translational Sciences Special Emphasis Panel CTSA.

Date: May 8, 2020.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate cooperative agreement applications.

Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892 (Virtual and Teleconference Meeting).

Contact Person: Victor Henriquez, Ph.D., Scientific Review Officer, Office of Scientific Director, National Center for Advancing Translational Sciences (NCATS), National Institutes of Health, 6701 Democracy Blvd., Democracy 1, Room 1080, Bethesda, MD 20892–4878, 301–435–0813 *henriquv@mail.nih.gov,*

(Catalogue of Federal Domestic Assistance Program Nos. 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.350, B—Cooperative Agreements; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: March 27, 2020.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–06870 Filed 4–1–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of an Exclusive Patent License: Methods and Compositions for Adoptive Cell Therapy

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The National Cancer Institute, an institute of the National Institutes of Health, Department of Health and Human Services, is contemplating the grant of an Exclusive Patent License to practice the inventions embodied in the Patents and Patent Applications listed in the Supplementary Information section of this Notice to Lyell Immunopharma, Inc. (''Lyell''), located in South San Francisco, CA.

DATES: Only written comments and/or applications for a license which are received by the National Cancer Institute's Technology Transfer Center on or before April 17, 2020 will be considered.

ADDRESSES: Requests for copies of the patent applications, inquiries, and comments relating to the contemplated Exclusive Patent License should be directed to: Andrew Burke, Ph.D., Senior Technology Transfer Manager, NCI Technology Transfer Center, 9609 Medical Center Drive, RM 1E530, MSC 9702, Bethesda, MD 20892–9702 (for business mail), Rockville, MD 20850–9702; Telephone: (240) 276–5484; Facsimile: (240) 276–5504; Email: *andy.burke@nih.gov.*

SUPPLEMENTARY INFORMATION:

Intellectual Property

Group A

E–022–2017: Methods for Selecting Therapy for a Cancer Patient

1. US Provisional Patent Application 62/418,461 filed November 7, 2016 (E–022–2017–0–US–01);

2. International Patent Application PCT/US2017/060304 filed November 7, 2017 (E–022–2017–0–PCT–02);

3. European Patent Application 17805342.7 filed May 6, 2019 (E–022–2017–0–EP–03); and

4. United States Patent Application 16/347,778 filed May 6, 2019 (E–022–2017–0–US–04).

Group B

E–250–2016: Methods of Preparing an Isolated or Purified Population of Thymic Emigrant Cells and Methods of Treatment Using the Same

1. US Provisional Patent Application 62/433,591 filed December 13, 2016 (E–250–2016–0–US–01);

2. International Patent Application PCT/US2017/065986 filed December 13, 2017 (E–250–2016–0–PCT–02);

3. European Patent Application 17825696.2 filed June 11, 2019 (E–250–2016–0–EP–03); and

4. United States Patent Application 16/468,890 filed June 12, 2019 (E–250–2016–0–US–04).

E–132–2017: Methods of Preparing Hematopoietic Progenitor Cells In Vitro

1. US Provisional Patent Application 62/583,240 filed November 8, 2017 (E–132–2017–0–US–01); and

2. International Patent Application PCT/US2018/059856 filed November 8, 2018 (E–132–2017–0–PCT–02).

E–133–2017: In Vitro Generation of Thymic Organoid From Human Pluripotent Stem Cells

1. US Provisional Patent Application 62/560,908 filed September 20, 2017 (E–133–2017–0–US–01); and

2. International Patent Application PCT/US2018/051625 filed September 19, 2018 (E–133–2017–0–PCT–02).

E–091–2019: Methods of Producing T Cell Populations Using Induced Pluripotent Stem Cells

1. US Provisional Patent Application 62/957,939 filed January 7, 2020 (E–091–2019–0–US–01).

Group C

E–174–2012: Methods of Producing T Memory Stem Cell Populations

1. International Patent Application PCT/US2012/053947 filed September 6, 2012 (E–174–2012–0–PCT–01);
2. United States Patent 10,316,289 issued June 11, 2019 (E–174–2012–0–US–02.; and
3. United States Patent Application 16/410,327 filed May 13, 2019 (E–174–2012–0–US–03).

The patent rights in these inventions have been assigned and/or exclusively licensed to the government of the United States of America.

The prospective exclusive license territory may be worldwide, and the fields of use may be limited to the following:

Field of Use Applying to Intellectual Property Group A

''Manufacture and commercialization of companion diagnostics approved or cleared by the FDA or equivalent foreign regulatory agency for Licensee-proprietary T cell therapy products.''

Field of Use Applying to Intellectual Property Group B

''Manufacture and commercialization of adoptive T cell therapy products generated from autologously-derived, induced pluripotent stem cells for the treatment of cancer in humans.''

Field of Use Applying to Intellectual Property Group C

''Manufacture and commercialization of adoptive T cell therapy products isolated from peripheral blood for the treatment of cancer in humans.''

E–022–2017 generally discloses methods of using certain gene signature profiles to identify cancer patients likely to respond to T cell immunotherapy.

E–250–2016 generally discloses in vitro methodologies for generating induced pluripotent stem cell-based thymic emigrants and methods of using the same for the treatment of cancer.

E–132–2017 generally discloses methods of generating multi-potent hematopoietic progenitor cells from induced pluripotent stem cells and methods of using the same for the treatment of cancer.

E–133–2017 generally discloses methods of generating autologous thymic organoids from human pluripotent stem cells and methods of treating cancer using T cells produced by such organoids.

E–091–2019 generally discloses methods of reprogramming tumor infiltrating lymphocytes into induced pluripotent stem cells and methods of treating cancer using such cells.

E–174–2012 generally discloses a method of generating stem cell-like memory T cells by stimulating naive T cells in the presence of GSK–3beta inhibitors, and methods of treating cancer using cells conditioned in such a manner.

This Notice is made in accordance with 35 U.S.C. 209 and 37 CFR part 404. The prospective exclusive license will be royalty bearing, and the prospective exclusive license may be granted unless within fifteen (15) days from the date of this published Notice, the National Cancer Institute receives written evidence and argument which establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR part 404.

In response to this Notice, the public may file comments or objections. Comments and objections, other than those in the form of a license application, will not be treated confidentially, and may be made publicly available.

License applications submitted in response to this Notice will be presumed to contain business confidential information and any release of information from these license applications will be made only as required and upon a request under the Freedom of Information Act, 5 U.S.C. 552.

Dated: March 23, 2020.

Richard U. Rodriguez,

Associate Director, Technology Transfer Center, National Cancer Institute.

[FR Doc. 2020–06922 Filed 4–1–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the joint meeting of the National Cancer Advisory Board and NCI Board of Scientific Advisors.

The meeting will be held as a virtual meeting and is open to the public. Individuals who plan to view the virtual meeting and need special assistance or other reasonable accommodations to view the meeting, should notify the Contact Person listed below in advance of the meeting.

A portion of the National Cancer Advisory Board meeting will be closed to the public in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended, for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Cancer Institute, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Advisory Board and NCI Board of Scientific Advisors.

Date: April 9, 2020.

Open: 1:00 p.m. to 3:15 p.m.

Agenda: Joint meeting of the National Cancer Advisory Board and NCI Board of Scientific Advisors, NCI Director's report and other related business.

Closed: 3:15 p.m. to 4:00 p.m.

Agenda: Review of ongoing intramural research efforts and the discussion of confidential personnel issues.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Rockville, MD 20850 (Virtual Meeting).

Instructions regarding access to the meeting can be found here:

NCAB: *https://deainfo.nci.nih.gov/advisory/ncab/ncabmeetings.htm*

BSA: *https://deainfo.nci.nih.gov/advisory/bsa/bsameetings.htm*

Contact Person: Paulette S. Gray, Ph.D., Executive Secretary, Division of Extramural Activities, National Cancer Institute—Shady Grove, National Institutes of Health, 9609 Medical Center Drive, 7th Floor, Room 7W444, Bethesda, MD 20892, 240–276–6340, *grayp@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page:

NCAB: *https://deainfo.nci.nih.gov/advisory/ncab/ncabmeetings.htm,*

BSA: *https://deainfo.nci.nih.gov/advisory/bsa/bsameetings.htm,* where an agenda, instructions for access, and any additional information for the meeting will be posted when available.

This notice is being published less than 15 days prior to the meeting due to scheduling difficulties.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and

Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: March 29, 2020.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–06871 Filed 4–1–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of an Exclusive Patent License: The Development of Bispecific Antibodies Targeting Glypican 1 (GPC1) for the Treatment of GPC1-Expressing Human Cancer

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The National Cancer Institute, an institute of the National Institutes of Health, Department of Health and Human Services, is contemplating the grant of an Exclusive Patent License to practice the inventions embodied in the Patents and Patent Applications listed in the Supplementary Information section of this notice to NeoImmune Tech, Inc. (NeoImmune), located in Rockville, Maryland.

DATES: Only written comments and/or applications for a license which are received by the National Cancer Institute's Technology Transfer Center on or before April 17, 2020 will be considered.

ADDRESSES: Requests for copies of the patent application, inquiries, and comments relating to the contemplated an Exclusive Patent License should be directed to: David Lambertson, Ph.D., Senior Technology Transfer Manager, NCI Technology Transfer Center, 9609 Medical Center Drive, RM 3W610 MSC 9702, Bethesda, MD 20892–9702 (for business mail), Rockville, MD 20850–9702 Telephone: (240)-276–6467; Email: *david.lambertson@nih.gov.*

SUPPLEMENTARY INFORMATION:

Intellectual Property

U.S. Provisional Patent Application 62/795,415 entitled ''High Affinity Monoclonal Antibodies Targeting Glypican-1 For Treating Pancreatic Cancer'' [HHS Ref. E–028–2019–0–US–01], PCT Patent Application PCT/US2020/013739 entitled ''High Affinity Monoclonal Antibodies Targeting Glypican-1 For Treating Pancreatic Cancer'' [HHS Ref. E–028–2019–0–PCT–02], and U.S. and foreign patent applications claiming priority to the aforementioned applications.

The patent rights in these inventions have been assigned and/or exclusively licensed to the government of the United States of America.

The prospective exclusive license territory may be worldwide and the field of use may be limited to:

The research, development and commercialization of a bispecific antibody having the following elements:

(A) a first antibody component that binds to glypican 1 (GPC1), comprised of:

(1) an antibody having the complementary determining region (CDR) sequences of the antibody known as HM2, or

(2) an antibody having the CDR sequences of the antibody known as D4; and

(B) a second antibody component that binds to CD3;

For the treatment of GPC1-expressing human cancers.

The Licensed Field of Use specifically excludes any unconjugated mono-specific therapeutic antibodies and non-specified immunoconjugates, including, but not limited to, chimeric antigen receptors (CARs) and variants thereof, recombinant immunotoxins, and antibody-drug conjugates (ADCs).

This technology discloses antibodies that are specific for the cell surface domain of GPC1. GPC1 is a protein that is aberrantly expressed on several forms of cancer, including pancreatic cancer. The antibodies can be used either as unconjugated agents, or in the form of immunoconjugates (such as bispecific antibodies, CARs, ADCs and immunotoxins) to specifically target diseased cells that express GPC1, These agents can be used for the selective destruction of the diseased cells, resulting in treatment that may not have severe deleterious effects seen with less specific therapeutic modalities.

This notice is made in accordance with 35 U.S.C. 209 and 37 CFR part 404. The prospective exclusive license will be royalty bearing, and the prospective exclusive license may be granted unless within fifteen (15) days from the date of this published notice, the National Cancer Institute receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR part 404.

In response to this Notice, the public may file comments or objections. Comments and objections, other than those in the form of a license application, will not be treated confidentially, and may be made publicly available.

License applications submitted in response to this Notice will be presumed to contain business confidential information and any release of information in these license applications will be made only as required and upon a request under the Freedom of Information Act, 5 U.S.C. 552.

Dated: March 24, 2020.

Richard U. Rodriguez,

Associate Director, Technology Transfer Center, National Cancer Institute.

[FR Doc. 2020–06917 Filed 4–1–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Clinical, Treatment and Health Services Research Review Subcommittee, June 19, 2020, 8:30 a.m. to June 19, 2020, 5:00 p.m., JW Marriott New Orleans, 3rd Floor, Suite 1, 614 Canal Street, New Orleans, LA 70130 which was published in the **Federal Register** on March 18, 2020, 85 FR 15485.

This notice is being amended to change the meeting location from the JW Marriott New Orleans, 3rd Floor, Suite 1, 614 Canal Street, New Orleans, LA 70130 to a telephone conference call. The meeting is closed to the public.

Dated: March 30, 2020.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–06920 Filed 4–1–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2020–0048]

National Offshore Safety Advisory Committee; April 2020 Teleconference

AGENCY: U.S. Coast Guard, Department of Homeland Security.

ACTION: Notice of Federal Advisory Committee teleconference meeting.

SUMMARY: The National Offshore Safety Advisory Committee (Committee) will

meet via teleconference to discuss Committee matters relating to the safety of operations and other matters affecting the offshore oil and gas industry.

DATES:

Meeting: The National Offshore Safety Advisory Committee will meet by teleconference on Tuesday, April 28, 2020 from 11:00 a.m. to 1:00 p.m. Eastern Daylight Time. This teleconference may close early if the Committee has completed its business.

Comments and Supporting Documentation: To ensure your comments are received by Committee members before the teleconference, submit your written comments no later than April 17, 2020.

ADDRESSES: To join the teleconference or to request special accommodations, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section no later than 1 p.m. on April 21, 2020, to obtain the needed information. The number of teleconference lines are limited and will be available on a first-come, first served basis.

Instructions: You are free to submit comments at any time, including orally at the teleconference as time permits, but if you want Committee members to review your comment before the teleconference, please submit your comments no later than April 17, 2020. We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* call or email the individual in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions. You must include the docket number [USCG–2020–0048]. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided. For more about privacy and submissions in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

If you encounter technical difficulties with comments submission, contact the individual listed in the **FOR FUTHER INFORMATION CONTACT** section below.

Docket Search: Documents mentioned in this notice as being available in the docket, and all public comments, will be in our online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign-up for email alerts, you will be notified when comments are posted.

FOR FURTHER INFORMATION CONTACT: Commander Myles Greenway, Designated Federal Officer of the National Offshore Safety Advisory Committee, Commandant (CG–OES–2), U.S. Coast Guard, 2703 Martin Luther King Jr. Avenue SE, Stop 7509, Washington, DC 20593–7509; telephone (202) 372–1410, fax (202) 372–8382 or email: *Myles.J.Greenway@uscg.mil,* or Mr. Patrick Clark, telephone (202) 372–1358, fax (202) 372–8382 or email *patrick.w.clark@uscg.mil.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is in compliance with the *Federal Advisory Committee Act,* 5 U.S.C. Appendix. The National Offshore Safety Advisory Committee provides advice and recommendations to the Department of Homeland Security on matters relating to activities directly involved with or in support of the exploration of offshore mineral and energy resources insofar as they relate to matters within Coast Guard jurisdiction.

Agenda

The National Offshore Safety Advisory Committee will meet via teleconference April 28, 2020 from 11 a.m. to 1 p.m. (Eastern Daylight Time) to review and discuss the progress of the Lifeboats and Rescue Craft Safety on the Outer Continental Shelf (OCS) Subcommittee. The Committee will then use this information and consider public comments in discussing and formulating recommendations to the United States Coast Guard. Public comments or questions will be taken at the discretion of the Designated Federal Officer during the discussion and recommendation portions of the teleconference and during the public comment period, see Agenda item (5). A complete agenda for the April 28, 2020 teleconference is as follows:

(1) Welcoming remarks.

(2) General administration and acceptance of minutes from the September 11, 2019 National Offshore Safety Advisory Committee public meeting.

(3) Current business—Presentation and discussion of progress from the Lifeboats and Rescue Craft Safety on the Outer Continental Shelf (OCS) Subcommittee.

(4) New Business —Discussion on Coast Guard initiatives relating to the Offshore Oil and Gas industries.

(5) Public comment period.

(6) Closing Remarks.

(7) Adjournment of teleconference.

A copy of all pre-meeting documentation will be available at *https://homeport.uscg.mil/missions/ports-and-waterways/safety-advisory-committees/nosac/meetings* no later than April 17, 2020. Alternatively, you may contact Commander Myles Greenway or Mr. Patrick Clark as noted in the **FOR FURTHER INFORMATION CONTACT** section above.

Public comments and questions will be taken throughout the teleconference as the Committee discusses the issues and prior to deliberations and voting. There will also be a public comment period at the end of the teleconference. Speakers are requested to limit their comments to 2 minutes. Please note that the public comment period may end before the period allotted, following the last call for comments. Contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section above to register as a speaker.

Dated: March 26, 2020.

Jeffery G. Lantz,

Director of Commercial Regulations and Standards.

[FR Doc. 2020–06924 Filed 4–1–20; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4476–DR; Docket ID FEMA–2020–0001]

Tennessee; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Tennessee (FEMA–4476–DR), dated March 5, 2020, and related determinations.

DATES: The declaration was issued March 5, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated March 5, 2020, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Tennessee resulting from severe storms, tornadoes, straight-line winds, and flooding on March 3, 2020, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare

that such a major disaster exists in the State of Tennessee.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance and assistance for debris removal and emergency protective measures (Categories A and B) under the Public Assistance program in the designated areas, Hazard Mitigation throughout the State, and any other forms of assistance under the Stafford Act that you deem appropriate subject to completion of Preliminary Damage Assessments (PDAs).

Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance, Hazard Mitigation, and Other Needs Assistance under section 408 will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Myra M. Shird, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Tennessee have been designated as adversely affected by this major disaster:

Davidson, Putnam, and Wilson Counties for Individual Assistance.

Davidson, Putnam, and Wilson Counties for debris removal and emergency protective measures (Categories A and B) under the Public Assistance program.

All areas within the State of Tennessee are eligible for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–06843 Filed 4–1–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4420–DR; Docket ID FEMA–2020–0001]

Nebraska; Amendment No. 14 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Nebraska (FEMA–4420–DR), dated March 21, 2019, and related determinations.

DATES: This change occurred on February 24, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Thomas J. Dargan, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of DuWayne Tewes as Federal Coordinating Officer for this disaster.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–06831 Filed 4–1–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3425–EM; Docket ID FEMA–2020–0001]

Commonwealth of the Northern Mariana Islands; Amendment No. 1 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the Commonwealth of the Northern Mariana Islands (FEMA–3425–EM), dated October 20, 2019, and related determinations.

DATES: This amendment was issued March 5, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this emergency is closed effective October 23, 2019.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–06828 Filed 4–1–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4473–DR; Docket ID FEMA–2020–0001]

Puerto Rico; Amendment No. 4 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Commonwealth of Puerto Rico (FEMA–4473–DR), dated January 16, 2020, and related determinations.

DATES: This amendment was issued February 27, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this disaster is closed effective February 4, 2020.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–06835 Filed 4–1–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4473–DR; Docket ID FEMA–2020–0001]

Puerto Rico; Amendment No. 5 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Commonwealth of Puerto Rico (FEMA–4473–DR), dated January 16, 2020, and related determinations.

DATES: This amendment was issued March 10, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the Commonwealth of Puerto Rico is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of January 16, 2020.

The municipalities of Aguada, Añasco, Barceloneta, Coamo, Moca, Naranjito, Salinas, and Santa Isabel for Individual Assistance.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–06838 Filed 4–1–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4478–DR; Docket ID FEMA–2020–0001]

Mississippi; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Mississippi (FEMA–4478–DR), dated March 12, 2020, and related determinations.

DATES: The declaration was issued March 12, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated March 12, 2020, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Mississippi resulting from severe storms, tornadoes, straight-line winds, and flooding during the period of January 10 to January 11, 2020, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Mississippi.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Terry L. Quarles, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Mississippi have been designated as adversely affected by this major disaster:

Bolivar, Choctaw, Clay, DeSoto, Oktibbeha, Panola, Prentiss, Sunflower, Tishomingo, and Washington Counties for Public Assistance.

All areas within the State of Mississippi are eligible for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034,

Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–06845 Filed 4–1–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4473–DR; Docket ID FEMA–2020–0001]

Puerto Rico; Amendment No. 6 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Commonwealth of Puerto Rico (FEMA–4473–DR), dated January 16, 2020, and related determinations.

DATES: This amendment was issued March 11, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the Commonwealth of Puerto Rico is hereby amended to include permanent work under the Public Assistance program and the Hazard Mitigation Grant Program for those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of January 16, 2020.

The municipalities of Adjuntas, Guánica, Guayanilla, Jayuya, Juana Díaz, Lajas, Las Marías, Mayagüez, Peñuelas, Ponce, Sabana Grande, San Germán, Utuado, and Yauco for Public Assistance [Categories C–G] (already designated for Individual Assistance and assistance for debris removal and emergency protective measures [Categories A and B], including direct federal assistance, under the Public Assistance program).

All areas within the Commonwealth of Puerto Rico are eligible for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–06839 Filed 4–1–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4451–DR; Docket ID FEMA–2020–0001]

Missouri; Amendment No. 6 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Missouri (FEMA–4451–DR), dated July 9, 2019, and related determinations.

DATES: This change occurred on February 21, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, John Brogan, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Jon K. Huss as Federal Coordinating Officer for this disaster.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–06833 Filed 4–1–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4435–DR; Docket ID FEMA–2020–0001]

Missouri; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Missouri (FEMA–4435–DR), dated May 20, 2019, and related determinations.

DATES: This change occurred on February 21, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, John Brogan, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Jon K. Huss as Federal Coordinating Officer for this disaster.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049,

Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–06832 Filed 4–1–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4273–DR; Docket ID FEMA–2020–0001]

West Virginia; Amendment No. 8 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of West Virginia (FEMA–4273–DR), dated June 25, 2016, and related determinations.

DATES: This amendment was issued February 21, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated February 21, 2020, the President amended the cost-sharing arrangements regarding Federal funds provided under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), in a letter to Pete Gaynor, Administrator, Federal Emergency Management Agency, Department of Homeland Security, under Executive Order 12148, as follows:

I have determined that the damage in certain areas of the State of West Virginia resulting from severe storms, flooding, landslides, and mudslides during the period of June 22–29, 2016, is of sufficient severity and magnitude that special cost-sharing arrangements are warranted regarding Federal funds provided under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act'').

Therefore, I amend the declaration of June 25, 2016, to now authorize Federal funds for all categories of Public Assistance at 90 percent of total eligible costs.

This adjustment to State and local cost sharing applies only to Public Assistance costs and direct Federal assistance eligible for such adjustments under the law. The Robert T. Stafford Disaster Relief and Emergency Assistance Act specifically prohibits a similar adjustment for funds provided for Other Needs Assistance (Section 408) and the Hazard Mitigation Grant Program (Section 404). These funds will continue to be reimbursed at 75 percent of total eligible costs.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–06830 Filed 4–1–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4459–DR; Docket ID FEMA–2020–0001]

Wisconsin; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for State of Wisconsin (FEMA–4459–DR), dated August 27, 2019, and related determinations.

DATES: This change occurred on March 12, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, John F. Boyle, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Steven W. Johnson as Federal Coordinating Officer for this disaster.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–06834 Filed 4–1–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3424–EM; Docket ID FEMA–2020–0001]

Commonwealth of the Northern Mariana Islands; Amendment No. 1 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the Commonwealth of the Northern Mariana Islands (FEMA–3424–EM), dated October 7, 2019, and related determinations.

DATES: This amendment was issued March 5, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this emergency is closed effective October 9, 2019.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora

Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–06824 Filed 4–1–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4477–DR; Docket ID FEMA–2020–0001]

Wisconsin; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Wisconsin (FEMA–4477–DR), dated March 11, 2020, and related determinations.

DATES: The declaration was issued March 11, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated March 11, 2020, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Wisconsin resulting from a severe winter storm and flooding during the period of January 10 to January 12, 2020, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Wisconsin.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, John Boyle, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Wisconsin have been designated as adversely affected by this major disaster:

Kenosha, Milwaukee, and Racine Counties for Public Assistance.

All areas within the State of Wisconsin are eligible for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–06844 Filed 4–1–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3426–EM; Docket ID FEMA–2020–0001]

Puerto Rico; Amendment No. 1 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the Commonwealth of Puerto Rico (FEMA–3426–EM), dated January 7, 2020, and related determinations.

DATES: This amendment was issued February 27, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this emergency is closed effective February 4, 2020.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–06829 Filed 4–1–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[19X.LLID930000.L11700000.DF0000.LXSGPL000000.241A.4500132602]

Notice of Availability of the Record of Decision for the Final Programmatic Environmental Impact Statement for Fuel Breaks in the Great Basin; California, Idaho, Oregon, Nevada, Utah, and Washington

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended, the Bureau of Land Management (BLM) announces the availability of the Record of Decision (ROD) for the Final Programmatic Environmental Impact Statement (EIS) for Fuel Breaks in the Great Basin.

ADDRESSES: Copies of the ROD for the Final Programmatic EIS for Fuel Breaks in the Great Basin are available for public inspection during regular business hours at the BLM Idaho State Office, 1387 South Vinnell Way, Boise, ID 83709. Interested persons may also review the Final Programmatic EIS online at: *https://go.usa.gov/xnQcG.* Additional copies can be made available at the BLM California, Nevada, Oregon/Washington and Utah BLM State Offices upon request.

FOR FURTHER INFORMATION CONTACT: Ammon Wilhelm, telephone 208–373–3824; address BLM Idaho State Office, 1387 South Vinnell Way, Boise, ID 83709; email *awilhelm@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact 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: Strategically placed fuel breaks in the Great Basin region improve firefighter safety and expand opportunities to catch rapidly moving fires, potentially reducing fire size. Fuel breaks provide greater protection of human life and property, sagebrush communities, and habitat restoration investments. Reducing fire size helps limit the expansion of invasive plants such as cheatgrass and medusahead. Fuel breaks address the increased size and frequency of wildfires throughout the western United States. From 2009 through 2018, over 13.5 million acres of BLM-administered lands burned within the project area, impacting healthy rangelands, sagebrush communities, and the general productivity of the lands. Larger and more frequent wildfires result in increased risk for injuries and fatalities among wildland firefighters, destruction of private property, degradation and loss of rangelands, loss of recreational opportunities, habitat loss for a variety of species, and conversion of native habitats to invasive annual grasses. Conversion of native habitats to invasive annual grasslands impedes rangeland health and productivity by slowing or preventing the recovery of sagebrush communities.

The Selected Alternative (Alternative D) analyzes a full suite of manual, chemical and mechanical treatments, including prescribed fire, seeding, and targeted grazing, to construct and maintain up to 11,000 miles of fuel breaks. This will remove or alter vegetation on up to 667,000 acres within 38 million acres of sagebrush communities. Fuel break types include green strips (areas planted with low-statured, fire-resistant vegetation), brown strips (areas where all vegetation is removed), and mowed strips (reduced vegetation height).

The NOA for the Draft Programmatic EIS published on June 21, 2019, initiating a 45-day public comment period (84 FR 29232). During July 2019, the BLM hosted 12 public meetings throughout the six-state project area. Agencies, organizations, and interested parties provided comments on the Draft Programmatic EIS via mail, email, and at the public meetings. The BLM received 907 form letters and 138 unique comment letters. The BLM considered and incorporated comments received from the public and internal review into the Final Programmatic EIS as appropriate. Public comments resulted in the addition of clarifying text but did not significantly change the alternatives or analysis.

The NOA for the Final Programmatic EIS was published on February 14, 2020, for a 30-day review period (85 FR 8585). On March 26, 2020, I signed the Record of Decision selecting Alternative D for implementation. That approval constitutes the final decision of the Department and, in accordance with the regulations at 43 CFR 4.410, is not subject to appeal under Departmental regulations found in 43 CFR part 4. Any challenge to this decision must be brought in Federal District Court and is subject to 42 U.S.C. 437m–6.

(Authority: 40 CFR 1506.6, 40 CFR 1506.10).

David L. Bernhardt,

Secretary of the Interior.

[FR Doc. 2020–06898 Filed 4–1–20; 8:45 am]

BILLING CODE 4310–GG–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–1435–1436, and 1439 (Final)]

Acetone from Belgium, Korea and South Africa; Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that an industry in the United States is materially injured by reason of imports of acetone from Belgium, Korea and South Africa, provided for in subheadings 2914.11.10 and 2914.11.50 of the Harmonized Tariff Schedule of the United States, that have been found by the U.S. Department of Commerce (''Commerce'') to be sold in the United States at less than fair value (''LTFV'').[2]

Background

The Commission, pursuant to section 735(b) of the Act (19 U.S.C. 1673d(b)), instituted these investigations effective February 19, 2019, following receipt of a petition filed with the Commission and Commerce by the Coalition for Acetone Fair Trade, consisting of AdvanSix Inc., Parsippany, New Jersey, Altivia Petrochemicals, LLC, Haverhill, Ohio, and Olin Corporation, Clayton, Missouri. The Commission established a general schedule for the conduct of the final phase of the investigations following notification of preliminary determinations by Commerce that imports of acetone from Singapore and Spain were being sold at LTFV within the meaning of 733(b) of the Act (19 U.S.C. 1673b(b)).[3] Notice of the scheduling of the final phase of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on August 26, 2019 (84 FR 44635). The hearing was held in Washington, DC, on October 21, 2019, and all persons who requested the opportunity were permitted to appear in person or by counsel. The Commission subsequently issued its final affirmative determinations regarding dumped imports from Singapore and Spain on December 5, 2019 (84 FR 67476, December 10, 2019).

Following notification of final determinations by Commerce that imports of acetone from Belgium, Korea, and South Africa were being sold in the United States at LTFV,[4] notice of the supplemental scheduling of the final phase of the Commission's antidumping duty investigations with respect to Belgium, Korea, and South Africa 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 February 26, 2020 (85 FR 11102).

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

[2] 85 FR 8249, 85 FR 8252, and 85 FR 8247, February 13, 2020.

[3] 84 FR 44635, August 26, 2019.

[4] 85 FR 8249, 85 FR 8252, and 85 FR 8247, February 13, 2020.

The Commission made these determinations pursuant to section 735(b) of the Act (19 U.S.C. 1673d(b)). It completed and filed its determinations in these investigations on March 17, 2020. The views of the Commission are contained in USITC Publication 5038 (March 2020), entitled *Acetone from Belgium, Korea and South Africa: Investigation Nos. 731–TA–1435–1436, and 1439 (Final).*

By order of the Commission.

Issued: March 30, 2020.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2020–06913 Filed 4–1–20; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–644 and 731–TA–1494 (Preliminary)]

Non-Refillable Steel Cylinders From China; Institution of Anti-Dumping and Countervailing Duty Investigations and Scheduling of Preliminary Phase Investigations

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the institution of investigations and commencement of preliminary phase antidumping and countervailing duty investigations Nos. 701–TA–644 and 731–TA–1494 (Preliminary) pursuant to the Tariff Act of 1930 (''the Act'') to determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of non-refillable steel cylinders from China, provided for in subheadings 7310.29.00 and 7311.00.00 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value and alleged to be subsidized by the Government of China. Unless the Department of Commerce (''Commerce'') extends the time for initiation, the Commission must reach a preliminary determination in antidumping and countervailing duty investigations in 45 days, or in this case by May 11, 2020. The Commission's views must be transmitted to Commerce within five business days thereafter, or by May 18, 2020.

DATES: March 27, 2020.

FOR FURTHER INFORMATION CONTACT: Kristina Lara (202–205–3386), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*. The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION:

Background.—These investigations are being instituted, pursuant to sections 703(a) and 733(a) of the Tariff Act of 1930 (19 U.S.C. 1671b(a) and 1673b(a)), in response to petitions filed on March 27, 2020, by Worthington Industries, Columbus, Ohio.

For further information concerning the conduct of these investigations and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A and B (19 CFR part 207).

Participation in the investigations and public service list.—Persons (other than petitioner) wishing to participate in the investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in sections 201.11 and 207.10 of the Commission's rules, not later than seven days after publication of this notice in the **Federal Register**. 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 duty 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 these investigations upon the expiration of the period for filing entries of appearance.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in these investigations available to authorized applicants representing interested parties (as defined in 19 U.S.C. 1677(9)) who are parties to the investigations under the APO issued in the investigations, provided that the application is made not later than seven days after the publication of this notice in the **Federal Register**. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Conference.— As the Commission proceeds with alternative solutions during the COVID–19 pandemic, the Commission is not holding in-person Title VII (antidumping and countervailing duty) preliminary phase staff conferences at the U.S. International Trade Commission Building. It is providing an opportunity for parties to provide opening remarks, witness testimony, and responses to staff questions through written submissions. Requests to participate in these written proceedings should be emailed to *preliminaryconferences@usitc.gov* (DO NOT FILE ON EDIS) on or before April 10, 2020. A nonparty who has testimony that may aid the Commission's deliberations may request permission to participate by submitting a short statement.

Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov.*) No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

Written submissions.—As provided in sections 201.8 and 207.15 of the Commission's rules, any person may submit to the Commission on or before April 22, 2020, a written brief containing information and arguments pertinent to the subject matter of the investigations. Parties may file written testimony in connection with their presentation at the conference. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings.

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a

document for filing without a certificate of service.

Certification.—Pursuant to section 207.3 of the Commission's rules, any person submitting information to the Commission in connection with these investigations must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that any information that it submits to the Commission during these investigations 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 these or related investigations or reviews, 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, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.12 of the Commission's rules.

By order of the Commission.

Issued: March 30, 2020.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2020–06912 Filed 4–1–20; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Portable Gaming Console Systems with Attachable Handheld Controllers and Components Thereof II, DN 3444;* 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.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.*

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 Gamevice, Inc. on March 27, 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 portable gaming console systems with attachable handheld controllers and components thereof II. The complaint names as respondents: Nintendo Co., Ltd. of Japan and Nintendo of America, Inc. of Redmond, WA. The complainant requests that the Commission issue a limited exclusion order, cease desist orders 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. 3444'') 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

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*

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: March 27, 2020.

Lisa Barton,
Secretary to the Commission.

[FR Doc. 2020–06847 Filed 4–1–20; 8:45 am]

BILLING CODE 7020–02–P

[2] All contract personnel will sign appropriate nondisclosure agreements.

[3] Electronic Document Information System (EDIS): *https://edis.usitc.gov.*

DEPARTMENT OF LABOR

Employment and Training Administration

Agency Information Collection Activities; Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor's (DOL) Employment and Training Administration (ETA) is soliciting comments concerning a proposed extension for the authority to conduct the information collection request (ICR) titled, ''Form ETA–750A and Form ETA–750B, Application for Alien Certification.'' 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 June 1, 2020.

ADDRESSES: A copy of this ICR with applicable supporting documentation, including a description of the likely respondents, proposed frequency of response, and estimated total burden, may be obtained for free by contacting Brian Pasternak, Administrator, Office of Foreign Labor Certification, by telephone at 202–513–7350 (this is not a toll-free number), TTY 1–877–889–5627 (this is not a toll-free number), or by email at *ETA.OFLC.Forms@dol.gov.*

Submit written comments about, or requests for a copy of, this ICR by mail or courier to the U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, 200 Constitution Avenue NW, Box PPII 12–200, Washington, DC 20210; by email: *ETA.OFLC.Forms@dol.gov;* or by fax: 202–513–7395.

FOR FURTHER INFORMATION CONTACT: Brian Pasternak, Administrator, Office of Foreign Labor Certification, by telephone at 202–513–7350 (this is not a toll-free number) or by email at *ETA.OFLC.Forms@dol.gov.*

SUPPLEMENTARY INFORMATION: DOL, in its 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 Office of Management and Budget (OMB) for final approval. This program ensures the public provides all necessary data in the desired format, the reporting burden (time and financial resources) is minimized, the collection instruments are clearly understood, and the impact of collection requirements can be properly assessed.

Under the Immigration and Nationality Act (INA) § 212(a)(5)(A), the Secretary of Labor must certify that any foreign worker seeking to permanently enter the United States to perform skilled or unskilled labor under an employment-based visa will not adversely affect the wages and working conditions of U.S. workers similarly employed and that there are not sufficient U.S. workers able, willing, qualified, and available to perform such labor. Before an employer may request any skilled or unskilled foreign labor under this section, it must submit a request for certification to the Secretary of Labor. In limited circumstances, a foreign national without an employer sponsor may apply for a waiver of the job offer requirement with the Department of Homeland Security (DHS) as provided in the INA § 203(b)(2)(B)(i) on the ground that the waiver is in the national interest, which allows foreign workers to self-petition and, where appropriate, enter without a labor certification.

DOL uses Form ETA–750A, *Application for Alien Employment Certification,* (OMB Control Number 1205–0015) to process applications for permanent employment certification, specifically related to the processing of professional athletes. Form ETA–750A collects information that, when appropriate, permits DOL to certify that the admission of a foreign professional athlete meets the requirements of Section 212(a)(5)(A). Section 212(a)(5)(A)(iii) of the INA deals specifically with professional athletes coming to the United States on a permanent basis as immigrants.

Through Form ETA–750B, *Application for Alien Employment Certification,* DOL collects biographical information concerning the education, work history, and personal details of a professional athlete on whose behalf an application for permanent labor certification is filed. DHS also collects information on the Form ETA–750B, pursuant to 8 CFR 204.5(k)(4)(ii) for foreign workers applying for the National Interest Waivers of the job offer requirement under the INA § 203(b)(2)(B)(i). 8 U.S.C. 1153(b)(2)(B)(i), § 1182(a)(5)(A)) and 8 Code of Federal Regulation (CFR) 204.5(k)(4)(ii) authorizes this information collection.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection unless OMB, under the PRA, approves it and the collection tool 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. Comments must be written to receive consideration, and they will be summarized and included in the request for OMB approval of the final ICR. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1205–0015.

Submitted comments will also be a matter of public record for this ICR and

posted on the internet, without redaction. DOL encourages commenters not to include personally identifiable information, confidential business data, or other sensitive statements/information in any comments.

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–ETA.

Type of Review: Extension Without Changes.

Title of Collection: Form ETA–750A, Application for Alien Employment Certification and Form ETA–750B, Application for Alien Employment Certification.

Form: Form ETA–750A and Form ETA–750B.

OMB Control Number: 1205–0015.

Estimated Number of Respondents:

Form ETA–750A—86.6.

Form ETA–750B—9,558.

Frequency: On Occasion.

Total Estimated Annual Responses: 9,644.6.

Estimated Average Time per Response:

Form ETA–750A—2.8 hours.

Form ETA–750B—1.8 hours.

Estimated Total Annual Burden Hours: 17,446.88.

Total Estimated Annual Other Costs Burden: $0.

(Authority: 44 U.S.C. 3506(c)(2)(A))

John Pallasch,

Assistant Secretary for Employment and Training.

[FR Doc. 2020–06875 Filed 4–1–20; 8:45 am]

BILLING CODE 4510–FP–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (20–040)]

Aerospace Safety Advisory Panel; Meeting.

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, the National Aeronautics and Space Administration announces a forthcoming meeting of the Aerospace Safety Advisory Panel (ASAP).

DATES: Thursday, April 23, 2020, 12:00 p.m. to 1:15 p.m., Eastern Time.

ADDRESSES: This will be a virtual meeting via teleconference.

FOR FURTHER INFORMATION, CONTACT: Ms. Lisa M. Hackley, ASAP Administrative Officer, NASA Headquarters, Washington, DC 20546, (202) 358–1947 or *lisa.m.hackley@nasa.gov.*

SUPPLEMENTARY INFORMATION: The Aerospace Safety Advisory Panel (ASAP) will hold its Second Quarterly Meeting for 2020. This discussion is pursuant to carrying out its statutory duties for which the Panel reviews, identifies, evaluates, and advises on those program activities, systems, procedures, and management activities that can contribute to program risk. Priority is given to those programs that involve the safety of human flight. The agenda will include:

—Updates on the International Space Station Program
—Updates on the Commercial Crew Program
—Updates on Exploration System Development Program
—Updates on Human Lunar Exploration Program

This meeting is a virtual meeting, and only available telephonically. Any interested person may call the USA toll free conference call number 800–593–9979; pass code 8001361 and then the # sign. At the beginning of the meeting, members of the public may make a verbal presentation to the Panel on the subject of safety in NASA, not to exceed 5 minutes in length. To do so, members of the public must contact Ms. Lisa M. Hackley at *lisa.m.hackley@nasa.gov* or at (202) 358–1947 at least 48 hours in advance. Any member of the public is permitted to file a written statement with the Panel via electronic submission to Ms. Hackley at the email address previously noted. Verbal presentations and written statements should be limited to the subject of safety in NASA. It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants.

Patricia Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2020–06868 Filed 4–1–20; 8:45 am]

BILLING CODE 7510–13–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–458, NRC–2020–0090]

Entergy Operations, Inc.; River Bend Station, Unit 1

AGENCY: Nuclear Regulatory Commission.

ACTION: License amendment application; opportunity to comment, request a hearing, and petition for leave to intervene.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an amendment to Renewed Facility Operating License No. NPF–47, issued to Entergy Operations, Inc. (the licensee), for operation of the River Bend Station, Unit 1. The proposed amendment would extend the implementation time from May 13, 2020, to September 30, 2020, for the NRC-approved license amendment issued May 14, 2019, associated with revising the emergency action levels (EALs) scheme based on Nuclear Energy Institute (NEI) guidance. The licensee is requesting this extension due to unforeseen circumstances.

DATES: Submit comments by May 4, 2020. Requests for a hearing or petition for leave to intervene must be filed by June 1, 2020.

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

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0090. Address questions about NRC docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail Comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and

Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Thomas J. Wengert, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–4037; email: *Thomas.Wengert@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2020–0090 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0090.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The license amendment request dated March 23, 2020, is available in ADAMS under Accession No. ML20083N719.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2020–0090 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Introduction

The NRC is considering issuance of an amendment to Renewed Facility Operating License No. NPF–47 issued to Entergy Operations, Inc., for operation of River Bend Station, Unit 1, located in West Feliciana Parish, Louisiana.

The proposed amendment would extend the implementation time from May 13, 2020, to September 30, 2020, for the NRC-approved license amendment issued May 14, 2019 (Amendment No. 197; ADAMS Accession No. ML19070A062), associated with revising the EALs scheme based on NEI guidance in NEI 99–01, Revision 6 (ADAMS Accession No. ML13091A209), which was endorsed by the NRC in a letter dated March 28, 2013 (ADAMS Accession No. ML12346A463). The licensee is requesting this extension due to unforeseen circumstances because of the ongoing COVID–19 pandemic, which has resulted in a need to delay implementation of NEI 99–01 Revision 6 EALs beyond the May 13, 2020, date specified in the approved license amendment dated May 14, 2019. An extension of the implementation date to September 30, 2020, will account for unforeseen impacts that have interfered with implementation of the Revision 6 EALs as originally planned.

Before any issuance of the proposed license amendment, the NRC will need to make the findings required by the Atomic Energy Act of 1954, as amended (the Act), and NRC regulations.

The NRC has made a proposed determination that the license amendment request involves no significant hazards consideration. Under the NRC's regulations in section 50.92 of title 10 of the *Code of Federal Regulations* (10 CFR), this means that operation of the facility in accordance with the proposed amendments would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

An Emergency Plan provides mitigative and recovery efforts associated with certain station events that could impact the health and safety of the public. The RBS [River Bend Station, Unit 1] Emergency Plan is unrelated to any accident or event initiator. The RBS Emergency Plan currently in use is based on NEI 99–01 guidance, as previously approved by the NRC. An Emergency Plan based on previous revisions to the NEI guidance is effective and acceptable for establishing all necessary actions necessary to mitigate the consequences of an accident previously evaluated and have been previously endorsed by the NRC. Therefore, delaying implementation of the NEI 99–01, Revision 6—based RBS Emergency Plan does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

As stated previously, an Emergency Plan is not associated with any accident initiator but acts only to limit the consequences of an accident. The proposed amendment does not alter any plant equipment or otherwise affect the RBS accident analyses. Therefore, delaying implementation of the NEI 99–01, Revision 6—based RBS Emergency Plan does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

As stated previously, an Emergency Plan based on earlier revisions of the NEI guidance is effective and acceptable for establishing all necessary actions necessary to mitigate the consequences of an accident previously evaluated and have been previously endorsed by the NRC. RBS will continue to utilize the station Emergency Plan based on previous revisions of NEI 99–01 until Revision 6 of the NEI guidance is fully implemented. Therefore, delaying implementation of the NEI 99–01, Revision 6—based RBS Emergency Plan does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the license amendment request involves no significant hazards consideration.

The NRC is seeking public comments on this proposed determination that the license amendment request involves no significant hazards consideration. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of

publication of this notice. The Commission may issue the license amendment before expiration of the 60-day notice period if the Commission concludes the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period if circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility. If the Commission takes action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. If the Commission makes a final no significant hazards consideration determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

III. Opportunity To Request a Hearing and Petition for Leave To Intervene

Within 60 days after the date of publication of this notice, any persons (petitioner) whose interest may be affected by this action may file a request for a hearing and petition for leave to intervene (petition) with respect to the action. Petitions shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309. The NRC's regulations are accessible electronically from the NRC Library on the NRC's website at *https://www.nrc.gov/reading-rm/doc-collections/cfr/.* Alternatively, a copy of the regulations is available at the NRC's Public Document Room, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. If a petition is filed, the Commission or a presiding officer will rule on the petition and, if appropriate, a notice of a hearing will be issued.

As required by 10 CFR 2.309(d) the petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements for standing: (1) The name, address, and telephone number of the petitioner; (2) the nature of the petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the petitioner's interest.

In accordance with 10 CFR 2.309(f), the petition must also set forth the specific contentions which the petitioner seeks to have litigated in the proceeding. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner must provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to the specific sources and documents on which the petitioner intends to rely to support its position on the issue. The petition must include sufficient information to show that a genuine dispute exists with the applicant or licensee on a material issue of law or fact. Contentions must be limited to matters within the scope of the proceeding. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to satisfy the requirements at 10 CFR 2.309(f) with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene. Parties have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that party's admitted contentions, including the opportunity to present evidence, consistent with the NRC's regulations, policies, and procedures.

Petitions must be filed no later than 60 days from the date of publication of this notice. Petitions and motions for leave to file new or amended contentions that are filed after the deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i) through (iii). The petition must be filed in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document.

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to establish when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of the amendment unless the Commission finds an imminent danger to the health or safety of the public, in which case it will issue an appropriate order or rule under 10 CFR part 2.

A State, local governmental body, Federally-recognized Indian Tribe, or agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h)(1). The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission no later than 60 days from the date of publication of this notice. The petition must be filed in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document, and should meet the requirements for petitions set forth in this section, except that under 10 CFR 2.309(h)(2) a State, local governmental body, or Federally-recognized Indian Tribe, or agency thereof does not need to address the standing requirements in 10 CFR 2.309(d) if the facility is located within its boundaries. Alternatively, a State, local governmental body, Federally-recognized Indian Tribe, or agency thereof may participate as a non-party under 10 CFR 2.315(c).

If a hearing is granted, any person who is not a party to the proceeding and is not affiliated with or represented by a party may, at the discretion of the presiding officer, be permitted to make a limited appearance pursuant to the provisions of 10 CFR 2.315(a). A person making a limited appearance may make an oral or written statement of his or her position on the issues but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to the limits and conditions as may be imposed by the presiding officer. Details regarding the opportunity to make a limited appearance will be provided by the presiding officer if such sessions are scheduled.

IV. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including a request for hearing and petition for leave to intervene (petition), any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities that

request to participate under 10 CFR 2.315(c), must be filed in accordance with the NRC's E-Filing rule (72 FR 49139; August 28, 2007, as amended at 77 FR 46562; August 3, 2012). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Detailed guidance on making electronic submissions may be found in the Guidance for Electronic Submissions to the NRC and on the NRC website at *https://www.nrc.gov/site-help/e-submittals.html.* Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals/getting-started.html.* Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit adjudicatory documents. Submissions must be in Portable Document Format (PDF). Additional guidance on PDF submissions is available on the NRC's public website at *https://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the document is submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed so that they can obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing adjudicatory documents in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *https://adams.nrc.gov/ehd,* unless excluded pursuant to an order of the Commission or the presiding officer. If you do not have an NRC-issued digital ID certificate as described above, click ''Cancel'' when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or personal phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. For example, in some instances, individuals provide home addresses in order to demonstrate proximity to a facility or site. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

For further details with respect to this action, see the licensee's application dated March 23, 2020 (ADAMS Accession No. ML20083N719).

Attorney for Licensee: Anna Vinson Jones., Senior Counsel—Entergy Services, Inc., 101 Constitution Avenue NW, Suite 200 East, Washington, DC 20001.

NRC Branch Chief: Jennifer L. Dixon-Herrity.

Dated at Rockville, Maryland, this 30th day of March, 2020.

For the Nuclear Regulatory Commission.

Thomas J. Wengert,

Sr. Project Manager, Plant Licensing Branch IV, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2020–06906 Filed 4–1–20; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Excepted Service

AGENCY: Office of Personnel Management (OPM).

ACTION: Notice.

SUMMARY: This notice identifies Schedule A, B, and C appointing authorities applicable to a single agency that were established or revoked from December 1, 2019 to December 31, 2019.

FOR FURTHER INFORMATION CONTACT: Julia Alford, Senior Executive Resources Services, Senior Executive Services and Performance Management, Employee Services, 202–606–2246.

SUPPLEMENTARY INFORMATION: In accordance with 5 CFR 213.103, Schedule A, B, and C appointing authorities available for use by all agencies are codified in the Code of Federal Regulations (CFR). Schedule A, B, and C appointing authorities applicable to a single agency are not codified in the CFR, but the Office of Personnel Management (OPM) publishes a notice of agency-specific authorities established or revoked each month in the **Federal Register** at *www.gpo.gov/fdsys/.* OPM also publishes an annual notice of the consolidated listing of all Schedule A, B, and C appointing authorities, current as of June 30, in the **Federal Register**.

Schedule A

11. Department of Homeland Security (Sch. A, 213.3111)

(d) General—

(1) Not to exceed 800 positions to perform cyber risk and strategic analysis, incident handling and malware/vulnerability analysis, program management, distributed control systems security, cyber incident response, cyber exercise facilitation and management, cyber vulnerability detection and assessment, network and systems engineering, enterprise architecture, intelligence analysis, investigation, investigative analysis and cyber-related infrastructure interdependency analysis requiring unique qualifications currently not established by OPM. Positions will be in the following occupations: Security (GS–0080), Intelligence Analysts (GS–0132), Investigators (GS–1810), Investigative Analysts (GS–1805), and Criminal Investigators (GS–1811) at the General Schedule (GS) grade levels 09–15. No new appointments may be made under this authority after January 5, 2021 or the effective date of the completion of regulations implementing the Border Patrol Agency Pay Reform Act of 2014 or, whichever comes first.

Schedule B

No Schedule B Authorities to report during December 2019.

Schedule C

The following Schedule C appointing authorities were approved during December 2019.

Agency name	Organization name	Position title	Authorization No.	Effective date
DEPARTMENT OF AGRICULTURE	Office of the Assistant Secretary for Congressional Relations.	Congressional and Policy Advisor	DA200024	12/03/2019
	Office of the Under Secretary for Rural Development.	Confidential Assistant	DA200025	12/03/2019
	Office of the Secretary	Special Assistant	DA200028	12/17/2019
DEPARTMENT OF COMMERCE	Office of the General Counsel	Counsel	DC190157	12/03/2019
	Office of Public Affairs	Deputy Press Secretary	DC200017	12/11/2019
	Bureau of Industry and Security	Director of Congressional and Public Affairs.	DC200022	12/13/2019
DEPARTMENT OF DEFENSE	Office of the Secretary	Special Assistant	DD200041	12/05/2019
	Office of the Assistant Secretary of Defense (Legislative Affairs).	Special Assistant (LA)	DD200046	12/09/2019
DEPARTMENT OF THE ARMY	Office Assistant Secretary Army (Installations, Energy and Environment).	Special Assistant (Installations, Energy and Environment).	DW200015	12/09/2019
DEPARTMENT OF EDUCATION	Office of Legislation and Congressional Affairs.	Confidential Assistant	DB200006	12/05/2019
	Office of the Secretary	Confidential Assistant	DB200012	12/03/2019
		Special Assistant (3)	DB200008	12/05/2019
			DB200009	12/05/2019
			DB200010	12/11/2019
DEPARTMENT OF ENERGY	Office of the Assistant Secretary for Fossil Energy.	Chief of Staff	DE200028	12/03/2019
	Office of Science	Senior Advisor	DE200036	12/03/2019
	Office of the Assistant Secretary for Energy Efficiency and Renewable Energy.	Chief of Staff	DE200033	12/04/2019
	Office of Economic Impact and Diversity.	Chief, Energy Workforce Division	DE200024	12/09/2019
	Office of General Counsel	Attorney-Advisor	DE200044	12/09/2019
		Counselor	DE200046	12/09/2019
	Office of the Secretary.	Deputy Chief of Staff	DE200047	12/09/2019
	Office of Cybersecurity, Energy Security and Emergency Response.	Special Assistant for Integration Services.	DE200038	12/19/2019
	Office of Policy	Deputy Director	DE200051	12/20/2019
ENVIRONMENTAL PROTECTION AGENCY.	Office of the Assistant Administrator for Air and Radiation.	Special Assistant for the Office of Air and Radiation.	EP200014	12/03/2019
	Office of the Associate Administrator for Policy.	Deputy Associate Administrator for Strategic Planning.	EP200019	12/13/2019
	Office of the Assistant Administrator for Enforcement and Compliance Assurance.	Policy Advisor	EP200024	12/19/2019
FEDERAL HOUSING FINANCE AGENCY.	Office of Director	Senior Congressional Affairs Advisor.	HA200003	12/02/2019
GENERAL SERVICES ADMINISTRATION.	Office of Congressional and Intergovernmental Affairs.	Deputy Associate Administrator for Congressional and Intergovernmental Affairs.	GS200002	12/17/2019
DEPARTMENT OF HEALTH AND HUMAN SERVICES.	Office of the Administration for Children and Families.	Senior Advisor for Communications	DH200035	12/03/2019

Agency name	Organization name	Position title	Authorization No.	Effective date
	Office of the Assistant Secretary for Public Affairs.	Deputy Assistant Secretary, National Spokesperson.	DH200042	12/04/2019
	Office of Intergovernmental and External Affairs.	Director of External Affairs	DH200041	12/05/2019
	Office of the Assistant Secretary for Financial Resources.	Associate Deputy Assistant Secretary.	DH200038	12/06/2019
	Office of the Assistant Secretary for Legislation.	Policy Advisor—Oversight and Investigations.	DH200045	12/11/2019
	Office of the Secretary	Deputy White House Liaison	DH200046	12/12/2019
	Office of the Assistant Secretary for Financial Resources.	Chief of Staff, Office of the Assistant Secretary for Financial Resources.	DH200044	12/13/2019
	Office of the Secretary	Special Assistant for Operations and Strategy.	DH200040	12/17/2019
		Special Assistant	DH200050	12/17/2019
DEPARTMENT OF HOMELAND SECURITY.	Office of the Assistant Secretary for Policy.	Confidential Assistant	DM200054	12/03/2019
	Office of the General Counsel	Deputy General Counsel	DM200058	12/11/2019
	Office of United States Citizenship and Immigration Services.	Senior Policy Advisor	DM200061	12/13/2019
		Advisor	DM200064	12/13/2019
	Office of Partnership and Engagement.	Special Assistant	DM200018	12/19/2019
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT.	Office of Congressional and Intergovernmental Relations.	Congressional Relations	DU200016	12/03/2019
	Office of Public Affairs	Press Secretary	DU200034	12/09/2019
	Office of Housing	Senior Advisor	DU200009	12/11/2019
	Office of Community Planning and Development.	Senior Policy Advisor	DU200037	12/17/2019
DEPARTMENT OF THE INTERIOR	Secretary's Immediate Office	Advisor	DI200016	12/03/2019
		Deputy Press Secretary	DI200018	12/11/2019
DEPARTMENT OF JUSTICE	Office of the Antitrust Division	Counsel	DJ190243	12/17/2019
	Office of Justice Programs	Legislative Assistant	DJ190239	12/04/2019
		Senior Advisor	DJ200026	12/12/2019
	Office of Legal Policy	Senior Counsel	DJ200033	12/05/2019
	Office of Public Affairs	Senior Advisor	DJ200001	12/03/2019
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION.	Office of Legislative and Intergovernmental Affairs.	Regional Affairs Specialist	NN200012	12/11/2019
NATIONAL TRANSPORTATION SAFETY BOARD.	Office of Board Members	Confidential Assistant	TB200003	12/09/2019
OFFICE OF MANAGEMENT AND BUDGET.	Office of E-Government and Information Technology.	Special Assistant	BO200013	12/05/2019
	Office of Information and Regulatory Affairs.	Confidential Assistant	BO200016	12/13/2019
	Office of the Director	Senior Advisor	BO200017	12/13/2019
OFFICE OF PERSONNEL MANAGEMENT.	Office of Communications	Senior Press Officer	PM200001	12/10/2019
	Office of the Director	Clerk	PM200010	12/20/2019
		Confidential Clerk	PM200011	12/20/2019
OFFICE OF SCIENCE AND TECHNOLOGY POLICY.	Office of Science and Technology Policy.	Press Secretary	TS200002	12/19/2019
SECURITIES AND EXCHANGE COMMISSION.	Office of the Chairman	Confidential Assistant	SE200002	12/05/2019
DEPARTMENT OF STATE	Office of the Secretary	Staff Assistant	DS200017	12/03/2019
		Senior Advisor (2)	DS200018	12/04/2019
			DS200019	12/09/2019
	Office of the Legal Advisor	Attorney Advisor	DS200023	12/19/2019
	Office of the Chief of Protocol	Protocol Officer (Gifts)	DS200025	12/19/2019
DEPARTMENT OF TRANSPORTATION.	Office of the Chief Information Officer.	Associate Director for Technology and Information Services.	DT200034	12/11/2019
DEPARTMENT OF THE TREASURY.	Office of the General Counsel	Special Assistant	DY200017	12/03/2019
	Office of the Assistant Secretary (Legislative Affairs).	Special Advisor	DY200021	12/19/2019
UNITED STATES INTERNATIONAL TRADE COMMISSION.	Office of Commissioner Karpel	Staff Assistant (Legal)	TC200006	12/03/2019

The following Schedule C appointing authorities were revoked during December 2019.

Agency name	Organization name	Position title	Request No.	Date vacated
DEPARTMENT OF AGRICULTURE	Office of the Under Secretary for Farm Production and Conservation.	Policy Advisor	DA190163	12/06/2019
	Farm Service Agency	State Executive Director—Tennessee.	DA180061	12/13/2019
	Office of the Assistant Secretary for Congressional Relations.	Congressional and Policy Advisor	DA190144	12/31/2019
	Office of the Secretary	Advance Lead	DA190057	12/07/2019
		Special Assistant	DA190200	12/21/2019
	Office of the Under Secretary for Rural Development.	Confidential Assistant	DA190037	12/07/2019
	Rural Housing Service	State Director—New Mexico	DA180018	12/20/2019
OFFICE OF THE SECRETARY OF DEFENSE.	Office of the Assistant Secretary of Defense (International Security Affairs).	Special Assistant	DD170208	12/02/2019
	Office of the Secretary of Defense	Advance Officer	DD190018	12/07/2019
	Office of the Under Secretary of Defense (Personnel and Readiness).	Special Assistant	DD190184	12/07/2019
	Office of the Under Secretary of Defense (Policy).	Special Assistant	DD190073	12/07/2019
	Washington Headquarters Services	Defense Fellow (2)	DD180142	12/07/2019
			DD190002	12/08/2019
DEPARTMENT OF EDUCATION	Office of Planning, Evaluation and Policy Development.	Confidential Assistant	DB180020	12/07/2019
	Office of the General Counsel	Attorney Advisor (2)	DB190107	12/07/2019
			DB190068	12/14/2019
DEPARTMENT OF HEALTH AND HUMAN SERVICES.	Office of Intergovernmental and External Affairs.	Senior Advisor for External Affairs	DH190011	12/07/2019
	Office of the Assistant Secretary for Financial Resources.	Director—Appropriations Liaison	DH190111	12/07/2019
	Office of the Assistant Secretary for Public Affairs.	Senior Advisor and National Spokesperson.	DH190198	12/07/2019
	Office of the Secretary	Deputy White House Liaison	DH200016	12/06/2019
		Deputy Scheduler	DH190110	12/14/2019
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT.	Office of Community Planning and Development.	Advisor	DU190080	12/28/2019
	Office of Congressional and Intergovernmental Relations.	Congressional Relations Specialist	DU190117	12/07/2019
	Office of Fair Housing and Equal Opportunity.	Senior Advisor	DU190023	12/07/2019
	Office of the Chief Financial Officer	Senior Advisor to the Chief Financial Officer.	DU180072	12/07/2019
	Office of the Secretary	Special Policy Assistant	DU190037	12/07/2019
DEPARTMENT OF JUSTICE	Office of Legal Policy	Counsel (2)	DJ190029	12/16/2019
			DJ180111	12/21/2019
DEPARTMENT OF LABOR	Office of the Chief Financial Officer	Chief of Staff	DL190048	12/14/2019
DEPARTMENT OF THE TREASURY.	Secretary of the Treasury	Director of Scheduling and Advance.	DY190085	12/08/2019
ENVIRONMENTAL PROTECTION AGENCY.	Office of the Associate Administrator for Policy.	Policy Advisor	EP190071	12/01/2019
EXPORT-IMPORT BANK	Office of Congressional and Intergovernmental Affairs.	Senior Advisor	EB190004	12/21/2019
GENERAL SERVICES ADMINISTRATION.	Office of the General Counsel	Senior Counsel	GS190034	12/28/2019
OFFICE OF MANAGEMENT AND BUDGET.	Office of the Director	Special Assistant to the Director and Chief of Staff.	BO170092	12/27/2019
	Office of Legislative Affairs	Legislative Analyst	BO180027	12/28/2019
OFFICE OF PERSONNEL MANAGEMENT.	Office of Communications	Press Officer	PM180063	12/21/2019
	President's Commission on White House Fellowships.	Deputy Director, President's Commission on White House Fellowships.	PM200003	12/27/2019

Authority: 5 U.S.C. 3301 and 3302; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218.

Office of Personnel Management.

Alexys Stanley,

Regulatory Affairs Analyst.

[FR Doc. 2020–06889 Filed 4–1–20; 8:45 am]

BILLING CODE 6325–39–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* April 2, 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 March 27, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 600 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–109, CP2020–115.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–06865 Filed 4–1–20; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* April 2, 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 March 24, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 597 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–105, CP2020–111.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–06861 Filed 4–1–20; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* April 2, 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 March 26, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 599 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–108, CP2020–114.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–06864 Filed 4–1–20; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* April 2, 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 March 27, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 601 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–110, CP2020–116.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–06866 Filed 4–1–20; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* April 2, 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 March 25, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 598 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–107, CP2020–113.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–06863 Filed 4–1–20; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and First-Class Package Service 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:* April 2, 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 March 20, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & First-Class Package Service Contract 144 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–103, CP2020–109.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–06859 Filed 4–1–20; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express and 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:* April 2, 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 March 25, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express & Priority Mail Contract 113 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–106, CP2020–112.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–06862 Filed 4–1–20; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—First-Class Package Service 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:* April 2, 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 March 23, 2020, it filed with the Postal Regulatory Commission a *USPS Request to Add First-Class Package Service Contract 107 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–104, CP2020–110.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2020–06860 Filed 4–1–20; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88504; File No. SR–NASDAQ–2020–013]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Current Pilot Program Related to Nasdaq Rule 11890 by Six Months

March 27, 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 March 23, 2020, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the current pilot program related to Nasdaq Rule 11890 (Clearly Erroneous Transactions) by six months, to the close of business on October 20, 2020.

The text of the proposed rule change is available on the Exchange's website at *http://nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to extend the current pilot program related to Rule 11890, Clearly Erroneous Transactions, to the close of business on October 20, 2020. This change is being proposed to allow the Exchange to further consider a permanent proposal for clearly erroneous execution reviews.

On September 10, 2010, the Commission approved, on a pilot basis, changes to Rule 11890 that, among other things: (i) Provided for uniform treatment of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (ii) reduced the ability of the Exchange to deviate from the objective standards set forth in the rule.[3] In 2013, the Exchange adopted a provision designed to address the operation of the Plan.[4] Finally, in 2014, the Exchange adopted two additional provisions providing that: (i) A series of transactions in a particular security on one or more trading days may be viewed as one event if all such transactions were effected based on the same fundamentally incorrect or grossly misinterpreted issuance information resulting in a severe valuation error for all such transactions; and (ii) in the event of any disruption or malfunction in the operation of the electronic communications and trading facilities of an Exchange, another SRO, or responsible single plan processor in connection with the transmittal or receipt of a trading halt, an Officer, acting on his or her own motion, shall nullify any transaction that occurs after

[3] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–NASDAQ–2010–076).

[4] *See* Securities Exchange Act Release No. 68819 (February 1, 2013), 78 FR 9438 (February 8, 2013) (SR–NASDAQ–2013–022).

a trading halt has been declared by the primary listing market for a security and before such trading halt has officially ended according to the primary listing market.[5] These changes are currently scheduled to operate for a pilot period that concludes on April 20, 2020.[6]

If the pilot period is not either extended, replaced or approved as permanent, the prior versions of paragraphs (a)(2)(C), (c)(1), (b)(i), and (b)(ii) shall be in effect, and the provisions of paragraphs (g) through (i) shall be null and void.[7] In such an event, the remaining sections of Rule 11890 would continue to apply to all transactions executed on the Exchange. The Exchange understands that the other national securities exchanges and Financial Industry Regulatory Authority (''FINRA'') will also file similar proposals to extend their respective clearly erroneous execution pilot programs, the substance of which are identical to Rule 11890.

The Exchange does not propose any additional changes to Rule 11890. The Exchange believes the benefits to market participants from the more objective clearly erroneous executions rule should continue on a limited six month pilot basis after the current expiration date to allow the Exchange to continue to assess whether additional changes should also be made to the operation of the clearly erroneous execution rules. Extending the effectiveness of Rule 11890 for an additional six months should provide the Exchange, other national securities exchanges and FINRA additional time to consider further amendments to the clearly erroneous execution rules.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of Section 6(b) of the Act,[8] in general, and Section 6(b)(5) of the Act,[9] in particular, in that it is 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 and not to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed rule change promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous. The Exchange believes that extending the clearly erroneous execution pilot under Rule 11890 for an additional six months would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. equities markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Based on the foregoing, the Exchange believes the amended Clearly Erroneous Transactions rule should continue to be in effect on a pilot basis while the Exchange, other national securities exchanges and FINRA consider a permanent proposal for clearly erroneous execution reviews.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposal would ensure the continued, uninterrupted operation of harmonized clearly erroneous execution rules across the U.S. equities markets while the Exchange, other national securities exchanges and FINRA consider further amendments to these rules. The Exchange understands that the other national securities exchanges and FINRA will also file similar proposals to extend their respective clearly erroneous execution pilot programs. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and Rule 19b–4(f)(6) thereunder.[11]

A proposed rule change filed under Rule 19b–4(f)(6)[12] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii)[13] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become effective and operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the current clearly erroneous execution pilot program to continue uninterrupted, without any changes, while the Exchange and the other national securities exchanges consider a permanent proposal for clearly erroneous execution reviews. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[14]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing,

[5] *See* Securities Exchange Act Release No. 72434 (June 19, 2014), 79 FR 36110 (June 25, 2014) (SR–NASDAQ–2014–044).

[6] *See* Securities Exchange Act Release No. 87358 (October 18, 2019), 84 FR 57129 (October 24, 2019) (SR–NASDAQ–2019–085).

[7] *See* notes 3–5, *supra.* The prior versions of paragraphs (a)(2)(C), (c)(1), (b)(i), and (b)(ii) generally provided greater discretion to the Exchange with respect to breaking erroneous trades.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6)(iii).

[14] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2020–013 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2020–013. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2020–013 and should be submitted on or before April 23, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–06853 Filed 4–1–20; 8:45 am]

BILLING CODE 8011–01–P

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88496; File No. SR–CboeBYX–2020–010]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Current Pilot Program Related to BYX Rule 11.17, Clearly Erroneous Executions, to the Close of Business on October 20, 2020

March 27, 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 March 18, 2020, Cboe BYX Exchange, Inc. (''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BYX Exchange, Inc. (''BYX'' or the ''Exchange'') is filing with the Securities and Exchange Commission (the ''Commission'') a proposed rule change to extend the current pilot program related to BYX Rule 11.17, Clearly Erroneous Executions, to the close of business on October 20, 2020. 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/byx/*), 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 purpose of this filing is to extend the effectiveness of the Exchange's current rule applicable to Clearly Erroneous Executions to the close of business on October 20, 2020. Portions of Rule 11.17, explained in further detail below, are currently operating as a pilot program set to expire on April 20, 2020.[5]

On September 10, 2010, the Commission approved, on a pilot basis, changes to BYX Rule 11.17 that, among other things: (i) Provided for uniform treatment of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (ii) reduced the ability of the Exchange to deviate from the objective standards set forth in the rule.[6] In 2013, the Exchange adopted a provision designed to address the operation of the Plan.[7] Finally, in 2014, the Exchange adopted two additional provisions providing that: (i) A series of transactions in a particular security on one or more trading days may be viewed as one event if all such transactions were effected based on the same fundamentally incorrect or grossly misinterpreted issuance information resulting in a severe valuation error for all such transactions; and (ii) in the event of any disruption or malfunction in the operation of the electronic communications and trading facilities of an Exchange, another SRO, or responsible single plan processor in connection with the transmittal or receipt of a trading halt, an Officer, acting on his or her own motion, shall nullify any transaction that occurs after a trading halt has been declared by the primary listing market for a security and before such trading halt has officially

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 87364 (Oct. 21, 2019), 84 FR 57528 (Oct. 25, 2019) (SR–CboeBYX–2019–018).

[6] *See* Securities Exchange Act Release No. 63097 (Oct. 13, 2010), 75 FR 64767 (Oct. 20, 2010) (SR–BYX–2010–002).

[7] *See* Securities Exchange Act Release No. 68798 (Jan. 31, 2013), 78 FR 8628 (Feb. 6, 2013) (SR–BYX–2013–005).

ended according to the primary listing market.[8]

On December 26, 2018, the Commission published the proposed Eighteenth Amendment[9] to the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS under the Act (the ''Limit Up-Limit Down Plan'' or the ''Plan'')[10] to allow the Plan to operate on a permanent, rather than pilot, basis. On April 8, 2019, the Exchange amended BYX Rule 11.17 to untie the pilot program's effectiveness from that of the Plan and to extend the pilot's effectiveness to the close of business on October 18, 2019 in order allow the Exchange and other national securities exchanges additional time to consider further amendments, if any, to the clearly erroneous execution rules in light of the proposed Eighteenth Amendment to the Plan.[11] On April 17, 2019, the Commission published an approval of the Eighteenth Amendment to allow the Plan to operate on a permanent, rather than pilot, basis.[12] Finally, on October 21, 2019, the Exchange amended BYX Rule 11.17 to extend the pilot's effectiveness to the close of business on April 20, 2020.[13]

The Exchange now proposes to amend BYX Rule 11.17 to extend the pilot's effectiveness to the close of business on October 20, 2020. The Exchange understands that the other national securities exchanges and Financial Industry Regulatory Authority (''FINRA'') will also file similar proposals to extend their respective clearly erroneous execution pilot programs, the substance of which are identical to BYX Rule 11.17.

The Exchange does not propose any additional changes to BYX Rule 11.17. The Exchange believes the benefits to market participants from the more objective clearly erroneous executions rule should continue on a limited six month pilot basis. As the Plan was approved by the Commission to operate on a permanent, rather than pilot, basis the Exchange intends to assess whether additional changes should also be made to the operation of the clearly erroneous execution rules. Extending the effectiveness of BYX Rule 11.17 for an additional six months should provide the Exchange and other national securities exchanges additional time to consider further amendments, if any, to the clearly erroneous execution rules.

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.[14] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[15] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[16] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that extending the clearly erroneous execution pilot under BYX Rule 11.17 for an additional six months would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. equities markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Based on the foregoing, the Exchange believes the amended clearly erroneous executions rule should continue to be in effect on a pilot basis while the Exchange and the other national securities exchanges consider and develop a permanent proposal for clearly erroneous execution reviews.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange understands that FINRA and other national securities exchanges will also file similar proposals to extend their respective clearly erroneous execution pilot programs. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No comments were solicited or received on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[17] and subparagraph (f)(6) of Rule 19b–4 thereunder.[18]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule 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.

[8] *See* Securities Exchange Act Release No. 71796 (March 25, 2014), 79 FR 18099 (March 31, 2014) (SR–BYX–2014–003).

[9] *See* Securities Exchange Act Release No. 84843 (December 18, 2018), 83 FR 66464 (December 26, 2018) (File No. 4–631) (''Eighteenth Amendment'').

[10] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

[11] *See* Securities Exchange Act Release No. 85542 (Apr. 8, 2019), 84 FR 15009 (Apr. 12, 2019) (SR–CboeBYX–2019–003).

[12] *See* Securities Exchange Act Release No. 85623 (Apr. 11, 2019), 84 FR 16086 (Apr. 17, 2019) (File No. 4–631).

[13] *See supra* note 5.

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

[16] *Id.*

[17] 15 U.S.C. 78s(b)(3)(A)(iii).

[18] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CboeBYX–2020–010 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeBYX–2020–010. 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–CboeBYX–2020–010 and should be submitted on or before April 23, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–06851 Filed 4–1–20; 8:45 am]

BILLING CODE 8011–01–P

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88497; File No. SR–CboeBZX–2020–026]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Extend the Current Pilot Program Related to BZX Rule 11.17, Clearly Erroneous Executions, to the Close of Business on October 20, 2020

March 27, 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 March 18, 2020, Cboe BZX Exchange, Inc. (''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (''BZX'' or the ''Exchange'') is filing with the Securities and Exchange Commission (the ''Commission'') a proposed rule change to extend the current pilot program related to BZX Rule 11.17, Clearly Erroneous Executions, to the close of business on October 20, 2020. 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

The purpose of this filing is to extend the effectiveness of the Exchange's current rule applicable to Clearly Erroneous Executions to the close of business on October 20, 2020. Portions of Rule 11.17, explained in further detail below, are currently operating as a pilot program set to expire on April 20, 2020.[5]

On September 10, 2010, the Commission approved, on a pilot basis, changes to BZX Rule 11.17 that, among other things: (i) Provided for uniform treatment of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (ii) reduced the ability of the Exchange to deviate from the objective standards set forth in the rule.[6] In 2013, the Exchange adopted a provision designed to address the operation of the Plan.[7] Finally, in 2014, the Exchange adopted two additional provisions providing that: (i) A series of transactions in a particular security on one or more trading days may be viewed as one event if all such transactions were effected based on the same fundamentally incorrect or grossly misinterpreted issuance information resulting in a severe valuation error for all such transactions; and (ii) in the event of any disruption or malfunction in the operation of the electronic communications and trading facilities of an Exchange, another SRO, or responsible single plan processor in connection with the transmittal or receipt of a trading halt, an Officer, acting on his or her own motion, shall nullify any transaction that occurs after a trading halt has been declared by the primary listing market for a security and before such trading halt has officially

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 87365 (October 21, 2019), 84 FR 57540 (October 25, 2019) (SR–CboeBZX–2019–089).

[6] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–BATS–2010–016).

[7] *See* Securities Exchange Act Release No. 68797 (January 31, 2013), 78 FR 8635 (February 6, 2013) (SR–BATS–2013–008).

ended according to the primary listing market.[8]

On December 26, 2018, the Commission published the proposed Eighteenth Amendment[9] to the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS under the Act (the ''Limit Up-Limit Down Plan'' or the ''Plan'')[10] to allow the Plan to operate on a permanent, rather than pilot, basis. On April 8, 2019, the Exchange amended BZX Rule 11.17 to untie the pilot program's effectiveness from that of the Plan and to extend the pilot's effectiveness to the close of business on October 18, 2019 in order allow the Exchange and other national securities exchanges additional time to consider further amendments, if any, to the clearly erroneous execution rules in light of the proposed Eighteenth Amendment to the Plan.[11] On April 17, 2019, the Commission published an approval of the Eighteenth Amendment to allow the Plan to operate on a permanent, rather than pilot, basis.[12] Finally, on October 21, 2019, the Exchange amended BZX Rule 11.17 to extend the pilot's effectiveness to the close of business on April 20, 2020.[13]

The Exchange now proposes to amend BZX Rule 11.17 to extend the pilot's effectiveness to the close of business on October 20, 2020. The Exchange understands that the other national securities exchanges and Financial Industry Regulatory Authority (''FINRA'') will also file similar proposals to extend their respective clearly erroneous execution pilot programs, the substance of which are identical to BZX Rule 11.17.

The Exchange does not propose any additional changes to BZX Rule 11.17. The Exchange believes the benefits to market participants from the more objective clearly erroneous executions rule should continue on a limited six month pilot basis. As the Plan was approved by the Commission to operate on a permanent, rather than pilot, basis the Exchange intends to assess whether additional changes should also be made to the operation of the clearly erroneous execution rules. Extending the effectiveness of BZX Rule 11.17 for an additional six months should provide the Exchange and other national securities exchanges additional time to consider further amendments, if any, to the clearly erroneous execution rules.

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.[14] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[15] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[16] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that extending the clearly erroneous execution pilot under BZX Rule 11.17 for an additional six months would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. equities markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Based on the foregoing, the Exchange believes the amended clearly erroneous executions rule should continue to be in effect on a pilot basis while the Exchange and the other national securities exchanges consider and develop a permanent proposal for clearly erroneous execution reviews.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange understands that FINRA and other national securities exchanges will also file similar proposals to extend their respective clearly erroneous execution pilot programs. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No comments were solicited or received on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[17] and subparagraph (f)(6) of Rule 19b–4 thereunder.[18]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule 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.

[8] *See* Securities Exchange Act Release No. 72434 (June 19, 2014), 79 FR 36110 (June 25, 2014) (SR–BATS–2014–014).

[9] *See* Securities Exchange Act Release No. 84843 (December 18, 2018), 83 FR 66464 (December 26, 2018) (File No. 4–631) (''Eighteenth Amendment'').

[10] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

[11] *See* Securities Exchange Act Release No. 85543 (April 8, 2019), 84 FR 15018 (April 12, 2019) (SR–CboeBZX–2019–022).

[12] *See* Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019) (File No. 4–631).

[13] *See supra* note 5.

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

[16] *Id.*

[17] 15 U.S.C. 78s(b)(3)(A)(iii).

[18] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

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–2020–026 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–2020–026. 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–2020–026 and should be submitted on or before April 23, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–06855 Filed 4–1–20; 8:45 am]

BILLING CODE 8011–01–P

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88499; File No. SR–CboeEDGA–2020–009]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Current Pilot Program Related to EDGA Rule 11.15, Clearly Erroneous Executions, to the Close of Business on October 20, 2020

March 27, 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 March 18, 2020, Cboe EDGA Exchange, Inc. (''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGA Exchange, Inc. (''EDGA'' or the ''Exchange'') is filing with the Securities and Exchange Commission (the ''Commission'') a proposed rule change to extend the current pilot program related to EDGA Rule 11.15, Clearly Erroneous Executions, to the close of business on October 20, 2020. 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/edga/*), 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 purpose of this filing is to extend the effectiveness of the Exchange's current rule applicable to Clearly Erroneous Executions to the close of business on October 20, 2020. Portions of Rule 11.15, explained in further detail below, are currently operating as a pilot program set to expire on April 20, 2020.[5]

On September 10, 2010, the Commission approved, on a pilot basis, changes to EDGA Rule 11.15 that, among other things: (i) Provided for uniform treatment of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (ii) reduced the ability of the Exchange to deviate from the objective standards set forth in the rule.[6] In 2013, the Exchange adopted a provision designed to address the operation of the Plan.[7] Finally, in 2014, the Exchange adopted two additional provisions providing that: (i) A series of transactions in a particular security on one or more trading days may be viewed as one event if all such transactions were effected based on the same fundamentally incorrect or grossly misinterpreted issuance information resulting in a severe valuation error for all such transactions; and (ii) in the event of any disruption or malfunction in the operation of the electronic communications and trading facilities of an Exchange, another SRO, or responsible single plan processor in connection with the transmittal or receipt of a trading halt, an Officer, acting on his or her own motion, shall nullify any transaction that occurs after a trading halt has been declared by the primary listing market for a security and before such trading halt has officially

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 87366 (October 21, 2019), 84 FR 57538 (October 25, 2019) (SR–CboeEDGA–2019–017).

[6] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–EDGA–2010–03).

[7] *See* Securities Exchange Act Release No. 68806 (February 1, 2013), 78 FR 8670 (February 6, 2013) (SR–EDGA–2013–05).

ended according to the primary listing market.[8]

On December 26, 2018, the Commission published the proposed Eighteenth Amendment[9] to the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS under the Act (the ''Limit Up-Limit Down Plan'' or the ''Plan'')[10] to allow the Plan to operate on a permanent, rather than pilot, basis. On April 8, 2019, the Exchange amended EDGA Rule 11.15 to untie the pilot program's effectiveness from that of the Plan and to extend the pilot's effectiveness to the close of business on October 18, 2019 in order allow the Exchange and other national securities exchanges additional time to consider further amendments, if any, to the clearly erroneous execution rules in light of the proposed Eighteenth Amendment to the Plan.[11] On April 17, 2019, the Commission published an approval of the Eighteenth Amendment to allow the Plan to operate on a permanent, rather than pilot, basis.[12] Finally, on October 21, 2019, the Exchange amended EDGA Rule 11.15 to extend the pilot's effectiveness to the close of business on April 20, 2020.[13]

The Exchange now proposes to amend EDGA Rule 11.15 to extend the pilot's effectiveness to the close of business on October 20, 2020. The Exchange understands that the other national securities exchanges and Financial Industry Regulatory Authority (''FINRA'') will also file similar proposals to extend their respective clearly erroneous execution pilot programs, the substance of which are identical to EDGA Rule 11.15.

The Exchange does not propose any additional changes to EDGA Rule 11.15. The Exchange believes the benefits to market participants from the more objective clearly erroneous executions rule should continue on a limited six month pilot basis. As the Plan was approved by the Commission to operate on a permanent, rather than pilot, basis the Exchange intends to assess whether additional changes should also be made to the operation of the clearly erroneous execution rules. Extending the effectiveness of EDGA Rule 11.15 for an additional six months should provide the Exchange and other national securities exchanges additional time to consider further amendments, if any, to the clearly erroneous execution rules.

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.[14] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[15] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[16] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that extending the clearly erroneous execution pilot under EDGA Rule 11.15 for an additional six months would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. equities markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Based on the foregoing, the Exchange believes the amended clearly erroneous executions rule should continue to be in effect on a pilot basis while the Exchange and the other national securities exchanges consider and develop a permanent proposal for clearly erroneous execution reviews.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange understands that FINRA and other national securities exchanges will also file similar proposals to extend their respective clearly erroneous execution pilot programs. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No comments were solicited or received on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[17] and subparagraph (f)(6) of Rule 19b–4 thereunder.[18]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule 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.

[8] *See* Securities Exchange Act Release No. 72434 (June 19, 2014), 79 FR 36110 (June 25, 2014) (SR–EDGA–2014–11).

[9] *See* Securities Exchange Act Release No. 84843 (December 18, 2018), 83 FR 66464 (December 26, 2018) (File No. 4–631) (''Eighteenth Amendment'').

[10] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

[11] *See* Securities Exchange Act Release No. 85544 (April 8, 2019), 84 FR 15011 (April 12, 2019) (SR–CboeEDGA–2019–005).

[12] *See* Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019) (File No. 4–631).

[13] *See supra* note 5.

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

[16] *Id.*

[17] 15 U.S.C. 78s(b)(3)(A)(iii).

[18] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CboeEDGA–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–CboeEDGA–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 to make available publicly. All submissions should refer to File Number SR–CboeEDGA–2020–009 and should be submitted on or before April 23, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–06848 Filed 4–1–20; 8:45 am]

BILLING CODE 8011–01–P

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88503; File No. SR–Phlx–2020–13]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Phlx Rule 3312

March 27, 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 March 23, 2020, Nasdaq PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to a proposal to extend the current pilot program related to Phlx Rule 3312 (Clearly Erroneous Transactions) by six months, to the close of business on October 20, 2020.

The text of the proposed rule change is available on the Exchange's website at *http://nasdaqphlx.cchwallstreet.com/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

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 purpose of the proposed rule change is to extend the current pilot program related to Rule 3312, Clearly Erroneous Transactions, to the close of business on October 20, 2020. This change is being proposed to allow the Exchange to further consider a permanent proposal for clearly erroneous execution reviews.

On September 10, 2010, the Commission approved, on a pilot basis, changes to Rule 3312 that, among other things: (i) Provided for uniform treatment of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (ii) reduced the ability of the Exchange to deviate from the objective standards set forth in the rule.[3] Following this, on September 30, 2010, the Exchange adopted changes to conform its Rule 3312 to Nasdaq's and BX's rules 11890.[4] In 2013, the Exchange adopted a provision designed to address the operation of the Plan.[5] Finally, in 2014, the Exchange adopted two additional provisions providing that: (i) A series of transactions in a particular security on one or more trading days may be viewed as one event if all such transactions were effected based on the same fundamentally incorrect or grossly misinterpreted issuance information resulting in a severe valuation error for all such transactions; and (ii) in the event of any disruption or malfunction in the operation of the electronic communications and trading facilities of an Exchange, another SRO, or responsible single plan processor in connection with the transmittal or receipt of a trading halt, an Officer, acting on his or her own motion, shall nullify any transaction that occurs after a trading halt has been declared by the primary listing market for a security and before such trading halt has officially ended according to the primary listing market.[6] These changes are currently scheduled to operate for a pilot period that concludes on April 20, 2020.[7]

If the pilot period is not either extended, replaced or approved as permanent, the prior versions of paragraphs (a)(2)(C), (c)(1), (b)(i), and (b)(ii) shall be in effect, and the provisions of paragraphs (g) through (i)

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–NASDAQ–2010–076).

[4] *See* Securities Exchange Act Release No. 63023 (September 30, 2010), 75 FR 61802 (October 6, 2010) (SR–Phlx–2010–125).

[5] *See* Securities Exchange Act Release No. 68820 (February 1, 2013), 78 FR 9436 (February 8, 2013) (SR–Phlx–2013–12).

[6] *See* Securities Exchange Act Release No. 72434 (June 19, 2014), 79 FR 36110 (June 25, 2014) (SR–Phlx–2014–27).

[7] *See* Securities Exchange Act Release No. 87356 (October 18, 2019), 84 FR 57133 (October 24, 2019) (SR–Phlx–2019–44).

shall be null and void.[8] In such an event, the remaining sections of Rule 3312 would continue to apply to all transactions executed on the Exchange. The Exchange understands that the other national securities exchanges and Financial Industry Regulatory Authority (''FINRA'') will also file similar proposals to extend their respective clearly erroneous execution pilot programs, the substance of which are identical to Rule 3312.

The Exchange does not propose any additional changes to Rule 3312. The Exchange believes the benefits to market participants from the more objective clearly erroneous executions rule should continue on a limited six month pilot basis after the current expiration date to allow the Exchange to continue to assess whether additional changes should also be made to the operation of the clearly erroneous execution rules. Extending the effectiveness of Rule 3312 for an additional six months should provide the Exchange, other national securities exchanges and FINRA additional time to consider further amendments to the clearly erroneous execution rules.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of Section 6(b) of the Act,[9] in general, and Section 6(b)(5) of the Act,[10] in particular, in that it is 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 and not to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed rule change promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous. The Exchange believes that extending the clearly erroneous execution pilot under Rule 3312 for an additional six months would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. equities markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Based on the foregoing, the Exchange believes the amended Clearly Erroneous Transactions rule should continue to be in effect on a pilot basis while the Exchange, other national securities exchanges and FINRA consider a permanent proposal for clearly erroneous execution reviews.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposal would ensure the continued, uninterrupted operation of harmonized clearly erroneous execution rules across the U.S. equities markets while the Exchange, other national securities exchanges and FINRA consider further amendments to these rules. The Exchange understands that the other national securities exchanges and FINRA will also file similar proposals to extend their respective clearly erroneous execution pilot programs. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [11] and Rule 19b–4(f)(6) thereunder.[12]

A proposed rule change filed under Rule 19b–4(f)(6) [13] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii) [14] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become effective and operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the current clearly erroneous execution pilot program to continue uninterrupted, without any changes, while the Exchange and the other national securities exchanges consider a permanent proposal for clearly erroneous execution reviews. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[15]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov. Please include File Number SR–Phlx–2020–13 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.

[8] *See* notes 3–6, *supra.* The prior versions of paragraphs (a)(2)(C), (c)(1), (b)(i), and (b)(ii) generally provided greater discretion to the Exchange with respect to breaking erroneous trades.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 240.19b–4(f)(6)(iii).

[15] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

All submissions should refer to File Number SR–Phlx–2020–13. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-2020–13 and should be submitted on or before April 23, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–06858 Filed 4–1–20; 8:45 am]

BILLING CODE 8011–01–P

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88495; File No. SR–FINRA–2020–008]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Pilot Program Related to FINRA Rule 11892 (Clearly Erroneous Transactions in Exchange-Listed Securities)

March 27, 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 March 18, 2020, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a ''non-controversial'' rule change under paragraph (f)(6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to extend the current pilot program related to FINRA Rule 11892 (Clearly Erroneous Transactions in Exchange-Listed Securities) (''Clearly Erroneous Transaction Pilot'' or ''Pilot'') until October 20, 2020.

The text of the proposed rule change is available on FINRA's website at *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

FINRA is proposing a rule change to extend the current pilot program related to FINRA Rule 11892 governing clearly erroneous transactions in exchange-listed securities until the close of business on October 20, 2020. Extending the Pilot would provide FINRA and the national securities exchanges additional time to consider a permanent proposal for clearly erroneous transaction reviews.

On September 10, 2010, the Commission approved, on a pilot basis, changes to FINRA Rule 11892 that, among other things: (i) Provided for uniform treatment of clearly erroneous transaction reviews in multi-stock events involving twenty or more securities; and (ii) reduced the ability of FINRA to deviate from the objective standards set forth in the rule.[4] In 2013, FINRA adopted a provision designed to address the operation of the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS (''Plan'').[5] Finally, in 2014, FINRA adopted two additional provisions addressing (i) erroneous transactions that occur over one or more trading days that were based on the same fundamentally incorrect or grossly misinterpreted information resulting in a severe valuation error; and (ii) a disruption or malfunction in the operation of the facilities of a self-regulatory organization or responsible single plan processor in connection with the transmittal or receipt of a trading halt.[6]

On April 9, 2019, FINRA filed a proposed rule change to untie the effectiveness of the Clearly Erroneous Transaction Pilot from the effectiveness of the Plan, and to extend the Pilot's effectiveness to the close of business on October 18, 2019.[7] On October 18, 2019, FINRA filed a proposed rule change to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] *See* Securities Exchange Act Release No. 62885 (September 10, 2010), 75 FR 56641 (September 16, 2010) (Order Approving File No. SR–FINRA–2010–032).

[5] *See* Securities Exchange Act Release No. 68808 (February 1, 2013), 78 FR 9083 (February 7, 2013) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2013–012).

[6] *See* Securities Exchange Act Release No. 72434 (June 19, 2014), 79 FR 36110 (June 25, 2014) (Order Approving File No. SR–FINRA–2014–021).

[7] *See* Securities Exchange Act Release No. 85612 (April 11, 2019), 84 FR 16107 (April 17, 2019) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2019–011).

extend the Pilot's effectiveness until April 20, 2020.[8] FINRA now is proposing to further extend the Pilot until October 20, 2020, so that market participants can continue to benefit from the more objective clearly erroneous transaction standards under the Pilot.[9] Extending the Pilot also would provide more time to permit FINRA and the other self-regulatory organizations to consider what changes, if any, to the clearly erroneous transaction rules are appropriate—particularly in light of the permanent approval of the Plan.[10]

FINRA has filed the proposed rule change for immediate effectiveness. The proposed rule change will become operative 30 days after the date of filing.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[11] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning the review of transactions as clearly erroneous. FINRA believes that extending the Pilot under FINRA Rule 11892, until October 20, 2020, would help assure consistent results in handling erroneous trades across the U.S. equities markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Based on the foregoing, FINRA believes the Clearly Erroneous Transaction Pilot should continue to be in effect while FINRA and the national securities exchanges consider a permanent proposal for clearly erroneous transaction reviews.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposal would ensure the continued, uninterrupted operation of harmonized clearly erroneous transaction rules across the U.S. equities markets while FINRA and the national securities exchanges consider further amendments to these rules in light of the approval of the Plan as permanent. FINRA understands that the national securities exchanges also will file similar proposals to extend their clearly erroneous execution pilot programs, as applicable. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[12] and subparagraph (f)(6) of Rule 19b–4 thereunder.[13]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule 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–FINRA–2020–008 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2020–008. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2020–008 and should be submitted on or before April 23, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–06850 Filed 4–1–20; 8:45 am]

BILLING CODE 8011–01–P

[8] *See* Securities Exchange Act Release No. 87344 (October 18, 2019), 84 FR 57076 (October 24, 2019) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2019–025).

[9] If the pilot period is not either extended or approved as permanent, the version of Rule 11892 prior to SR–FINRA–2010–032 shall be in effect, and the amendments set forth in SR–FINRA–2014–021 and the provisions of Supplementary Material .03 of the rule shall be null and void.

[10] *See* Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019) (Order Approving the Eighteenth Amendment to the National Market System Plan to Address Extraordinary Market Volatility).

[11] 15 U.S.C. 78*o*–3(b)(6).

[12] 15 U.S.C. 78s(b)(3)(A)(iii).

[13] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. FINRA has satisfied this requirement.

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88502; File No. SR–CBOE–2020–027]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating To Amend Rule 6.6 in Connection With Updates Permitted Through the Clearing Editor

March 27, 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 March 26, 2020, Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') proposes to amend Rule 6.6 in connection with updates permitted through the Clearing Editor. 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://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), 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 proposed rule change amends Rule 6.6(d), which describes updates that may be made to trades executed in open outcry through the Clearing Editor and accompanied by a Reason Code, to permit such updates to be made to trades executed electronically.

The Clearing Editor allows Trading Permit Holders to update executed trades on their trading date and revise them for clearing. The Clearing Editor may be used to update certain information entered pursuant to Rule 6.1 or to correct certain bona fide errors. Rule 6.6(b) permits Trading Permit Holders (''TPHs'') to change certain fields in Clearing Editor in connection with orders executed electronically and in open outcry. Such fields may include: (1) Executing Firm and Contra Firm; (2) Executing Broker and Contra Broker; (3) CMTA; (4) Account and Sub Account; (5) Client Order ID; (6) Position Effect (open/close); (7) Capacity; [5] (8) Strategy ID; (9) Frequent Trader ID; (10) Compression Trade ID; or (11) ORS ID. Rule 6.6(d) currently provides that, in addition to the fields listed in paragraph (b), TPHs may change the following fields through the Clearing Editor for trades executed in open outcry: (1) Series, (2) Quantity, (3) Buy or Sell; or (4) Price. Each of these changes must be accompanied by a Reason Code.[6] Notification of changes made pursuant to this paragraph (d) will automatically be sent to the Exchange with the submission of the changes through the Clearing Editor. The Exchange notes that, prior to a recent technology migration,[7] the Exchange Rules allowed for TPHs to make the updates enumerated in 6.6(d) to their trades executed electronically.

Many TPHs currently split single trades into multiple smaller trades (or post-trade allocations), each of which may be adjusted or nullified according to the mutual adjustment process in Rule 6.5 (Nullification and Adjustment of Options Transactions Including Obvious Error). A TPH may easily update (adjust or nullify) an allocated portion of a trade executed in open outcry via the Clearing Editor and pursuant to Rule 6.6(d). A TPH that seeks to update an allocated portion of an electronically executed trade, however, must do so through the Trade Desk,[8] and the TPH may then only nullify and re-enter the single trade in its entirety, despite the fact that only one partial trade needed to be busted and re-entered.

For example, a broker may execute a trade of 100 contracts for Buyer 1 and then may add the Contra Firm via Clearing Editor, pursuant to Rule 6.6(b), allocating 50 contracts to Seller 1, 25 contracts to Seller 2, and 25 contracts to Seller 3.[9] The broker may subsequently realize that the 25 contracts allocated to Seller 3 should have been allocated to Seller 4. If executed in open outcry, the broker would be able to update the relevant allocated portion (Quantity) in the Clearing Editor pursuant to Rule 6.6(d) and the appropriate Clearing Editor messages would then be sent to the relevant TPHs (*i.e.,* Seller 3 receives a Clearing Editor cancel message for 25 contracts, Buyer 1 receives a cancel message for 25 contracts with Seller 3 as the Contra Firm; Seller 4 receives an execution message for 25 contracts with Buyer 1 as the Contra Firm, and Buyer 1 receives a new execution message for 25 with Seller 4 as the Contra Firm). If executed electronically, the broker is currently unable to make these updates via the Clearing Editor, and instead, must nullify the entire trade (including the allocations apportioned to Seller 1 and Seller 2) and re-enter the trade details for all three portions via the Trade Entry tool.[10] Re-entry of trades using this process does not currently disseminate messages regarding updated trade executions and Contra Firms to relevant parties, which results in trade processing issues for Clearing TPHs. As such, the Exchange proposes to amend Rule 6.6(d) by removing its restriction to trades executed in open outcry in order

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] If the change is from a customer Capacity code of (C) to any other Capacity code, it must be accompanied by a Reason Code and notice of such change will automatically be sent to the Exchange with the submission of the change through the Clearing Editor.

[6] Example Reason Codes include: Input Error; Unmatched Trade; Unknown; Manual Add; Other Text Required; Trade Nullification; Trade Adjustment; Error Account; and System Issue.

[7] *See* Securities Exchange Act Release No. 87079 (September 24, 2019) 84 FR 51693 (September 30, 2019) (SR–CBOE–2019–062).

[8] *See* C1 Options Mutual Adjust/Bust Form, available at *https://markets.cboe.com/us/options/trading/mutual_adjust_or_bust_form/?mkt=cone* (March 23, 2020).

[9] The Exchange notes that a broker might do this for a trade executed electronically where, for example, the broker executes a trade in the Automated Improvement Mechanism (''AIM Auction'') through PULSe, which does not currently provide functionality that allows a broker to add Contras to the trade. Therefore, the broker would have to allocate the trade and submit the Contras via the Clearing Editor following the transaction.

[10] The Trade Entry Tool allows TPHs to enter the other side of unmatched trades and is part of the Clearing Editor.

to permit TPHs to make updates through the Clearing Editor to the fields enumerated in Rule 6.6(d), accompanied by a Reason Code, for their trades executed in either open outcry or electronically.

As indicated above, up until October 2019, the Exchange Rules permitted TPHs to make changes permitted by Rule 6.6(d) to their trades executed electronically and in open outcry, and currently, TPHs may essentially continue to adjust the same fields enumerated in Rule 6.6(d) for their electronic orders by submitting a mutual adjustment request through the Trade Desk, and thereafter re-entering the entire trade with the updated fields. Because the same reasons that require TPHs to update trades pursuant to Rule 6.6(d) apply to executions electronically and in open outcry, the Exchange believes it is appropriate to permit TPHs to updates all trades pursuant to Rule 6.6(d) as they previously could. The Exchange believes this will streamline the process when updates need to be made in connection with busts and adjusts of partial trades. The Exchange notes that, like for open outcry trades today, all TPHs that update Rule 6.6(d) fields for their electronic trades will be required to accompany such changes with a Reason Code (which is automatically prompted by the Clearing Editor). Accordingly, this enables the Exchange to better surveil for and enforce against potential issues or abusive behavior via the Clearing Editor and in connection with the adjustment process by allowing the Exchange to automatically receive information regarding the changes and understand the rationale behind all such changes.

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.[11] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [12] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [13] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that the proposed rule change will foster cooperation and coordination with persons engaged in clearing and processing information with respect to securities and will remove impediments to and perfect the mechanism of a free and open market and a national market system, as it is intended to reduce potential issues in the processing of post-trade information and facilitate a more effective adjustment process. The proposed rule change will allow TPHs to adjust and/or nullify only the relevant portions of electronically executed trades, rather than having to nullify and re-enter the entire trade, and will ensure that all relevant parties to the revised transaction receive information regarding the changes. The Exchange further believes that the proposed rule change does not raise and new or novel issues or processes for TPHs, as they are currently able to update the same fields for their trades executed in open outcry (and were until fewer than six months ago permitted to make such updates to their trades executed electronically), pursuant to Rule 6.6(d), previously filed with the Commission.[14] As described above, TPHs make currently make the same updates to their electronic executions through another, more onerous process through the Trade Desk and Trade Entry tool. The Exchange believes the proposed rule change will streamline the process when updates need to be made in connection with busts and adjusts of partial trades, which efficiency the Exchange believes will remove impediments to and perfect the mechanism of a free and open market and a national market system, which in general will benefit TPHs. Furthermore, the Exchange believes that continuing to require a TPH to submit a Reason Code via the Clearing Editor in conjunction with any change made pursuant to Rule 6.6(d), will assist in preventing fraudulent and manipulative acts and otherwise promote just and equitable principles of trade because it would allow the Exchange to automatically be notified of Rule 6.6(d) changes and the rationale behind such changes. This, in turn, will continue to allow the Exchange to better surveil for and enforce against potential issues or abusive behavior via the Clearing Editor, thus, protecting investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe the proposed rule change would impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the Act, because it would again allow all TPHs to make updates to (including providing a requisite Reason Code) the fields enumerated under Rule 6.6(d) for their trades executed electronically and in open outcry in the same manner. The Exchange notes that the proposed rule change does not restrict any the fields that a TPH may currently change via the Clearing Editor, but merely extends the existing permissible changes to all trades. The Exchange does not believe that the proposed rule change would impose any burden on intermarket competition, because the proposed rule change is not intended to address competitive issues, but rather, is concerned with the correction of post-trade information and the reduction of any post-trade processing issues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [15] and Rule 19b–4(f)(6) thereunder.[16]

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

[13] *Id.*

[14] *See* Securities Exchange Act Release No. 73439 (October 27, 2014) 79 FR 64846 (October 31, 2014) (SR–CBOE–2014–082). Prior to the October 7, 2019 technology migration, current Rule 6.6(d) was Rule 6.67(b).

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief

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A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[17] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii)[18] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay. The Exchange believes that waiver of the operative delay is consistent with the protection of investors and the public interest because, as the Exchange discussed above, its proposal is intended to facilitate the processing of post-trade information and mitigate any issues that may arise from the current post-electronic trade update process. Particularly, the Exchange believes that putting the proposed rule change into operation as soon as possible would assist floor brokers currently trading electronically to continue to use the Clearing Editor for post-trade adjustments while the Exchange's trading floor is inoperable due to the novel coronavirus.[19] As stated above, the Exchange believes that the proposed rule change would not impact TPHs nor raise any new or novel issues or processes for them, as they are able (when the Exchange floor is operable) to implement the same process for their open outcry trades, and have, up until recently,[20] been able to do so for their electronic executions. For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[21]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov. Please include File Number* SR–CBOE–2020–027 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–CBOE–2020–027.* 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–CBOE–2020–027 and should be submitted on or before April 23, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–06857 Filed 4–1–20; 8:45 am]

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description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[17] 17 CFR 240.19b–4(f)(6).

[18] 17 CFR 240.19b–4(f)(6)(iii).

[19] *See* Tradedesk Update No. C2020031204 (March 12, 2020) Novel Coronavirus Update, Trading Floor Closure.

[20] *See* Securities Exchange Act Release No. 87079 (September 24, 2019) 84 FR 51693 (September 30, 2019) (SR–CBOE–2019–062).

[21] For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88501; File No. SR–IEX–2019–15]

Self-Regulatory Organizations; Investors Exchange LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Add a New Discretionary Limit Order Type Called D-Limit

March 27, 2020.

I. Introduction

On December 16, 2019, the Investors Exchange LLC (''IEX'' or the ''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 adopt a new order type, the Discretionary Limit or ''D-Limit.'' The proposed rule change was published for comment in the **Federal Register** on December 30, 2019.[3] On February 12, 2020, the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[4] This order institutes proceedings under Section 19(b)(2)(B) of the Exchange Act[5] to determine whether to approve or disapprove the proposed rule change.

II. Description of the Proposed Rule Change

IEX proposes to establish a new order type, called a Discretionary Limit order (''D-Limit''), which the Exchange explains ''is designed to protect liquidity providers, institutional

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 87814 (December 20, 2019), 84 FR 71997 (''Notice''). Comments on the proposed rule change can be found at *https://www.sec.gov/comments/sr-iex-2019-15/sriex201915.htm.*

[4] *See* Securities Exchange Act Release No. 88186 (February 19, 2020), 85 FR 9513.

[5] 15 U.S.C. 78s(b)(2)(B).

investors as well as market makers, from potential adverse selection by latency arbitrage trading strategies in a fair and nondiscriminatory manner. . . .'' [6]

In the Notice, the Exchange explains how it has designed its market model around ''ways to counter or reduce speed advantages that can harm investors by exposing them to execution at stale prices when their orders are traded against by traders with more complete and timely information about market prices.'' [7] The primary feature of that market model is the IEX ''speed bump,'' which employs physical path latency to introduce an equivalent 350 microseconds of latency between the network access point (the Point-of-Presence, or ''POP'') and the Exchange's system at its primary data center.[8]

Currently, the speed bump works together with non-displayed order types on IEX that are ''pegged'' to a given price, including the Discretionary Peg (''DPeg'') and the primary peg (''PPeg'') orders.[9] DPeg and PPeg orders can ''exercise discretion'' to trade at prices more aggressive than their pegged prices.[10] Specifically, IEX uses a proprietary mathematical calculation, the crumbling quote indicator (''CQI''), to determine when these pegged order types are eligible to exercise discretion.[11] As described in the Notice, the CQI is designed to predict whether a particular quote is unstable or ''crumbling,'' meaning that the NBB is likely about to decline or the NBO is likely about to increase.[12] The Exchange utilizes real time relative quoting activity of certain Protected Quotations and a proprietary mathematical calculation (the ''quote instability calculation'') to assess the probability of an imminent change to the current Protected NBB to a lower price or Protected NBO to a higher price for a particular security (''quote instability factor'').[13] When the quoting activity meets predefined criteria and the quote instability factor calculated is greater than the Exchange's defined quote instability threshold, IEX treats the quote as ''unstable,'' and the CQI is on at that price level for up to two milliseconds (hereafter referred to as the ''quote instability determination price level'' or the ''CQI Price'').[14] During all other times, the quote is considered stable, and the CQI is off. IEX assesses the stability of the Protected NBB and Protected NBO for each security.[15] When IEX determines, pursuant to the CQI methodology, that the current market for a specific security is unstable—meaning there is a heightened probability of an imminent quote change at the NBB or NBO—IEX's system will prevent DPeg and PPeg orders on that side of the market from exercising discretion and trading at a price that is more aggressive than their default resting prices.[16]

In this proposal, IEX seeks to adopt the D-Limit order type, which would work in conjunction with the CQI by adjusting its price when the CQI is on.[17] A D-Limit order could be a *displayed* or non-displayed limit order that, upon entry and when posting to the Order Book, is priced to be equal to and ranked at the order's limit price.[18]

A D-Limit order would be adjusted to a less-aggressive price during periods of quote instability. As proposed, if, upon entry of a D-Limit buy (sell) order, the CQI is on and the order has a limit price equal to or higher (lower) than the quote instability determination price level (*i.e.,* the CQI Price), the price of the D-Limit order will automatically be adjusted by IEX to *one* MPV [19] lower (higher) than the CQI price. Similarly, when unexecuted shares of a D-Limit buy (sell) order are posted to the Order Book, if a quote instability determination is made and such shares are ranked and displayed (in the case of a displayed order) by IEX at a price equal to or higher (lower) than the CQI Price, the price of the order will automatically be adjusted by IEX to *one* MPV lower (higher) than the CQI Price.

A D-Limit order whose price is adjusted by IEX will not revert back to the price at which it was previously ranked and displayed (in the case of a displayed order).[20] Rather, the order will continue to be ranked and displayed (in the case of a displayed order) at the new price, unless the order becomes subject to another automatic adjustment or if the order is subject to the price sliding provisions of IEX Rule 11.190(h). When the price of a D-Limit order is adjusted, the order will receive a new time priority. If multiple D-Limit orders are adjusted at the same time, their relative time priority will be maintained. Further, when the price of a D-Limit order is adjusted, the member that entered the order will receive an order message from the Exchange notifying the member of the price adjustment.

The Commission has received a number of comment letters on the proposed rule change.[21] Many of those commenters support the proposal, and recommend that the Commission approve it. Commenters in support opine that the proposal is an innovative response to what some categorize as aggressive and ''predatory'' trading behavior by a small number of market participants that ''plague'' the displayed markets; and they support the D-Limit order as a transparent, widely-accessible, and not unfairly discriminatory means to counter those traders through an order type that will protect and thus encourage additional long-term investors and others to submit more displayed liquidity to exchanges, and thereby potentially increase the depth of displayed liquidity and narrow quoted spreads.[22] Several other

[6] Notice, *supra* note 3, at 71998. The Exchange uses the term ''latency arbitrage'' to refer to trading strategies used by market participants with sophisticated low-latency technology, who can rapidly aggregate market data feeds (including proprietary data products obtained directly from the exchanges) to react faster than other market participants, as well as the Exchange, when the national best bid and offer (''NBBO'') changes. *See id.* at 71997.

[7] *See id.*

[8] *See id.* The IEX speed bump applies to all incoming and outgoing messages except for inbound market data from other trading centers and outbound transaction and quote information sent to the applicable securities information processor. In addition, updates to resting pegged orders on IEX are processed within the IEX trading system and do not require separate messages to be transmitted from outside the system. The speed bump provides time for IEX to update resting pegged orders when the NBBO changes, so that the resting pegged orders are accurately pegged to current market prices.

[9] *See* IEX Rule 11.190(b)(10) and 11.190(b)(8), respectively.

[10] *See* Notice, *supra* note 3, at 71998.

[11] *See id.*

[12] *See id.*

[13] *See id.*

[14] *See id.*

[15] *See id.*

[16] *See id.*

[17] IEX proposes to amend IEX Rule 11.190(b)(7), which is currently reserved, to add the D-Limit order type.

[18] A non-displayed D-Limit order with a limit price more aggressive than the Midpoint Price will be subject to the Midpoint Price Constraint and be booked and ranked on the Order Book at a price equal to the Midpoint Price pursuant to IEX Rule 11.190(h)(2).

[19] *See* IEX Rule 11.210.

[20] IEX Rule 11.190(h) provides for price sliding in the event of a locked or crossed market, to enforce the Midpoint Price Constraint, to comply with the display or execution requirements for a short sale order not marked short exempt during a Short Sale Period, or to comply with the Limit Up-Limit Down Price Constraint. As set forth in IEX Rule 11.190(h), an order that has been subject to price sliding *will* be repriced back to its more aggressive limit price when the market condition changes such that the condition necessitating the price sliding is no longer applicable. This is in contrast to the normal operation of a D-Limit order when it adjusts due to the CQI being triggered, at which point the D-Limit order's adjusted price will not reprice.

[21] *See supra* note 3.

[22] *See, e.g.,* Letters from Thomas M. Merritt, Deputy General Counsel, Virtu Financial, LLC, dated, January 16, 2020; Marius-Andrei Zoican, Assistant Professor of Finance, University of Toronto-Mississauga, dated January 20, 2020; Daniel Aisen, Proof Services LLC, dated December 24, 2019; Mehmet Kinak and Jonathan D. Siegel, T Rowe Price, dated February 5, 2020; Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, dated February 11, 2020; and OTPP,

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commenters, however, urge the Commission to disapprove the proposed rule change, arguing that it constitutes an unnecessary and inappropriate burden on competition that is unfairly discriminatory, circumvents the federal securities laws, would not be an automated and protected quote, may negatively impact investors particularly for larger orders, will lead to phantom liquidity/quote fading and declining fill rates, and lacks sufficient data to support the proposal.[23]

III. Proceedings To Determine Whether To Approve or Disapprove SR–IEX–2019–15 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act [24] to determine whether the proposed rule change should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change and the comments received thereon. Institution of Proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved.

Pursuant to Section 19(b)(2)(B) of the Exchange Act,[25] the Commission is providing notice of the grounds for possible disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis and input concerning the proposed rule change's consistency with the Exchange Act, including Sections 6(b)(5) and 6(b)(8) thereof,[26] and the rules and regulations thereunder.

The Commission is instituting proceedings to further consider the proposal and the issues raised by the commenters on the proposal as it determines whether the proposed D-Limit order type is consistent with the Exchange Act and the rules and regulations thereunder. Specifically, the Commission is providing notice of the following grounds for possible disapproval under consideration:

- Whether the Exchange has demonstrated how its proposal is consistent with Section 6(b)(5) of the Exchange Act,[27] which requires the rules of IEX to not be ''designed to permit unfair discrimination between customers, issuers, brokers, or dealers.''
- Whether the Exchange has demonstrated how its proposal is consistent with Section 6(b)(8) of the Exchange Act,[28] which requires that the rules of IEX not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Under the Commission's Rules of Practice, 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 [SRO] that proposed the rule change.'' [29] 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,[30] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations.[31] Moreover, ''unquestioning reliance'' on an SRO's representations in a proposed rule change would not be sufficient to justify Commission approval of a proposed rule change.[32]

For the reasons discussed above, the Commission believes it is appropriate to institute proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act to allow for additional consideration of the issues raised by the proposal as it determines whether the proposal should be approved or disapproved.

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Sections 6(b)(5) and 6(b)(8), or any other provision of the Exchange Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[33]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by April 23, 2020. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by May 7, 2020.

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–IEX–2019–15 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 Numbers SR–IEX–2019–15. 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/*

CDPQ, and the Office of the New York City Comptroller, et al., dated February 24, 2020.

[23] *See, e.g.,* Letters from Joan C. Conley, Senior Vice President & Corporate Secretary, NASDAQ, dated January 21, 2020; Joanna Mallers, Secretary, FIA Principal Traders Group, dated January 21, 2020; Adam Nunes, Head of Business Development, Hudson River Trading LLC, dated January 21, 2020; and Ellen Greene, Managing Director, Equity and Options Market Structure, SIFMA, dated February 5, 2020.

[24] 15 U.S.C. 78s(b)(2)(B).

[25] *Id.*

[26] 15 U.S.C. 78f(b)(5) and 15 U.S.C. 78f(b)(8), respectively. Section 6(b)(5) of the Exchange Act requires that the rules of a national securities exchange be designed, among other things, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Section 6(b)(8) of the Exchange Act requires that the rules of a national securities exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

[27] 15 U.S.C. 78f(b)(5).

[28] 15 U.S.C. 78f(b)(8).

[29] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[30] *See id.*

[31] *See id.*

[32] *See Susquehanna Int'l Group, LLP* v. *Securities and Exchange Commission,* 866 F.3d 442, 446–47 (D.C. Cir. 2017) (rejecting the Commission's reliance on an SRO's own determinations without sufficient evidence of the basis for such determinations).

[33] Section 19(b)(2) of the Exchange Act, as amended by the Securities Act Amendments of 1975, Public Law 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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 these filings 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–IEX–2019–15 and should be submitted on or before April 23, 2020. Rebuttal comments should be submitted by May 7, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[34]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–06856 Filed 4–1–20; 8:45 am]

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[34] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88494; File No. SR–NSCC–2020–002]

Self-Regulatory Organizations; National Securities Clearing Corporation; Order Approving a Proposed Rule Change To Enhance the Calculation of the Family-Issued Securities Charge

March 27, 2020.

On January 28, 2020, National Securities Clearing Corporation (''NSCC'') 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–NSCC–2020–002 to enhance the calculation of the Family-Issued Securities Charge.[3] The proposed rule change was published for comment in the **Federal Register** on February 18, 2020,[4] and the Commission received no comment letters regarding the changes proposed in the proposed rule change.[5] For the reasons discussed below, the Commission is approving the proposed rule change.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Description of the Proposed Rule Change

The proposed rule change would revise NSCC's Rules and Procedures (''Rules'')[6] to amend the calculation of NSCC's existing margin charge applied to long positions in Family-Issued Securities to address certain risk presented by these positions.

A. Background

NSCC provides clearing, settlement, risk management, central counterparty services, and a guarantee of completion for virtually all broker-to-broker trades involving equity securities, corporate and municipal debt securities, and certain other securities. NSCC manages its credit exposure to its Members by determining an appropriate Required Fund Deposit for each Member, which serves as each Member's margin.[7] The aggregate of all NSCC Members' Required Fund Deposits (together with certain other deposits required under the Rules) constitutes NSCC's Clearing Fund, which NSCC would access should a Member default and that Member's Required Fund Deposit, upon liquidation, is insufficient to satisfy NSCC's losses.

Each Member's Required Fund Deposit consists of a number of applicable components, each of which is calculated to address specific risks faced by NSCC.[8] NSCC states that it 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.[9] Such risks include risks introduced by its counterparties or Members. In particular, NSCC seeks to identify and mitigate its exposures to specific wrong-way risk (''SWWR''), which is the risk that an exposure to a counterparty is highly likely to increase when the creditworthiness of that counterparty deteriorates. Such risk would arise when NSCC acts as central counterparty to a Member with unsettled long positions in securities that were issued by that Member or an affiliate of that Member (''Family-Issued Securities''). If that Member defaults, NSCC would seek to cover its losses by closing out the unsettled Family-Issued Securities long positions. However, because the Member default would also likely lead to a drop in the creditworthiness of the Member and, therefore, the value of the Family-Issued Securities, NSCC would likely not be able to completely cover its losses in closing out those positions.

In order to address this particular form of SWWR, NSCC imposes a charge on all Members with unsettled long positions in their own Family-Issued Securities, called the FIS Charge, which is calculated by multiplying the value of the net unsettled long positions in Family-Issued Securities by a certain percentage (''Haircut Rate''). Currently, the Haircut Rate applied in the FIS Charge calculation is based on a Member's rating category on NSCC's Credit Risk Rating Matrix (''CRRM''), which ranges from 1 to 7. NSCC utilizes the CRRM to evaluate its credit risk exposure to each Member; a higher CRRM rating represents a higher credit risk (*i.e.,* a greater risk of defaulting on settlement obligations) and may cause a Member to be subject to enhanced surveillance or additional margin requirements.[10]

Currently, the applicable Haircut Rate for the FIS Charge depends on a Member's rating on the CRRM.

[3] NSCC also filed the proposals contained in the proposed rule change as advance notice SR–NSCC–2020–801 with the Commission pursuant to Section 806(e)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act entitled the Payment, Clearing, and Settlement Supervision Act of 2010, 12 U.S.C. 5465(e)(1), and Rule 19b–4(n)(1)(i) of the Act, 17 CFR 240.19b–4(n)(1)(i). Notice of Filing of the Advance Notice was published for comment in the **Federal Register** on February 27, 2020. Securities Exchange Act Release No. 88267 (February 24, 2020), 85 FR 11437 (February 27, 2020) (File No. SR–NSCC–2020–801).

[4] Securities Exchange Act Release No. 88163 (February 11, 2020), 85 FR 8964 (February 18, 2020) (''Notice of Filing'').

[5] As the proposals contained in the proposed rule change were also filed as an advance notice, all public comments received on the proposals are considered regardless of whether the comments are submitted on the proposed rule change or the advance notice.

[6] Capitalized terms not defined herein are defined in NSCC's Rules and Procedures (''Rules''), *available at http://www.dtcc.com/~/media/Files/Downloads/legal/rules/nscc_rules.pdf.*

[7] *See* Rule 4 (Clearing Fund) and Procedure XV (Clearing Fund Formula and Other Matters) of the Rules, *supra* note 6.

[8] *Id.*

[9] *See* Notice of Filing *supra* note 4, at 85 FR 8965.

[10] *See* Rule 1 and Section 4 of Rule 2B of the Rules, *supra* note 6. *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).

Specifically, for Members that are rated 6 or 7 on the CRRM, the applicable Haircut Rate for net unsettled long positions in Family-Issued Securities shall be (1) at least 80 percent for fixed income securities, and (2) 100 percent for equity securities. For Members that are rated 1 through 5 on the CRRM, the applicable Haircut Rate shall be (1) at least 40 percent for fixed income securities, and (2) at least 50 percent for equity securities.[11]

B. Proposed Changes to FIS Charge

In the proposed rule change, NSCC is proposing to revise the calculation of the FIS Charge to use the same Haircut Rate for all Members regardless of their CRRM rating category. Under the proposal, net unsettled long positions in (1) fixed income securities that are Family-Issued Securities are charged a Haircut Rate of no less than 80 percent, and (2) equity securities that are Family-Issued Securities are charged a Haircut Rate of 100 percent.

NSCC states that it may still be exposed to SWWR despite applying different Haircut Rates based on a Member's rating on the CRRM, and it can better mitigate its exposure to this risk by calculating the FIS Charge without considering Members' CRRM rating categories.[12] According to NSCC, while the current methodology appropriately assumes that Members with a higher rating category on the CRRM present a heightened credit risk to NSCC or have demonstrated higher risk related to their ability to meet settlement, this methodology does not account for the risk that a Member may default due to unanticipated causes (referred to as a ''jump-to-default'' scenario) not captured by the CRRM.[13] This is because the CRRM relies on historical data as a predictor of future risks,[14] whereas jump-to-default scenarios are triggered by unanticipated causes that could not be predicted based on historical trends or data (*e.g.,* instances of fraud or other bad actions by a Member's management). Therefore, NSCC represents that the proposed change is designed to cover SWWR arising from potential jump-to-default scenarios by applying the higher applicable Haircut Rate in calculating the FIS Charge for all Members.[15]

The practical outcome of this proposed change is that for all Family-Issued Securities, NSCC would apply a haircut equivalent to the current Haircut Rate for Members that are rated 6 or 7 on the CRRM regardless of whether a Member is rated at a 6 or 7. 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.

II. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act[16] 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 NSCC. In particular, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F)[17] of the Act and Rules 17Ad–22(e)(4)(i) and (e)(6)(i) and (v) thereunder.[18]

A. Consistency With Section 17A(b)(3)(F)

Section 17A(b)(3)(F) of the Act requires, in part, that the rules of a clearing agency, such as NSCC, be designed to promote the prompt and accurate clearance and settlement of securities transactions, and to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible.[19]

The Commission believes that the proposal is consistent with the promotion of prompt and accurate clearance and settlement of securities transactions. As described above, NSCC faces SWWR when it acts as central counterparty to a Member with long positions in Family-Issued Securities. Although NSCC's current margin methodology addresses SWWR through imposition of the FIS Charge, it does not address SWWR associated with a jump-to-default scenario. The proposal would address SWWR associated with a jump-to-default scenario by using the higher applicable Haircut Rate for all Members concerning their net unsettled long positions in Family-Issued Securities, regardless of the Members' CRRM rating category. As such, the proposal would address a risk not captured currently under NSCC's margin methodology and provide for more comprehensive risk management of NSCC's risks. Further, applying the higher applicable Haircut Rate in calculating the FIS Charge for all Members would result in the collection of additional margin, which should, in turn, better enable NSCC to manage the potential losses arising out of a Member default and continue operations of its critical clearance and settlement services in default scenarios. Accordingly, the Commission finds that NSCC's proposal should help NSCC to continue providing prompt and accurate clearance and settlement of securities transactions in the event of a Member default.

The Commission also believes that the proposal is consistent with assuring the safeguarding of securities and funds which are in the custody or control of NSCC for which it is responsible. As described above, the proposal would allow NSCC to collect additional margin to collateralize exposures to SWWR associated with jump-to-default scenario that NSCC may face when liquidating Family-Issued Securities positions that are depreciating in value in response to a Member's default. By expanding the higher haircut rates to all Members, the proposal would assist NSCC in collecting margin and maintaining the Clearing Fund that more precisely reflects NSCC's overall risk exposure to its Members. By better limiting NSCC's exposure to Members, the proposal is designed to help ensure that NSCC has collected sufficient margin from Members with long positions in Family-Issued Securities, so that non-defaulting Members would not be exposed to mutualized losses as a result of a default of a Member with long positions in Family-Issued Securities. By helping to limit non-defaulting Members' exposure to mutualized losses, the proposal is designed to help assure the safeguarding of securities and funds which are in NSCC's custody or control. For the reasons stated above, the Commission believes that the Proposed Rule Change is consistent with the requirements of Section 17A(b)(3)(F) of the Act.[20]

B. Consistency With Rule 17Ad–22(e)(4)(i)

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

[11] *See* Procedure XV (Clearing Fund Formula and Other Matters) of the Rules, *supra* note 6.

[12] *See* Notice of Filing *supra* note 4, at 85 FR 8965.

[13] *See id.*

[14] *See* Notice of Filing *supra* note 4, at 85 FR 8965–66.

[15] *See* Notice of Filing *supra* note 4, at 85 FR 8966.

[16] 15 U.S.C. 78s(b)(2)(C).

[17] 15 U.S.C. 78q–1(b)(3)(F).

[18] 17 CFR 240.17Ad–22(e)(4)(i) and (e)(6)(i) and (v).

[19] 15 U.S.C. 78q–1(b)(3)(F).

[20] 15 U.S.C. 78q–1(b)(3)(F).

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.[21]

As described above, NSCC is exposed to SWWR where it acts as central counterparty for its Members' transactions in Family-Issued Securities. Applying the same higher Haircut Rate to all Members with net long unsettled positions in Family-Issued Securities, regardless of their rating on the CRRM, would help further mitigate NSCC's SWWR exposures, especially in a jump-to-default scenario. Thus, applying the same Haircut Rate in the FIS charge calculation is designed to help NSCC collect sufficient financial resources to help cover its credit exposures, with a high degree of confidence, to those Members seeking to clear and settle transactions in Family-Issued Securities. Therefore, the Commission believes the proposed change is consistent with Rule 17Ad–22(e)(4)(i).[22]

C. Consistency With Rules 17Ad–22(e)(6)(i) and (v)

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.[23] 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.[24]

As described above, NSCC faces SWWR in jump-to-default scenarios where it acts as central counterparty to Member transactions in Family-Issued Securities. This risk is present regardless of a Member's rating on the CRRM. However, the current methodology assumes that Members with a higher rating on the CRRM present a heightened credit risk to NSCC and applies a higher Haircut Rate to such Members. This distinction does not take into account the SWWR that would manifest in a jump-to-default scenario. As such, NSCC proposes to apply the same higher Haircut Rate to all Members. This proposal would improve NSCC's ability to mitigate its exposure to SWWR in a jump-to-default scenario, thereby helping NSCC to maintain a risk-based margin system that considers, and produces margin levels commensurate with, the risks and particular attributes of net unsettled long positions in Family-Issued Securities. Therefore, the Commission believes that the proposal would be consistent with Rule 17Ad–22(e)(6)(i).[25]

Additionally, because the enhanced FIS Charge would be a component of the margin that NSCC collects from its Members to help cover NSCC credit exposure to the Members, and because the charge would be based on different product risk factors with respect to equity and fixed-income securities, it would be part of an appropriate method for measuring credit exposure that accounts for relevant product risk factors and portfolio effects across products, as described above. Therefore, the Commission believes the proposed change is consistent with Rule 17Ad–22(e)(6)(v).[26]

III. 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 Section 17A of the Act[27] and the rules and regulations promulgated thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act[28] that proposed rule change SR–NSCC–2020–002, be, and hereby is, *approved.*[29]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

J. Matthew DeLesDernier,

Assistant Secretary.

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[21] 17 CFR 240.17Ad–22(e)(4)(i).

[22] *Id.*

[23] 17 CFR 240.17Ad–22(e)(6)(i).

[24] 17 CFR 240.17Ad–22(e)(6)(v).

[25] 17 CFR 240.17Ad–22(e)(6)(i).

[26] 17 CFR 240.17Ad–22(e)(6)(v).

[27] 15 U.S.C. 78q–1.

[28] 15 U.S.C. 78s(b)(2).

[29] In approving the proposed rule change, the Commission considered the proposals' impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[30] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Securities Exchange Act of 1934; Release No. 88493/March 27, 2020]

In the Matter of the BOX Exchange LLC Regarding Proposed Rule Changes To Amend the Fee Schedule on the BOX Market LLC Options Facility To Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network (File Nos. SR–BOX–2018–24, SR–BOX–2018–37, and SR–BOX–2019–04); Order Affirming Action by Delegated Authority and Disapproving Proposed Rule Changes Related to Connectivity and Port Fee

This matter comes before the Securities and Exchange Commission (''Commission'') on a petition to review the Division of Trading and Markets's disapproval, by delegated authority, of proposed rule changes filed by the BOX Exchange LLC (''BOX'' or ''Exchange''). BOX proposed to amend the fee schedule on the BOX options facility to establish certain connectivity fees and reclassify its high-speed vendor feed connection as a port fee (File Nos. SR–BOX–2018–24, SR–BOX–2018–37, and SR–BOX–2019–04). The three filings propose identical rule changes.

The Division of Trading and Markets, acting for the Commission pursuant to delegated authority, disapproved the proposed rule changes. Pursuant to Section 4A of the Securities Exchange Act of 1934, and Commission Rules of Practice 430 and 431, we have conducted a de novo review of the record. For the reasons discussed below, we conclude that BOX has not met its burden to demonstrate that the proposed rule changes are consistent with the Exchange Act. Nor do BOX's other arguments convince us that its proposed rule changes should be approved. Accordingly, we disapprove the proposed rule changes.

I. Background

A. The Proposed Rule Changes

1. BOX 1

On July 19, 2018, BOX filed with the Commission, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 and Rule 19b–4 thereunder,[1] a proposed rule change to amend the BOX fee schedule to establish certain connectivity fees and to reclassify its high speed vendor feed connection fee as a port fee (SR–BOX–2018–24) (''BOX 1''). BOX 1 was immediately effective upon filing with the Commission

[1] 15 U.S.C. 78s(b)(1); 17 CFR 240.19b–4.

pursuant to Section 19(b)(3)(A) of the Exchange Act,[2] and was published for comment in the **Federal Register** on August 2, 2018.[3]

BOX proposed to amend its fee schedule to establish connectivity fees for Participants and non-Participants who connect to the BOX network based on the amount of bandwidth made available to them.[4] Participants and non-Participants with 10 Gigabit Connections to the Exchange would be charged $5,000 per connection per month, while those with slower, non-10 Gigabit Connections would be charged $1,000 per connection per month. Prior to its filing of BOX 1, BOX did not impose any fees for these connections. BOX also proposed to amend its fee schedule to reclassify its existing High Speed Vendor Feed (''HSVF'') connection fee as a port fee, rather than a connectivity fee (as it had previously been described), and to clarify that subscribers must be credentialed by BOX to receive the feed. BOX explained that it ''believe[d] this reclassification is more accurate, as HSVF subscription is not dependent on a physical connection to the Exchange.'' [5] Though the nomenclature would change, the amount of the HSVF port fee would remain at $1,500 per month for every month a Participant or non-Participant is credentialed to use the HSVF port.

On September 17, 2018, the Division of Trading and Markets, acting for the Commission by delegated authority, issued an order temporarily suspending BOX 1 pursuant to Section 19(b)(3)(C) of the Exchange Act and simultaneously instituting proceedings under Section 19(b)(2)(B) to determine whether to approve or disapprove BOX 1 (''OIP 1'').[6]

Two days later, BOX filed a notice of intent to petition for review of OIP 1. The notice triggered an automatic stay of the delegated action under Commission Rule of Practice 431(e)—meaning that the suspension of BOX 1 was stayed and BOX was able to continue charging fees.[7] BOX filed its petition for review of OIP 1 on September 26, 2018.

We granted BOX's petition on November 16, 2018.[8] At that time, we discontinued the stay of the suspension order and thus reinstated the suspension of BOX 1.[9] After allowing additional statements to be filed in support of or in opposition to the suspension and institution of proceedings, we issued an order affirming OIP 1 on February 25, 2019.[10]

2. BOX 2 and BOX 3

On November 30, 2018, less than two weeks after we granted its petition for review of OIP 1 (and reinstated the suspension of BOX 1), and while that petition was pending before the Commission, BOX filed a second proposed rule change (SR–BOX–2018–37) (''BOX 2'').[11] BOX 2 proposed fees that were identical to those proposed in BOX 1 and was also immediately effective upon filing, thus enabling BOX to continue charging the proposed fees. The Forms 19b–4 BOX submitted for the two filings were substantively identical, except that the BOX 2 filing added a list of categories of BOX's costs to offer connectivity services and stated that the proposed fees would ''offset'' the Exchange's costs in ''maintaining and enhancing a state-of-the-art exchange network infrastructure in the U.S. options industry.'' [12]

On December 14, 2018, the Division, acting for the Commission by delegated authority, issued an order temporarily suspending BOX 2 and instituting proceedings to determine whether to approve or disapprove it (''OIP 2'').[13] BOX did not seek Commission review of OIP 2.

On February 13, 2019, BOX filed a third proposed rule change (SR–BOX–2019–04) (''BOX 3'') to amend the BOX fee schedule to establish the same fees proposed by BOX 1 and BOX 2. The proposed fees in BOX 3 were identical to those proposed in BOX 1 and 2, and the Forms 19b–4 for the filings were substantively identical. Again, BOX 3 was effective upon filing, enabling BOX to charge the proposed fees.

On February 26, 2019, the Division, acting for the Commission by delegated authority, issued an order temporarily suspending BOX 3 and instituting proceedings to determine whether to approve or disapprove it (''OIP 3'').[14] That same day, BOX filed a notice of intent to petition for review of OIP 3—which again triggered an automatic stay of the delegated action—and filed the petition on March 5, 2019. On March 22, 2019, the Commission issued an order simultaneously granting BOX's petition, lifting the automatic stay of the suspension, and affirming the determination to suspend and institute proceedings in OIP 3.[15]

3. The Disapproval Order

On March 29, 2019, the Division, acting for the Commission by delegated authority, issued an order disapproving the proposed rule changes in BOX 1, BOX 2, and BOX 3 (''Disapproval Order'').[16] The Disapproval Order analyzed whether the proposed changes in BOX 1, BOX 2, and BOX 3 (''Proposed Rule Changes'') were consistent with the requirements of the Exchange Act, including the Act's requirements that the rules of an exchange ''provide for the equitable allocation of reasonable . . . fees'' and not be ''designed to permit unfair discrimination between customers,

[2] 15 U.S.C. 78s(b)(3)(A).

[3] Exchange Act Release No. 83728 (July 27, 2018), 83 FR 37853 (Aug. 2, 2018), *https://www.govinfo.gov/content/pkg/FR-2018-08-02/pdf/2018-16531.pdf.*

[4] *See* BOX Rule 100(a)(41) (defining a Participant as a firm or organization that is registered with the Exchange for purposes of participating in trading on a BOX facility).

[5] 83 FR at 37853.

[6] *See* 15 U.S.C. 78s(b)(3)(C), (b)(2)(B); Exchange Act Release No. 84168 (Sept. 17, 2018), 83 FR 47947 (Sept. 21, 2018), *https://www.govinfo.gov/content/pkg/FR-2018-09-21/pdf/2018-20548.pdf.* The Division also took similar action with respect to connectivity fees of other exchanges. That same month, the Division, again acting for the Commission by delegated authority, suspended immediately effective proposed rule changes submitted by the Miami International Securities Exchange, LLC (''MIAX'') and MIAX PEARL, LLC (''PEARL'') to increase their respective connectivity fees, and instituted proceedings to determine whether to approve or disapprove them. *See* Exchange Act Release No. 84175 (Sept. 17, 2018), 83 FR 47955 (Sept. 21, 2018), *https://www.govinfo.gov/content/pkg/FR-2018-09-21/pdf/2018-20547.pdf;* and Exchange Act Release No. 84177 (Sept. 17, 2018), 83 FR 47953 (Sept. 21, 2018), *https://www.govinfo.gov/content/pkg/FR-2018-09-21/pdf/2018-20545.pdf.* The filings were later withdrawn. MIAX, PEARL, and their affiliate exchange, MIAX Emerald, LLC (''Emerald''), have continued to file similar rule changes involving connectivity fees, but have withdrawn them before the Commission has acted on them. On December 20, 2019, MIAX, PEARL, and Emerald filed their most recent proposed rule changes involving connectivity fees, SR–MIAX–2019–51, SR–PEARL–2019–36, and SR–EMERALD–2019–39. Those filings were not withdrawn, and the Commission did not suspend them within sixty days.

[7] 17 CFR 201.431(e).

[8] *See* Exchange Act Release No. 84614 (Nov. 16, 2018), 83 FR 59,432 (Nov. 23, 2018), *https://www.govinfo.gov/content/pkg/FR-2018-11-23/pdf/2018-25471.pdf.*

[9] *Id.* at 59432.

[10] *See* Exchange Act Release No. 85184 (Feb. 25, 2019), 84 FR 6842 (Feb. 28, 2019), *https://thefederalregister.org/2019-02-28/2019-03543.pdf.*

[11] *See* Exchange Act Release No. 84823 (Dec. 14, 2018), 83 FR 65381 (Dec. 20, 2018), *https://www.govinfo.gov/content/pkg/FR-2018-12-20/pdf/2018-27512.pdf.*

[12] *See id.* at 65382.

[13] *See id.* at 65383.

[14] *See* Exchange Act Release No. 85201 (Feb. 26, 2019), 84 FR 7146 (Mar. 1, 2019), *https://www.govinfo.gov/content/pkg/FR-2019-03-01/pdf/2019-03706.pdf.*

[15] *See* Exchange Act Release No. 85399 (Mar. 22, 2019) 84 FR 11850 (Mar. 28, 2019), *https://www.govinfo.gov/content/pkg/FR-2019-03-28/pdf/2019-05912.pdf.*

[16] *Order Disapproving Proposed Rule Changes To Amend the Fee Schedule on the BOX Market LLC Options Facility To Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network,* Exchange Act Release No. 85459 (Mar. 29, 2019), 84 FR 13363 (Apr. 4, 2019), *https://www.govinfo.gov/content/pkg/FR-2019-04-04/pdf/2019-06519.pdf.*

issuers, brokers, or dealers.'' [17] The Disapproval Order recognized that BOX attempted to justify its fees under the market-based test that the Commission has historically applied to assess the equitableness and reasonableness of market data fees, and that BOX also presented a cost-based justification for its fees.[18] The Disapproval Order analyzed both sets of arguments and concluded that BOX failed to provide sufficient information to show that the Proposed Rule Changes were consistent with the requirements of the Exchange Act under either a market-based or cost-based test. On April 8, 2019, BOX filed a petition for review of the Disapproval Order, which the Commission granted on May 23, 2019.[19]

B. The Relevant Precedent

Recent decisions by the Court of Appeals for the D.C. Circuit and the Commission guide our review of the Proposed Rule Changes. We summarize that relevant precedent here.

1. The *NetCoalition* litigation

In 2010, the D.C. Circuit vacated the Commission's approval of a fee rule for market data filed by NYSE Arca, Inc. (''NYSE Arca'').[20] The court held that focusing on whether competitive market forces constrained the exchange's pricing decisions was an acceptable basis for assessing the fairness and reasonableness of the fees pursuant to the Exchange Act, but determined that the record did not factually support the conclusion that significant competitive forces limited NYSE Arca's ability to set unfair or unreasonable prices. The D.C. Circuit vacated and remanded for further proceedings.

Subsequently, NYSE Arca filed with the Commission a new rule that imposed the same fees that had been vacated by the D.C. Circuit and designated the filing as effective immediately pursuant to Sections 19(b)(3)(A) and (C), which were amended as part of the Dodd-Frank Act in 2010.[21] The Commission did not suspend that filing, and another petition for review to the D.C. Circuit ensued. On that petition, the court held that it lacked jurisdiction to consider challenges to the Commission's non-suspension of the fees under Exchange Act Section 19(b).[22] But the court, in so holding, ''[took] the Commission at its word'' that the Commission would ''make the [Exchange Act] section 19(d) process available to parties'' seeking to challenge fees as improper limitations or prohibitions of access to exchange services, and recognized that this Commission process would ''open[ ] the gate to [judicial] review.'' [23]

Following that decision, the Securities Industry and Financial Markets Association (''SIFMA'') filed a challenge with the Commission to NYSE Arca's 2010 fee rule under Exchange Act Section 19(d) on the ground that it was an improper limitation of access to exchange services. We consolidated that challenge with a challenge to a 2010 Nasdaq fee rule.[24]

On October 16, 2018, we issued our decision in the consolidated proceeding (''SIFMA Decision'').[25] We held that the exchanges failed to meet their burden of establishing that the challenged fees were consistent with the purposes of the Exchange Act—that the fees were fair and reasonable and not unreasonably discriminatory. We noted that we were not making a determination that the fees themselves were not fair and reasonable. Rather, we explained that it was possible the challenged fees could be shown to be fair and reasonable and otherwise consistent with the Exchange Act, but that the evidence submitted by the exchanges failed to satisfy their burden on the existing record. Accordingly, we set those fees aside. The exchanges filed a petition for review of the SIFMA Decision with the D.C. Circuit and the case remains pending.

During the pendency of the challenge that led to the SIFMA Decision, over 60 related challenges to national securities exchange rule changes and National Market System (''NMS'') plan amendments were filed with the Commission.[26] Contemporaneously with the SIFMA Decision, we issued a separate order (''Remand Order'') remanding those related challenges to the respective exchanges and NMS plan participants and instructing the exchanges and plan participants to consider the impact of the SIFMA Decision on the challengers' assertions that the contested rule changes and plan amendments should be set aside.[27] We further directed the exchanges and NMS plans to identify or develop fair procedures for them to use in assessing the challenged rule changes and NMS plan amendments as potential denials or limitations to services. Several exchanges and plan participants moved for reconsideration of the Remand Order. We denied reconsideration on May 7, 2019, but we tolled the deadlines set in the Remand Order until after the resolution of the appeal of the SIFMA Decision in the D.C. Circuit.[28]

2. Susquehanna

In August 2017, the D.C. Circuit issued a decision in *Susquehanna*

[17] *See* Exchange Act Section 19(b)(2)(C), 15 U.S.C. 78s(b)(2)(C) (stating that the Commission ''shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of'' the Exchange Act); Exchange Act Sections 6(b)(4)–(5), 15 U.S.C. 78f(b)(4)–(5).

[18] *See* Disapproval Order, 84 FR at 13,367–70 (discussing BOX's market-based and cost-based arguments).

[19] Exchange Act Release No. 85927 (May 23, 2019), *https://www.sec.gov/rules/sro/box/2019/34-85927.pdf.* On March 27, 2019, BOX filed a fourth proposed rule change (SR–BOX–2019–09) (''BOX 4''), but withdrew this filing on March 29, 2019. *See BOX Regulation, Rule Filings, http://rules.boxoptions.com/rulefilings* (last visited Mar. 25, 2020). On June 26, 2019, BOX filed a fifth proposed rule change (SR–BOX–2019–22) (''BOX 5''), but withdrew it on August 22, 2019. Exchange Act Release No. 86835 (Aug. 30, 2019), 84 FR 47009 (Sept. 5, 2019), *https://www.govinfo.gov/content/pkg/FR-2019-09-06/pdf/2019-19223.pdf.* That same day, BOX filed a sixth proposed rule change (SR–BOX–2019–25) (''BOX 6''), but withdrew it on September 5, 2019. *See BOX Regulation, Rule Filings, http://rules.boxoptions.com/rulefilings* (last visited Mar. 25, 2020). Also on September 5, 2019, BOX filed a seventh proposed rule change (SR–BOX–2019–27) (''BOX 7''), Exchange Act Release No. 87014 (Sept. 19, 2019), 84 FR 50534 (Sept. 25, 2019), *https://www.govinfo.gov/content/pkg/FR-2019-09-25/pdf/2019-20706.pdf,* but withdrew it on November 1, 2019. BOX filed an eighth proposed rule change (SR–BOX–2019–32) (''BOX 8'') on October 31, 2019, a ninth proposed rule change (SR–BOX–2019–38) (''BOX 9'') on December 20, 2019, a tenth proposed rule change (SR–BOX–2019–39) (''BOX 10'') on December 31, 2019, and an eleventh proposed rule change (SR–BOX–2020–01) (''BOX 11'') on January 15, 2020, which were withdrawn on December 23, 2019, December 31, 2019, January 15, 2020, and January 29, 2020, respectively. The Division did not suspend BOX 4 through 11 before they were withdrawn. On January 29, 2020, BOX filed a twelfth proposed rule change (SR–BOX–2020–03) (''BOX 12''). Because each proposed rule change is immediately effective upon filing, BOX has been able to charge these fees despite the suspension and subsequent disapproval of BOX 1, 2, and 3.

[20] *NetCoalition* v. *SEC,* 615 F.3d 525, 534–35, 539–44 (D.C. Cir. 2010) (''*NetCoalition I*'').

[21] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 111–203, 124 Stat. 1376 (July 21, 2010); *see also* Exchange Act Sections 19(b)(3)(A), (C), 15 U.S.C. 78s(b)(3)(A), (C) (permitting self-regulatory organizations (''SROs'') to designate as immediately effective rule changes ''establishing or changing a due, fee, or other charge imposed by the [SRO] on any person, whether or not the person is a member of the [SRO]'').

[22] *NetCoalition* v. *SEC,* 715 F.3d 342, 351 (DC Cir. 2013) (''*NetCoalition II*'').

[23] *Id.* at 353.

[24] *See Sec. Indus. & Fin. Mkts. Ass'n,* Exchange Act Release No. 72182, 2014 WL 1998525, at *6, 11–13 (May 16, 2014) (identifying Nasdaq fee rule for Level 2 depth-of-book data product).

[25] *See Sec. Indus. & Fin. Mkts. Ass'n,* Exchange Act Release No. 84432, 2018 WL 5023228 (Oct. 16, 2018), *petition for review filed,* No. 18–1292 (D.C. Cir. docketed Oct. 23, 2018).

[26] *Sec. Indus. & Fin. Mkts. Ass'n,* Exchange Act Release No. 84433, 2018 WL 5023230, at * 3–6 (Oct. 16, 2018) (listing challenges).

[27] *Id.*

[28] *Sec. Indus. & Fin. Mkts. Ass'n,* Exchange Act Release No. 85802, 2019 WL 2022819, at * 3 (May 7, 2019). Oral argument on the appeal was held on February 18, 2020.

International Group v. *SEC.*[29] There, the court held that the Commission's order approving a proposed rule change filed by the Options Clearing Corporation (''OCC'')—its ''Capital Plan''—failed to meet the standards of the Administrative Procedure Act (''APA'').[30] In so ruling, the court found that the Commission's analysis was flawed in that the Commission relied too heavily on OCC's representations rather than performing an independent analysis of the Capital Plan or critically evaluating OCC's analysis of the Plan.[31] The court emphasized that the Commission's ''unquestioning reliance on OCC's defense of its own actions is not enough to justify approving the Plan.'' [32] Nor, according to the court, could the Commission reach a conclusion ''unsupported by substantial evidence.'' [33] The D.C. Circuit remanded for further proceedings.

Following the remand, the Commission disapproved the OCC Capital Plan, finding that the information OCC submitted before the Commission was insufficient to support a finding that the Plan was consistent with the Exchange Act.[34] In reaching this determination, the Commission reiterated the D.C. Circuit's holding that it must ''critically evaluate the representations made and the conclusions drawn'' by the self-regulatory organization (''SRO'') in determining whether a proposed rule change is consistent with the Exchange Act.[35] OCC subsequently submitted a new proposal to adopt a capital management policy, which the Commission approved after a comprehensive analysis and review of the record.[36]

II. Analysis

Our Rules of Practice set forth procedures for reviewing actions made pursuant to delegated authority.[37] Pursuant to Rule 431(a), the Commission may affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the action made pursuant to delegated authority. Here, we conducted a de novo review of both the Disapproval Order and the record, which includes, among other items: (1) The Proposed Rule Changes and attachments thereto, as well as supplemental information submitted by BOX; (2) comments received in connection with the Proposed Rule Changes, including responses from BOX; (3) orders issued in connection with the Proposed Rule Changes and comments received in connection with them; and (4) BOX's petitions for review and related arguments. As a result of that de novo review, we affirm the action disapproving the Proposed Rule Changes for the reasons expressed below.

A. BOX Has Not Met Its Burden To Demonstrate That the Proposed Rule Changes Are Consistent With the Exchange Act

Under Section 19(b)(2)(C) of the Exchange Act, the Commission must approve an SRO's proposed rule change if it finds that it is consistent with the applicable requirements of the Exchange Act and the rules and regulations thereunder; if it does not make such a finding, the Commission must disapprove the proposed rule change.[38] Here, the applicable provisions of the Act include Section 6, which requires that an exchange's rules provide for the ''equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities,'' do not ''permit unfair discrimination between customers, issuers, brokers, or dealers,'' and do ''not impose any burden on competition not necessary or appropriate in furtherance of the purposes of'' the Exchange Act.[39]

Additionally, under Rule of Practice 700(b)(3), 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.'' [40] 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.[41] Any failure of an SRO to provide the requisite information may result in the Commission not having a sufficient basis to find that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations issued thereunder.[42]

The Commission has historically applied a ''market-based'' test in assessing whether exchanges' market data fees satisfy the requisite Exchange Act requirements.[43] Under that test, we consider whether an exchange ''was subject to significant competitive forces in setting the terms of its proposal for [market data], including the level of any fees.'' [44] If an exchange meets that burden, we will find that the rule is consistent with the Exchange Act unless there is ''a substantial countervailing basis to find that the terms'' of the rule violate the Exchange Act or the rules thereunder.[45] BOX asserts that the Proposed Rule Changes satisfy the market-based test.

An exchange may ''provide a substantial basis, other than competitive forces, . . . demonstrating that the terms of the [fee] proposal are equitable, fair, reasonable, and not unreasonably discriminatory.'' [46] We have recognized ''that sufficient evidence may be presented for the Commission to sustain or strike the fee on other grounds.'' [47] It is the exchange's prerogative to choose what basis to provide, and a cost-based argument could be one such basis.[48] But whatever the bases, it is the exchange's burden to show that its proposed fees are consistent with the Exchange Act.[49]

[29] 866 F.3d 442 (D.C. Cir. 2017).

[30] *Id.* at 447 (citing *NetCoalition I*).

[31] *Id.*

[32] *Id.*

[33] *Id.* at 447–48.

[34] *See* Exchange Act Release No. 85121 (Feb. 13, 2019), 84 FR 5157 (Feb. 20, 2019) (SR–OCC–2015–02), *https://www.govinfo.gov/content/pkg/FR-2019-02-20/pdf/2019-02731.pdf.*

[35] *See id.* at 5157.

[36] *See* Exchange Act Release No. 88029 (Jan. 24, 2020), 85 FR 5500 (Jan. 30, 2020), *https://www.govinfo.gov/content/pkg/FR-2020-01-30/pdf/2020-01643.pdf.*

[37] *See* 17 CFR 201.431.

[38] 15 U.S.C. 78s(b)(2)(C).

[39] 15 U.S.C. 78f(b)(4), (5), (8).

[40] 17 CFR 201.700(b)(3).

[41] *See* Exchange Act Release No. 63723 (Jan. 14, 2011), 76 FR 4066, 4071 (Jan. 24, 2011), *https://www.sec.gov/rules/final/2011/34-63723fr.pdf* (release accompanying amendments to Rules of Practice) (''2011 Rule Amendments Adopting Release'').

[42] *See id.*

[43] *Cf. NetCoalition I,* 615 F.3d at 532, 534–35, 537 (finding Commission's use of market-based test—one that relies primarily on the effect of competitive forces to assess the terms on which market data is made available to investors—to be permissible). The Disapproval Order noted that market data fees and connectivity fees ''present similar issues'' and so merit similar assessment under a market-based test. *See* Disapproval Order, 84 FR at 13367. Because BOX presents a market-based argument in support of its connectivity fees, we assess that argument under a market-based test.

[44] Exchange Act Release No. 59039 (Dec. 2, 2008), 73 FR 74770, 74781 (Dec. 9, 2008), *https://www.govinfo.gov/content/pkg/FR-2008-12-09/pdf/E8-28908.pdf* (''2008 ArcaBook Approval Order'').

[45] *Id.* at 74781; *see also* SIFMA Decision, 2018 WL 5023228, at * 12 (citing same).

[46] 2008 ArcaBook Approval Order, 73 FR at 74781; *see also* SIFMA Decision, 2018 WL 5023228, at * 12 (citing same).

[47] 2008 ArcaBook Approval Order, 73 FR at 74781; *see also* SIFMA Decision, 2018 WL 5023228, at * 12 (citing same).

[48] We, and the D.C. Circuit, have also recognized that an exchange's costs of providing data could be relevant to the fairness of the fees charged under the market-based approach. *See* SIFMA Decision, 2018 WL 5023228, at *33 (citing *NetCoalition I,* 615 F.3d at 537).

[49] *See* Rule of Practice 700(b)(3), 17 CFR 201.700(b)(3); *see also* 2008 ArcaBook Approval Order, 73 FR at 74781; General Instructions for

BOX invokes both a cost-based and market-based justification for the Proposed Rule Changes, and so we evaluate both here.

1. BOX Has Not Demonstrated, as it Asserts, That the Proposed Rule Changes Are Consistent With the Exchange Act as an Offset of Costs

In each of its filings under review, BOX begins by raising a cost-based argument. BOX states that the fees will ''allow the Exchange to recover costs associated with offering access through the network connections, . . . offset the costs BOX incurs in maintaining, and implementing ongoing improvements to the trading systems, including connectivity costs, costs incurred on software and hardware enhancements and resources dedicated to software development, quality assurance, and technology support.'' [50] The information BOX has provided is insufficient to support these assertions, and so BOX has failed to meet its burden to demonstrate that the Proposed Rule Changes are consistent with the Exchange Act on this cost basis.

BOX has not submitted the requisite information for us to evaluate the reasonableness of the fees being charged on the basis of cost. We have explained that a cost-based approach contemplates consideration of whether the fees ''bear at least some relationship to costs.''[51] BOX fails to provide the information necessary to determine whether there is any relationship between the amounts that it anticipates it will collect from the fees and the costs that it asserts it will offset through those fees. Indeed, BOX fails to identify either the amount of these total revenues or the amount of the specific costs they will offset. Nor does BOX identify the frequency of these purported costs (such as one-time implementation costs, fixed costs, etc.), or the expected revenues from the Proposed Rule Changes. We therefore have no basis upon which to evaluate BOX's argument that the fees established by the Proposed Rule Changes are necessary to offset its costs,[52] and we have no way to ascertain the relationship, if any, between the connectivity fees and the costs they purport to offset.

We also lack the information necessary to evaluate whether these fees are being allocated equitably.[53] Because BOX fails to explain why these enumerated costs are appropriately offset by connectivity fees (as opposed to some other fees), nor to what extent fees charged for other services and products (such as data products and trading services) offset them, we are unable to determine whether the costs attributable to supporting connectivity are being equitably allocated to those using that connectivity. BOX also provides no explanation for how it arrived at the specific amounts of the fees ($5,000 per month for 10 Gb connections and $1,000 per month for non-10 Gb connections) nor the disparity between them, beyond noting that one connection ''use[s] more bandwidth.'' Consequently, we are unable to determine whether the pricing unfairly discriminates between different groups using connectivity.[54]

BOX argues that the Disapproval Order ''cited no authority for the proposition that an exchange is invariably required to provide a detailed analysis of costs in support of a proposed fee filing.'' Although BOX is correct that we do not require a cost-based justification in support of a proposed fee filing, BOX, in its filings, chose to justify its Proposed Rule Changes as reasonable in light of its claimed costs. Having done so, BOX must present sufficient evidence to demonstrate that the Proposed Rule Changes are consistent with the Exchange Act under a cost-based theory.[55] An ''unquestioning reliance on'' an SRO's ''defense of its own actions is not enough''; rather, we must ''critically review[the] analysis or perform [our] own.'' [56] BOX has not provided sufficient evidence for us to discharge our review function, and so we must disapprove these Proposed Rule Changes under a cost-based analysis.

BOX also attempts to support its cost-based argument by asserting that the proposed fees are reasonable because they are equal to or lower than competitors' fees.[57] But Rule of Practice 700(b)(3) provides that a ''mere assertion . . . that another self-regulatory organization has a similar rule in place'' is ''not sufficient'' to ''explain why the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a self-regulatory organization.'' [58] BOX cites no contrary authority and provides no explanation as to why, without providing sufficient cost information, its comparison of its own fees to a competitor's fees is sufficient here.[59] The mere fact that another exchange charges similar fees does not demonstrate that BOX's fees are reasonable.[60] The circumstances that would make another exchange's fees reasonable (assuming they are) would not necessarily be the same for BOX.

BOX argues that it did not need to submit additional information because it submitted its proposals as

Form 19b–4, Sec. I.3, *https://www.sec.gov/files/form19b–4.pdf.*

[50] *See* 83 FR at 37854 (BOX 1); *see also* 83 FR at 65383 (same as to BOX 2); 84 FR at 7148 (same as to BOX 3).

[51] *Bloomberg L.P.,* Exchange Act Release No. 83755, 2018 WL 3640780, at * 9 & n.63 (July 31, 2018).

[52] *See* 15 U.S.C. 78f(b)(4) (requiring that an exchange's rules provide for ''reasonable'' fees).

[53] *See id.* (requiring that an exchange's rules ''provide for the equitable allocation'' of its fees).

[54] *See* 15 U.S.C. 78f(b)(5) (requiring that an exchange's rules not be designed ''to permit unfair discrimination between customers, issuers, brokers, or dealers'').

[55] BOX also argues that providing more detailed information would put it at a ''significant competitive disadvantage because it would expose sensitive information.'' BOX is free to seek confidential treatment of any such information under Rule of Practice 190, 17 CFR 201.190.

[56] *See Susquehanna,* 866 F.3d at 447; *see also* 15 U.S.C. 78s(b)(2)(C) (stating that the Commission ''shall disapprove a proposed rule change'' of an SRO ''if it does not make a *finding*'' of consistency with the Exchange Act (emphasis added)); *cf. Eagle Supply Grp., Inc.,* Exchange Act Release No. 39800, 1998 WL 133847, at * 4 (Mar. 25, 1998) (remanding under Section 19(f) of the Exchange Act so that NASD could ''provide a sufficient basis for its decision to enable us to make the requisite determination''); *Jonathan Feins,* Exchange Act Release No. 37091, 1996 WL 169441, at * 2 (Apr. 10, 1996) (stating, in reviewing SRO disciplinary action, that ''it is important that a self-regulatory organization clearly explain the bases for its conclusions'' and that if it ''fails to do so, we cannot discharge properly our review function'').

[57] *See* 83 FR at 37854 (BOX 1); *see also* 83 FR at 65382–83 (same as to BOX 2), 84 FR at 7148 (same as to BOX 3).

[58] 17 CFR 201.700(b)(3). *See* Exchange Act Section 19(b)(2)(C)(i), 15 U.S.C. 78s(b)(2)(C)(i) (''The Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this chapter *and the rules and regulations issued under this chapter that are applicable to such organization.*'') (emphasis added); *see also* Exchange Act Section 19(b)(2)(F), 15 U.S.C. 78s(b)(2)(F) (requiring Commission to ''promulgate rules setting forth the procedural requirements of the proceedings required'' for SRO rule review); 2011 Rule Amendments Adopting Release, 76 FR at 4067 (adopting release for Rule 700 noting the rules are being promulgated to fulfill the requirements of Exchange Act Section 19(b)(2)(F)). To the extent that BOX points to other exchanges' fees to argue that the amounts of the Proposed Rule Changes are constrained by competition, with no further showing of competitive forces, we reject this argument for the same reason.

[59] We also note that some of those other fees BOX cites are the subject of pending proceedings to determine if they are fair and reasonable and otherwise consistent with the Exchange Act. *See* Remand Order, 2018 WL 5023230.

[60] 2011 Rule Amendments Adopting Release, 76 FR at 4071 (stating that rather than a ''mere assertion'' that another SRO has a similar rule in place, the SRO must provide a ''legal analysis'' of the proposed rule change's ''consistency with applicable requirements'' that is ''sufficiently detailed and specific to support an affirmative Commission finding'').

immediately effective rule changes. According to BOX, *Susquehanna* presented a different situation than the one here because it involved a rule change submitted for approval under Exchange Act Section 19(b)(2) rather than an immediately effective rule filing under Section 19(b)(3). But when the Commission suspends an immediately effective rule filing, Section 19(b)(3) requires that the Commission institute proceedings to determine whether the proposed rule change should be approved or disapproved under Section 19(b)(2)(B)—the same provision at issue in *Susquehanna*.[61] Once the Commission did so here, the Exchange Act's requirements for approving a proposed rule change apply equally, regardless of whether the Proposed Rule Rules were initially filed pursuant to Section 19(b)(2) or 19(b)(3).

2. BOX Has Not Demonstrated That the Fees Established by the Proposed Rule Changes Are Constrained by Competition to Equitable and Reasonable Levels

BOX also argues under the market-based test that its services are subject to sufficient competition to render its fees equitable, reasonable, and otherwise consistent with the Exchange Act. BOX has not, however, provided the evidence necessary to support the Proposed Rule Changes or its arguments. Consequently, BOX has failed to meet its burden to demonstrate that the fees established by the Proposed Rule Changes are equitably allocated, not unfairly discriminatory, and do not impose an unnecessary or inappropriate burden on competition.

a. BOX Has Not Demonstrated That Total Platform Theory Demonstrates That the Fees Established by the Proposed Rule Changes Are Constrained by Competition

BOX argues that the ''total platform'' theory demonstrates that its fees are constrained by competition. The premise of the theory is that an exchange is a platform with joint products and joint costs.[62] In the context of market data fees, the D.C. Circuit has stated that the theory posits that ''[a]lthough an exchange may price its trade execution fees higher and its market data fees lower (or vice versa), because of 'platform' competition the exchange nonetheless receives the same return from the two 'joint products' in the aggregate.''[63]

BOX relies on platform theory to assert that because a market is competitive on a platform basis, the fees charged by the platform are consistent with the Exchange Act. An SRO that relies on platform theory to support a proposed fee change must provide data and analysis demonstrating that these competitive forces are sufficient to constrain the SRO's pricing.[64] It remains true that an SRO must establish by a preponderance of the record that the fee is ''reasonable,''[65] and that it is neither unfairly discriminatory nor an undue burden on competition.[66]

BOX argues that its exchange is a trading platform, and so its ability to price its joint products, including the connectivity services at issue here, is constrained by competition for order flow. In particular, BOX claims that the competition it faces for order flow ensures that its proposed connectivity fees are reasonable and otherwise consistent with the requirements of the Exchange Act. BOX has failed to show that platform theory has any applicability here.

BOX supports its argument by relying on an economic analysis of the extent to which competitive forces constrain the prices of connectivity services offered by Nasdaq (the ''Nasdaq Statement'').[67] The Nasdaq Statement argues that Nasdaq's provision of connectivity services is ''inextricably linked'' to its provision of trading services such that it is not possible to evaluate Nasdaq's pricing of connectivity services in isolation from the trading and other ''joint'' services it offers. The Nasdaq Statement also argues that Nasdaq is subject to significant competition from other trading exchanges and rivals that can be expected to constrain Nasdaq's aggregate return from its joint products. Because connectivity services are an ''input'' into trading, the Nasdaq Statement contends, competition for equity trading will thus constrain the pricing of connectivity services. Neither the Nasdaq Statement itself nor the arguments BOX makes based on it establish that BOX's Proposed Rule Changes are consistent with the Exchange Act.[68]

i. The Nasdaq Statement Does Not Establish That BOX Has Met Its Burden of Demonstrating That the Proposed Rule Changes Are Consistent With the Exchange Act

The Nasdaq Statement does not establish that the Proposed Rule Changes are consistent with the Exchange Act for several reasons. First, the Nasdaq Statement does not establish that the fact that an exchange offers multiple products constrains its pricing of connectivity fees to reasonable levels. In explaining how equity exchanges like Nasdaq offer joint products to their customers and have joint costs to do so, the Nasdaq Statement repeatedly compares Nasdaq to a fitness center competing for members with other centers. But this analogy is not apt. Consumers rarely are members of more than one fitness center, but many traders trade at multiple exchanges. Traders may make trades at or close to the same time on different exchanges and regularly pay for data and connectivity services at some or all of the exchanges.[69] In contrast, if Gym A raises its rates for some fees, this may drive some of its members to Gym B because the total cost of Gym A's platform has increased. A similar example involving Exchanges A and B does not necessarily hold because traders are frequently customers of multiple exchanges. Exchange customers may need to connect to both Exchange A and B, as well as others, for a variety of reasons (*e.g.,* to ensure best execution, to implement profitable trading strategies based on access to complete market data, to provide competitive trade execution, to comply

[61] *See* 15 U.S.C. 78s(b)(3)(C).

[62] *See* SIFMA Decision, 2018 WL 5023228, at *14, 23 (citing *NetCoalition I,* 615 F.3d at 542 n.16).

[63] *Id.* at *14 (quoting *NetCoalition I,* 615 F.3d at 542 n.16).

[64] *Id.* at *17–19, 23 (finding that the exchange presenting the platform theory argument did not substantiate its assertions with evidence sufficient to support its platform-based arguments).

[65] *See* Exchange Act Section 6(b)(4), 15 U.S.C. 78f(b)(4).

[66] *See* Exchange Act Sections 6(b)(5), (8), 15 U.S.C. 78f(b)(5), (8).

[67] *See* Attachment to Letter from Jeffrey S. Davis, Nasdaq, Inc., to Brent J. Fields, Secretary, Securities and Exchange Commission (Feb. 13, 2019), *https://www.sec.gov/comments/4-729/4729-4930892-178427.pdf.*

[68] BOX also does not explain whether, if it charges fees for connectivity based on the fact that it also offers other ''joint'' services that are ''inextricably linked,'' consumers receive any benefit for paying fees that are priced in this manner.

[69] *See, e.g.,* SIFMA Decision, 2018 WL 5023228, at *5 (noting that companies subscribe to multiple exchanges to take advantage of ''valuable trading opportunities'') and *29 (noting that traders engaging in high-frequency or algorithmic trading usually require ''depth-of-book data from multiple exchanges'' to pursue their trading strategies); *see also, e.g.,* Letter from Theodore R. Lazo and Ellen Greene, SIFMA, to Brent J. Fields, Secretary, Securities and Exchange Commission (Oct. 15, 2018) at 2, *https://www.sec.gov/comments/sr-box-2018-24/srbox201824-4530417-176029.pdf* (positing that it is necessary for certain firms to connect to numerous—if not all—exchanges and obtain their depth-of-book data to effectuate their trading strategies or meet their execution obligations); Letter from Tyler Gellasch, Health Markets, to Brent J. Fields, Secretary, Securities and Exchange Commission (Aug. 23, 2019) at 6–7 & n.22, 12 & n.35, *https://www.sec.gov/comments/sr-box-2018-24/srbox201824-4258035-173056.pdf* (same).

with regulatory obligations such as the Order Protection Rule). Thus, an increase in Exchange A's connectivity fees might simply increase the cost of trading, rather than drive market participants to Exchange B.

Second, BOX has not demonstrated the relevance of the Nasdaq Statement's reliance on economic theory relating to two-sided transaction platforms. Under that theory, because two-sided transaction platforms ''facilitate a single, simultaneous transaction'' between two participants, they ''cannot raise prices on one side without risking a feedback loop of declining demand.'' [70] ''Price increases on one side of the platform . . . do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services.'' [71] As a result, it is necessary to ''evaluat[e] both sides of a two-sided transaction platform . . . to accurately assess competition.'' [72] The Nasdaq Statement asserts that equity exchanges are two-sided markets to the extent that they bring together liquidity providers (those market participants that provide liquidity by posting quotes on exchanges) with liquidity takers (those market participants that take liquidity by trading against posted quotes).

BOX fails to establish that there is a two-sided market for its connectivity services. Consumers purchase connectivity services from BOX, but BOX does not bring together buyers and sellers of connectivity. As a result of failing to establish that a two-sided market for its connectivity services exists, BOX has not demonstrated that the framework for evaluating competition with respect to a two-sided transaction platform has relevance here.

Third, the Nasdaq Statement is inapposite to our analysis of the fees at issue here because it addresses the equities market and opines on Nasdaq's connectivity services rather than the options market and BOX's connectivity services.[73] We reject BOX's argument that the Nasdaq Statement's conclusions necessarily apply to the options market and BOX's connectivity services.[74] BOX has not demonstrated that the analysis of the equities market in the Nasdaq Statement is applicable in the context of the options market. BOX asserts that it is the Commission's burden to demonstrate that the conclusions of the Nasdaq Statement do not apply here, but this is not correct. Rather, as Commission Rule of Practice 700(b)(3) provides, ''[t]he burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization is on the self-regulatory organization that proposed the rule change.'' [75] And because ''[t]he self-serving views of the regulated entities . . . provide little support to establish that significant competitive forces affect their pricing decisions,'' BOX's assertion that the Nasdaq Statement applies to the fees at issue here does not discharge its burden.[76] BOX may not simply assert that the conclusions of the Nasdaq Statement apply to its market; it must substantiate that assertion and show that they do. As the D.C. Circuit has recognized, the Commission cannot ''merely accept'' BOX's unsupported assertions.[77]

ii. The Arguments BOX Makes Based on the Nasdaq Statement Do Not Establish That the Fees Established by the Proposed Rule Changes Are Consistent With the Exchange Act

We reject BOX's assertion in its petition for review that the conclusions of the Nasdaq Statement are ''confirmed by other parts of the record pertaining to specific BOX customers.'' BOX relies on a comment submitted by an individual that it asserts is employed by a previous BOX Participant that ended its membership three months before the connectivity fees were announced and implemented. The comment expresses concern that BOX's connectivity fees are excessive.[78] BOX also relies on a comment from a former BOX customer objecting to the level of BOX's fees, challenging BOX's assertion that no one complained about the fees, and explaining that the fees had caused the commenter to terminate service.[79] But these two comments are insufficient to demonstrate that BOX's total return across the platform remains the same regardless of whether it charges more for connectivity fees and less for transaction fees or vice versa. The actions of one or two customers are insufficient to establish that the fees in the Proposed Rule Changes are reasonable as required by the Exchange Act.

BOX also affirmatively attempts to distinguish itself from the exchanges discussed in the Nasdaq Statement. BOX argues that it is in particular need of connectivity fees compared to other exchanges because it ''does not own and operate its own data center and therefore cannot control data center costs.'' [80] But BOX does not explain how this difference in its cost structure might affect the applicability of the Nasdaq Statement's analysis, which involves balancing the exchange's total joint costs against the services offered.

Finally, BOX argues, based on the Nasdaq Statement, that ''regulatory forbearance'' is appropriate because there purportedly is no economically rational way for an exchange to allocate its joint costs since it offers joint products. This argument effectively urges the Commission not to review the fees BOX charges for connectivity. But as the D.C. Circuit stated in *NetCoalition I,* ''an agency may not shirk a statutory responsibility simply because it may be difficult.'' [81] Indeed, as the D.C. Circuit later emphasized in *Susquehanna,* ''[w]hen a statute requires an agency to make a finding as a prerequisite to action, it must do so.'' [82] We must have a basis for approving BOX's proposed fee changes, and BOX has not demonstrated that its inability to allocate its costs to those fees is such a basis.

[70] *Ohio* v. *Am. Express Co.,* 138 S. Ct. 2274, 2285–86 (2018).

[71] *Id.* at 2286.

[72] *Id.* at 2287.

[73] Because the equities market and connectivity offerings of Nasdaq's equities exchanges are not at issue here, we need not (and do not) determine whether the underlying conclusions of the Nasdaq Statement are correct with respect to Nasdaq.

[74] For this same reason, we reject BOX's reliance on the fact that both the Commission and the D.C. Circuit have acknowledged the existence of ''fierce'' competition for order flow. *See NetCoalition I,* 615 F.3d at 539 (''No one disputes that competition for order flow is 'fierce.' '') quoting 2008 ArcaBook Approval Order, 73 FR at 74782)). These authorities addressed competition for order flow among equity exchanges and other trading venues, not competition for connectivity in options markets.

[75] *See* Rule of Practice 700(b)(3), 17 CFR 201.700(b)(3).

[76] *NetCoalition I,* 615 F.3d at 541; *accord Susquehanna,* 866 F.3d at 447, 450 (citing *NetCoalition I* for same proposition); *see also id.* at 443 (finding that by ''grant[ing] approval [of the SRO rule change] without itself making the findings and determinations prescribed by'' the Exchange Act, the Commission ''effectively abdicated that responsibility'' to the SRO).

[77] *Susquehanna,* 866 F.3d at 447.

[78] Comment from Anand Prakash (Mar. 27, 2019), *https://www.sec.gov/comments/sr-box-2019-04/srbox201904-183648.htm* (''If this fee increase goes in effect, we wouldn't be able to subscribe to BOX market data as the cost of access will go higher and as such, we wouldn't be able to participate in trades on BOX. As of now, we have stopped our access to BOX as we await for a decision on this fees increase.'').

[79] Comment from Stefano Durdic, former owner of R2G Services, LLC (Mar. 27, 2019), *https://www.sec.gov/comments/sr-box-2019-04/srbox201904-5214039-183647.pdf.*

[80] 83 FR at 65382 (BOX 2).

[81] 615 F.3d at 539.

[82] 866 F.3d at 446 (quoting *Gerber* v. *Norton,* 294 F.3d 173, 185–86 (D.C. Cir. 2002)).

b. BOX Has Not Otherwise Offered Evidence That the Proposed Rule Changes Are Constrained by Competition

BOX also argues that competitive forces separate from those related to platform theory also constrain their connectivity fee pricing. But, again, BOX fails to provide sufficient factual support for these assertions and so fails to meet its burden of establishing that the Proposed Rule Changes are consistent with the Exchange Act.

BOX argues that market participants do not need to connect to BOX, and that ''the possibility that market participants will discontinue routing orders to a trading platform if it sets its connectivity fees at an unreasonably high level is a substantial constraint on exchanges' ability to increase connectivity fees.'' But BOX does not address the effects of regulatory obligations, such as best execution and trade-through requirements associated with the Order Protection Rule, which suggest that, at least under certain circumstances, firms would be limited in their ability to discontinue routing orders to BOX.[83] Moreover, as we stated in the SIFMA Decision, there ''must be evidence that competition will in fact constrain pricing . . . before the Commission approves a fee . . . premised on a competitive pricing model.'' [84] And BOX does not establish that connectivity to BOX is unnecessary in the options market or that market participants would, in fact, discontinue routing orders to it if it sets its connectivity fees at an unreasonably high level such that this behavior would constrain its pricing decisions.[85]

BOX also argues that the Proposed Rule Changes will not impose an unnecessary or inappropriate burden on competition because as a ''small Exchange in the already highly competitive environment for options trading, BOX does not have the market power necessary to set prices for services that are unreasonable or unfairly discriminatory.'' [86] It argues that because market participants are not required to connect to BOX, they simply will not do so if its connectivity fees are unreasonably high, and that those that do need to connect can do so through third parties. But as explained above, BOX has not established that firms may simply refrain from connecting to BOX (or connect through a third party with attendant lag time) without running afoul of applicable regulatory obligations or failing to take steps necessary to meet customer needs. Nor has BOX offered any information regarding the effect of the connectivity fees on its market share over the months in which the fees were charged since BOX filed its initial fee filing.[87]

The record does not support BOX's position that the connectivity fees at issue satisfy the market-based test. BOX has provided inadequate information regarding the competiveness of the market for connectivity services. This does not mean that the fees are not consistent with the Exchange Act, but we cannot approve them under the market-based test unless BOX establishes that significant competitive forces limit its ability to set unreasonable prices.[88]

B. Disapproval Is Not Arbitrary and Capricious

BOX argues that the Disapproval Order should be vacated because it arbitrarily and capriciously treats BOX differently from other exchanges and ''represents a fundamental shift in the Commission's regulatory approach to connectivity fees.'' According to BOX, ''in suspending and then disapproving'' the Proposed Rule Changes, the Division departed from a policy of allowing other immediately effective exchange rule filings to go into effect. BOX points to instances in which the Commission—by delegated authority or otherwise—did not suspend and institute proceedings on immediately effective connectivity fee (and data fee) filings by other exchanges. But neither the Commission's actions regarding OIP 1, OIP 2, and OIP 3, nor the disapproval of the Proposed Rule Changes, constitute an impermissible change in policy or otherwise arbitrary or capricious action.

First, BOX's primary complaint is not about the merits of the Disapproval Order but about the decisions to suspend BOX's rule filings and institute proceedings to consider whether to approve or disapprove them. These are the decisions that BOX contends depart from prior Commission practice, and which, it claims, have caused BOX to be treated unfairly compared with other exchanges.[89] But Exchange Act Section 19(b)(3) states that the determination of whether to suspend an immediately effective rule filing and institute proceedings is not reviewable under Section 25 of the Exchange Act and is not ''final agency action'' for purposes of review.[90] As the D.C. Circuit explained in *NetCoalition II,* the plain language was ''clear and convincing evidence of the Congress's intent to preclude'' judicial review of the Commission's determination whether to suspend an SRO rule filing or to allow it to become effective without instituting a rule disapproval proceeding.[91] Thus, neither the previous determinations to not suspend other fee filings nor the determination to suspend here—including whether those decisions departed from any prior practice—constitute reviewable agency action.[92] It is the decision whether to approve or disapprove the Proposed Rule Changes, after the Proposed Rule Changes have been suspended and proceedings instituted, and not the decision whether to suspend BOX's rule filings and institute proceedings to determine whether they should be approved or disapproved, that is relevant here and that would be reviewable.

Second, BOX points to no formal Commission policy regarding the suspension of immediately effective rule filings and, in fact, there is none.[93]

[83] *See Options Order Protection and Locked/Crossed Market Plan* (2009) Section 5, *https://www.theocc.com/components/docs/clearing/services/options_order_protection_plan.pdf; see also* Rule 611 of Regulation NMS, 17 CFR 242.611 (Order Protection Rule for equities market).

[84] *See* SIFMA Decision, 2018 WL 5023228, at *18; *see also id.* at *17–22 (analyzing exchanges' arguments regarding link between order flow and market data fee prices and finding exchanges failed to meet their burden in part due to regulatory constraints on firms' ability to move order flow).

[85] *Cf. NetCoalition I,* 615 F.3d at 541 (dismissing examples provided in 2008 ArcaBook Approval Order as ''two anecdotes'' that ''say nothing about whether an exchange like NYSE Arca is constrained to price its depth-of-book data competitively'').

[86] 83 FR at 37854 (BOX 1).

[87] *See supra* note 19. We calculate that from July 2018, when BOX 1 was filed, through February 2020, BOX has been authorized to collect these fees for at least fifteen of these twenty months, including nine of the eleven months after issuance of the Disapproval Order.

[88] *See NetCoalition I,* 615 F.3d at 539–44 (vacating rule approval because market-based test had not been satisfied).

[89] We note that since July 2018, when BOX 1 was filed, BOX has filed over forty additional immediately effective rule filings. Other than BOX 2 and 3, none of those rule filings have been suspended. *See* SR–BOX–2018–25, 26, 27, 28, 30, 32, 33, 34, 35, 36, 38, 39; SR–BOX–2019–01, 02, 03, 05, 07, 08, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 25, 27, 28, 30, 31, 32, 33, 34, 35, 36, 38, 39; SR–BOX–2020–01, 02, 03, 05, 06, 07.

[90] 15 U.S.C. 78s(b)(3)(C).

[91] 715 F.3d at 351 (internal quotation marks and citations omitted).

[92] *Id.* at 353 (''We make clear that [Exchange Act] section 19(b)(3)(C) imposes a *jurisdictional* bar to our review of the Commission's decision not to suspend a proposed rule change.'') (emphasis in original); *see also supra* note 90 (Commission's decision to suspend a rule change is not reviewable).

[93] BOX refers to the staff guidance the Division issued to assist SROs in preparing fee filings that would meet their burdens under the Exchange Act and related rules. *See* ''Staff Guidance on SRO Rule Filings Related to Fees'' (May 21, 2019), *https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees.* But this document makes no mention of any previous purported policy to not suspend rule filings, nor any new policy to do otherwise now.

Rather, the determination whether to suspend an immediately effective exchange fee filing and institute proceedings to determine whether it is consistent with the Exchange Act occurs on a case-by-case basis. As BOX itself emphasizes in its filings, Section 19(b)(3) does not require the Commission to take any action or form any conclusion about the Proposed Rule Changes BOX filed or about any other exchange's filing. The determination not to suspend a fee filing does not constitute reviewable Commission action or require an explanation from the Commission.[94] When the Commission does determine to suspend an immediately effective rule change and institute proceedings to determine whether to approve or disapprove a fee, the Commission does explain the specific issues in that case that led to its conclusion, as occurred in the current instance.[95] The Commission's exercise of discretion is consistent with the Exchange Act's provisions.[96]

BOX bases its argument on its observation that before OIP 1 issued on September 17, 2018, the Commission had not suspended any immediately effective exchange fee filings regarding connectivity fees. It is true that recently, the Commission's case-by-case review of these filings has led to the Commission suspending more immediately effective filings than previously. But BOX's argument that our treatment of previous filings renders disapproval of the Proposed Rule Changes at issue here arbitrary and capricious ignores the need for the Commission to respond to intervening legal developments. As discussed above, in the *NetCoalition* litigation, as well as in *Susquehanna,* the D.C. Circuit has recently reiterated the Commission's obligation to examine the factual support for assertions that competitive forces constrain fees and emphasized the need for the Commission to ''critically review[ ]'' an SRO's analysis.[97]

Consistent with the court's directives, following *Susquehanna* and prior to OIP 1, the Commission issued several orders indicating a need for further substantiation of various fee filings.[98] After OIP 1 was issued on September 17, 2018, the Division suspended other immediately effective exchange fee filings regarding connectivity fees.[99] For example, as discussed above, the Division suspended effective upon filing rule changes to increase connectivity fees submitted by MIAX and PEARL around the same time as OIP 1.[100]

As the D.C. Circuit stated in *Road Sprinkler Fitters Local Union 669* v. *Herman,* it is not ''arbitrary and capricious for an agency to change its position in response to new legal developments.'' [101] And here, to the extent that the treatment of immediately effective rule filings has changed, that change was prompted by recent case law. Under these circumstances, our action in suspending the Proposed Rule Changes was not arbitrary or capricious.[102]

C. The Proposed Rule Changes Are Not Currently in Effect

BOX also asserts that its Proposed Rule Changes have been ''deemed approved by operation of law'' pursuant to Exchange Act Section 19(b)(2)(B). That section requires the Commission to ''issue an order'' approving or disapproving a proposed rule change within, at most, 240 days of the proposed rule change's filing.[103] If the Commission fails to issue an order within that period, the proposed rule change is deemed to have been approved.[104] BOX argues that because the Division by delegated authority, and not the Commission itself, issued the Disapproval Order within the required 240-day period, the Proposed Rule Changes have been deemed approved.[105] This argument lacks merit.

The Commission complied with the requirements of the statute. Section 19(b)(2)(D) requires only that the Commission ''issue an order'' approving or disapproving the proposed rule change within 240 days. The Disapproval Order was issued within that period.

Although orders issued by delegated authority are issued by Commission staff, they are issued with the full authority of the Commission and are signed by the Secretary's office on behalf of the Commission. Section 4A of the Exchange Act authorizes the Commission to delegate certain functions—including approval or disapproval of proposed rule changes under Section 19—to a ''division of the Commission.'' [106] And the Commission's Rules of Practice make clear that ''an action made pursuant to delegated authority shall have immediate effect and be deemed the action of the Commission.'' [107]

And, as the staff guidance itself makes clear, it represents only the views of the staff of the Division of Trading and Markets—not the Commission—and the Commission neither approved nor disapproved its contents. *Id.* at n.1.

[94] Although a determination not to suspend a proposed fee rule change would not be reviewable, the enforcement of a rule that has gone into effect could still be challenged as a limitation of access to exchange services through an application for review to the Commission under Exchange Act Section 19(d), 15 U.S.C. 78s(d). *See Sec. Indus. & Fin. Mkts. Ass'n,* 2014 WL 1998525, at *6–11 (explaining jurisdictional limits of Section 19(d) and setting forth framework for determining whether fees are reviewable as limitations of access under the Exchange Act and referencing timeliness requirement).

[95] *See, e.g.,* OIP 1, 83 FR at 47948 (explaining reasoning for suspension). And once the Commission issues a final approval or disapproval order, that order could then be appealed.

[96] *See* 15 U.S.C. 78s(b)(3)(C) (''[T]he Commission summarily may temporarily suspend the change in the rules . . . 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 this chapter.'').

[97] 866 F.3d at 447.

[98] *See, e.g.,* Exchange Act Release No. 83148 (May 1, 2018), 83 FR 20126 (May 7, 2018), *https://www.govinfo.gov/content/pkg/FR-2018-05-07/pdf/2018-09579.pdf;* Exchange Act Release No. 83149 (May 1, 2018), 83 FR 20129 (May 7, 2018), *https://www.govinfo.gov/content/pkg/FR-2018-05-07/pdf/2018-09580.pdf* (orders summarily abrogating immediately effective NMS plan amendments regarding fees because of concerns that there was not enough information provided to show consistency with the Exchange Act); *Bloomberg L.P.,* 2018 WL 3640780, at *9 (staying the effectiveness of NMS Plan amendments because the filings did ''not identify any basis by which [the] fee changes could be assessed for fairness and reasonableness'' beyond an ''unsupported declaration'' to that effect).

[99] *See, e.g.,* Exchange Act Release No. 85152 (Feb. 15, 2019), 84 FR 5737 (Feb. 22, 2019), *https://www.govinfo.gov/content/pkg/FR-2019-02-22/pdf/2019-03041.pdf* (suspending proposed rule changes filed by Nasdaq BX, Inc. and Nasdaq PHLX LLC involving port fees). The filings were later withdrawn.

[100] *See supra* note 6. BOX argues that the Division's approach to MIAX and PEARL ''further underscore[s] that BOX is being treated less favorably than other exchanges'' because the Division did not immediately suspend refiled versions of those rule proposals ''and instead permitted them to remain in effect during the comment period.'' BOX ignores the fact that MIAX and PEARL withdrew their rule proposals before resubmitting them, meaning that, unlike with respect to BOX, proceedings were not pending when they filed new versions of their proposed rules. Moreover, the Division has not immediately suspended any of BOX's subsequent versions of the Proposed Rule Changes; instead, BOX, like MIAX and PEARL, has continued to withdraw them. In many instances, all of these exchanges, including BOX, have not withdrawn their proposed rules until the very end of the comment period, enabling them to charge the proposed fees. *See supra* note 87.

[101] 234 F.3d 1316, 1320 (D.C. Cir. 2000).

[102] BOX also argues that the Remand Order—which remanded immediately effective rule changes and NMS plan amendments challenged as improper limitations of access to services under Exchange Act Sections 19(d) and 11A—exacerbated its allegedly disparate treatment by allowing other exchanges' fees to remain in effect. But the determination to suspend BOX 1 was made before the Remand Order issued, so that order had no effect on BOX's treatment here.

[103] *See* 15 U.S.C. 78s(b)(2)(B)(ii).

[104] *See* 15 U.S.C. 78s(b)(2)(D).

[105] BOX cited BOX 1 and BOX 2 as having been deemed approved since the relevant period had not yet elapsed for BOX 3 when it made its argument.

[106] *See* 15 U.S.C. 78d–1(a).

[107] *See* Commission Rule of Practice 431(e), 17 CFR 201.431(e). *See also, e.g.,* Rule of Practice 430(c), 17 CFR 201.430(c) (referring to ''a final order

Continued

Moreover, Congress was aware of the Commission's ability to delegate authority to approve SRO rule filings when the time restrictions in Exchange Act Section 19(b)(2)(D) were enacted. Yet it did not indicate that a delegated order would not comply with the statutory deadlines. Congress authorized actions taken by delegated authority in 1962,[108] added the 240-day requirement for approving or disapproving a proposed rule change in 1975,[109] and added the provision that a proposed rule change is deemed approved if the Commission fails to act in that time in 2010.[110] Indeed, Congress amended the delegated authority provisions at the same time it enacted the majority of the current review provisions for SRO proposed rule changes.[111]

To construe Section 19(b)(2), as BOX does, to require Commission review of an order by delegated authority to be completed within 240 days ''would undermine both the specific deadlines set forth in the statute and the Commission's ability to delegate functions.'' [112] Exchange Act Section 4A makes clear that, when it delegates an action, the Commission retains a discretionary right to review staff action, either on its own initiative or at the request of a party to that action.[113] If action taken by delegated authority were insufficient to meet the statutory deadline, the Commission would either be unable to delegate this function, or be faced with the possibility that this right of review would be thwarted; action taken by delegated authority close to the end of the statutory period would leave insufficient time for either the Commission or outside parties to seek review. Alternatively, to avoid this result, an action taken by delegated authority would have to be taken well before the end of the statutory period so the Commission could complete any review of the action before the underlying proposed rule change was deemed approved. And the Commission might have to issue its decision with insufficient time to engage in the independent and thoughtful analysis required by both the Exchange Act and the APA or otherwise have the order deemed approved before completing its deliberations.[114]

Nor does Exchange Act Section 4A(c) support BOX's argument. That provision states: ''If the right to exercise such review is declined, or if no such review is sought within the time stated in the rules promulgated by the Commission, then the action [taken by delegated authority] shall, for all purposes, including appeal or review thereof, be deemed the action of the Commission.'' [115] Contrary to BOX's assertion, this does not mean that an action taken by delegated authority shall '' 'be deemed the action of the Commission' *only* '[i]f the right to exercise such review is declined, or if no such review is sought within the time stated in the rules promulgated by the Commission.' '' [116] Section 4A is silent on the effect of a delegated action when Commission review is sought and granted.[117] And the Commission employed the rulemaking authority granted by Section 4A(b) to promulgate Rule 431(e), which provides that actions made pursuant to delegated authority are deemed actions of the Commission.[118]

III. Conclusion

For the reasons set forth above, the Commission does not find, pursuant to Section 19(b)(2) of the Exchange Act, that BOX has met its burden of demonstrating that the Proposed Rule Changes are consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange. *It is therefore ordered,* pursuant to Rule 431 of the Commission's Rules of Practice, that the Proposed Rule Changes (SR–BOX–2018–24; SR–BOX–2018–37; SR–BOX–2019–04) be, and hereby are, disapproved.

By the Commission.

J. Matthew DeLesDernier,

Assistant Secretary.

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entered pursuant to [delegated authority]''); Rule of Practice 431(f), 17 CFR 201.431(f) (giving an order by delegated authority operative effect, even when review has been sought, until a person receives actual notice that it was been stayed, modified, or reversed on review).

[108] *See* ''An Act to Authorize the Securities and Exchange Commission to Delegate Certain Functions,'' Public Law 87–592, 76 Stat. 394, 394–95 (1962).

[109] *See* Securities Act Amendments of 1975, Public Law 94–29, 89 Stat. 97.

[110] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010). Commission Rule of Practice 431(e), which states that actions performed by delegated authority shall be deemed the actions of the Commission, was originally enacted in 1963, and in its current form in 1995. *See* Exchange Act Release No. 35833 (June 9, 1995), 60 FR 32738, 32823 (June 23, 1995), *https://www.govinfo.gov/content/pkg/FR-1995-06-23/pdf/95-14750.pdf* (noting that Rule of Practice 431(e) replaced previous Rule 26(e)); Exchange Act Release No. 7031, 1963 WL 64555, at *12 (Mar. 8, 1963) (''Any determination at a delegated level shall have immediate effect and be deemed the action of the Commission.'').

[111] *See* Securities Act Amendments of 1975, 89 Stat. 97.

[112] *See Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and No. 2, Regarding the Acquisition of CHX Holdings, Inc. by North America Casin Holdings, Inc.,* Exchange Act Release No. 82727 (Feb. 15, 2018) at 21–23, *https://www.sec.gov/rules/sro/chx/2018/34-82727.pdf.*

[113] *See* 15 U.S.C. 78d–1(b).

[114] *See Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) (''[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'''') (quoting *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168 (1962)).

[115] 15 U.S.C. 78d–1(c).

[116] The emphasis and alteration are in BOX's filing. The language in the internal quotation marks is in Section 4A(c), 15 U.S.C. 78d–1(c). The word ''only'' is not. *Id.*

[117] *Cf. Indiana Bell Telephone Co., Inc.* v. *McCarthy,* 362 F.3d 378, 387 (7th Cir. 2004) (noting that decisions made pursuant to delegated authority represent actions of the agency).

[118] *See* Exchange Act Section 4A(a), 15 U.S.C. 78d–1(a) (''[T]he Commission shall have the authority to delegate, by published order or rule, any of its functions . . . .''); *see also* Exchange Act Release No. 35833 (June 9, 1995), 60 FR 32738, 32777 (June 23, 1995), *https://www.govinfo.gov/content/pkg/FR-1995-06-23/pdf/95-14750.pdf* (noting that Commission was relying on the authority granted by Exchange Act Section 4A, among other provisions, in promulgating the Rule 430 series); Exchange Act Release No. 7031, 1963 WL 64555, at *1 (Mar. 8, 1963) (noting that original rule relied on same language from Section 4A(a)).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88505; File No. SR–BX–2020–005]

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Current Pilot Program Related to BX Rule 11890

March 27, 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 March 23, 2020, Nasdaq BX, Inc. (''BX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the current pilot program related to BX Rule 11890 (Clearly Erroneous Transactions) by six months, to the close of business on October 20, 2020.

The text of the proposed rule change is available on the Exchange's website at *http://nasdaqbx.cchwallstreet.com/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to extend the current pilot program related to Rule 11890, Clearly Erroneous Transactions, to the close of business on October 20, 2020. This change is being proposed to allow the Exchange to further consider a permanent proposal for clearly erroneous execution reviews.

On September 10, 2010, the Commission approved, on a pilot basis, changes to Rule 11890 that, among other things: (i) Provided for uniform treatment of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (ii) reduced the ability of the Exchange to deviate from the objective standards set forth in the rule.[3] In 2013, the Exchange adopted a provision designed to address the operation of the Plan.[4] Finally, in 2014, the Exchange adopted two additional provisions providing that: (i) A series of transactions in a particular security on one or more trading days may be viewed as one event if all such transactions were effected based on the same fundamentally incorrect or grossly misinterpreted issuance information resulting in a severe valuation error for all such transactions; and (ii) in the event of any disruption or malfunction in the operation of the electronic communications and trading facilities of an Exchange, another SRO, or responsible single plan processor in connection with the transmittal or receipt of a trading halt, an Officer, acting on his or her own motion, shall nullify any transaction that occurs after a trading halt has been declared by the primary listing market for a security and before such trading halt has officially ended according to the primary listing market.[5] These changes are currently scheduled to operate for a pilot period that concludes on April 20, 2020.[6]

If the pilot period is not either extended, replaced or approved as permanent, the prior versions of paragraphs (a)(2)(C), (c)(1), (b)(i), and (b)(ii) shall be in effect, and the provisions of paragraphs (g) through (i) shall be null and void.[7] In such an event, the remaining sections of Rule 11890 would continue to apply to all transactions executed on the Exchange. The Exchange understands that the other national securities exchanges and Financial Industry Regulatory Authority (''FINRA'') will also file similar proposals to extend their respective clearly erroneous execution pilot programs, the substance of which are identical to Rule 11890.

The Exchange does not propose any additional changes to Rule 11890. The Exchange believes the benefits to market participants from the more objective clearly erroneous executions rule should continue on a limited six month pilot basis after the current expiration date to allow the Exchange to continue to assess whether additional changes should also be made to the operation of the clearly erroneous execution rules. Extending the effectiveness of Rule 11890 for an additional six months should provide the Exchange, other national securities exchanges and FINRA additional time to consider further amendments to the clearly erroneous execution rules.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of Section 6(b) of the Act,[8] in general, and Section 6(b)(5) of the Act,[9] in particular, in that it is 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 and not to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed rule change promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous. The Exchange believes that extending the clearly erroneous execution pilot under Rule 11890 for an additional six months would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. equities markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Based on the foregoing, the Exchange believes the amended Clearly Erroneous Transactions rule should continue to be in effect on a pilot basis while the Exchange, other national securities exchanges and FINRA consider a permanent proposal for clearly erroneous execution reviews.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposal would ensure the continued, uninterrupted operation of harmonized clearly erroneous execution rules across the U.S. equities markets while the Exchange, other national securities exchanges and FINRA consider further amendments to these rules. The Exchange understands that the other national securities exchanges and FINRA will also file similar proposals to extend their respective clearly erroneous execution pilot programs. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

[3] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–BX–2010–040).

[4] *See* Securities Exchange Act Release No. 68818 (February 1, 2013), 78 FR 9100 (February 7, 2013) (SR–BX–2013–010).

[5] *See* Securities Exchange Act Release No. 72434 (June 19, 2014), 79 FR 36110 (June 25, 2014) (SR–BX–2014–021).

[6] *See* Securities Exchange Act Release No. 87359 (October 18, 2019), 84 FR 57131 (October 24, 2019) (SR–BX–2019–037).

[7] *See* notes 3–5, *supra.* The prior versions of paragraphs (a)(2)(C), (c)(1), (b)(i), and (b)(ii) generally provided greater discretion to the Exchange with respect to breaking erroneous trades.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [10] and Rule 19b–4(f)(6) thereunder.[11]

A proposed rule change filed under Rule 19b–4(f)(6) [12] normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b–4(f)(6)(iii) [13] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become effective and operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the current clearly erroneous execution pilot program to continue uninterrupted, without any changes, while the Exchange and the other national securities exchanges consider a permanent proposal for clearly erroneous execution reviews. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[14]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule 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–BX–2020–005 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2020–005. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 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–BX–2020–005 and should be submitted on or before April 23, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–06854 Filed 4–1–20; 8:45 am]

BILLING CODE 8011–01–P

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6)(iii).

[14] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88500; File No. SR–CboeEDGX–2020–013]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Current Pilot Program Related to EDGX Rule 11.15, Clearly Erroneous Executions, to the Close of Business on October 20, 2020

March 27, 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 March 18, 2020, Cboe EDGX Exchange, Inc. (''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (''EDGX'' or the ''Exchange'') is filing with the Securities and Exchange Commission (the ''Commission'') a proposed rule change to extend the current pilot program related to EDGX Rule 11.15, Clearly Erroneous Executions, to the close of business on October 20, 2020. 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

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 purpose of this filing is to extend the effectiveness of the Exchange's current rule applicable to Clearly Erroneous Executions to the close of business on October 20, 2020. Portions of Rule 11.15, explained in further detail below, are currently operating as a pilot program set to expire on April 20, 2020.[5]

On September 10, 2010, the Commission approved, on a pilot basis, changes to EDGX Rule 11.15 that, among other things: (i) Provided for uniform treatment of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; 16 and [sic] (ii) reduced the ability of the Exchange to deviate from the objective standards set forth in the rule.[6] In 2013, the Exchange adopted a provision designed to address the operation of the Plan.[7] Finally, in 2014, the Exchange adopted two additional provisions providing that: (i) A series of transactions in a particular security on one or more trading days may be viewed as one event if all such transactions were effected based on the same fundamentally incorrect or grossly misinterpreted issuance information resulting in a severe valuation error for all such transactions; and (ii) in the event of any disruption or malfunction in the operation of the electronic communications and trading facilities of an Exchange, another SRO, or responsible single plan processor in connection with the transmittal or receipt of a trading halt, an Officer, acting on his or her own motion, shall nullify any transaction that occurs after a trading halt has been declared by the primary listing market for a security and before such trading halt has officially ended according to the primary listing market.[8]

On December 26, 2018, the Commission published the proposed Eighteenth Amendment[9] to the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS under the Act (the ''Limit Up-Limit Down Plan'' or the ''Plan'')[10] to allow the Plan to operate on a permanent, rather than pilot, basis. On April 8, 2019, the Exchange amended EDGX Rule 11.15 to untie the pilot program's effectiveness from that of the Plan and to extend the pilot's effectiveness to the close of business on October 18, 2019 in order allow the Exchange and other national securities exchanges additional time to consider further amendments, if any, to the clearly erroneous execution rules in light of the proposed Eighteenth Amendment to the Plan.[11] On April 17, 2019, the Commission published an approval of the Eighteenth Amendment to allow the Plan to operate on a permanent, rather than pilot, basis.[12] Finally, on October 21, 2019, the Exchange amended EDGX Rule 11.15 to extend the pilot's effectiveness to the close of business on April 20, 2020.[13]

The Exchange now proposes to amend EDGX Rule 11.15 to extend the pilot's effectiveness to the close of business on October 20, 2020. The Exchange understands that the other national securities exchanges and Financial Industry Regulatory Authority (''FINRA'') will also file similar proposals to extend their respective clearly erroneous execution pilot programs, the substance of which are identical to EDGX Rule 11.15.

The Exchange does not propose any additional changes to EDGX Rule 11.15. The Exchange believes the benefits to market participants from the more objective clearly erroneous executions rule should continue on a limited six month pilot basis. As the Plan was approved by the Commission to operate on a permanent, rather than pilot, basis the Exchange intends to assess whether additional changes should also be made to the operation of the clearly erroneous execution rules. Extending the effectiveness of EDGX Rule 11.15 for an additional six months should provide the Exchange and other national securities exchanges additional time to consider further amendments, if any, to the clearly erroneous execution rules.

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.[14] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[15] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[16] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that extending the clearly erroneous execution pilot under EDGX Rule 11.15 for an additional six months would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. equities markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Based on the foregoing, the Exchange believes the amended clearly erroneous executions rule should continue to be in effect on a pilot basis while the Exchange and the other

[5] *See* Securities Exchange Act Release No. 87367 (October 21, 2019), 84 FR 57519 (October 25, 2019) (SR–CboeEDGX–2019–062).

[6] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–EDGX–2010–03).

[7] *See* Securities Exchange Act Release No. 68814 (February 1, 2013), 78 FR 9086 (February 7, 2013) (SR–EDGX–2013–06).

[8] *See* Securities Exchange Act Release No. 72434 (June 19, 2014), 79 FR 36110 (June 25, 2014) (SR–EDGX–2014–12).

[9] *See* Securities Exchange Act Release No. 84843 (December 18, 2018), 83 FR 66464 (December 26, 2018) (File No. 4–631) (''Eighteenth Amendment'').

[10] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

[11] *See* Securities Exchange Act Release No. 87364 (April 10, 2019), 84 FR 15652 (April 16, 2019) (SR–CboeEDGX–2019–018).

[12] *See* Securities Exchange Act Release No. 85623 (April 11, 2019), 84 FR 16086 (April 17, 2019) (File No. 4–631).

[13] *See supra* note 5.

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

[16] *Id.*

national securities exchanges consider and develop a permanent proposal for clearly erroneous execution reviews.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange understands that FINRA and other national securities exchanges will also file similar proposals to extend their respective clearly erroneous execution pilot programs. Thus, the proposed rule change will help to ensure consistency across market centers without implicating any competitive issues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No comments were solicited or received on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act [17] and subparagraph (f)(6) of Rule 19b–4 thereunder.[18]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule 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–2020–013 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeEDGX–2020–013. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeEDGX–2–2020–013 and should be submitted on or before April 23, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–06852 Filed 4–1–20; 8:45 am]

BILLING CODE 8011–01–P

[17] 15 U.S.C. 78s(b)(3)(A)(iii).

[18] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[19] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 16405 and # 16406; TENNESSEE Disaster Number TN–00120]

Presidential Declaration of a Major Disaster for Public Assistance Only for the State of Tennessee

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Tennessee (FEMA–4476–DR), dated 03/24/2020.

Incident: Severe Storms, Tornadoes, Straight-line Winds, and Flooding.

Incident Period: 03/03/2020.

DATES: Issued on 03/24/2020.

Physical Loan Application Deadline Date: 05/25/2020.

Economic Injury (EIDL) Loan Application Deadline Date: 12/24/2020.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 03/24/2020, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Benton, Carroll, Davidson, Smith, Wilson, Putnam.

The Interest Rates are:

For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere	2.750
Non-Profit Organizations without Credit Available Elsewhere	2.750
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere	2.750

The number assigned to this disaster for physical damage is 16405C and for economic injury is 164060.

(Catalog of Federal Domestic Assistance Number 59008)

James Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2020–06876 Filed 4–1–20; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

Interest Rates

The Small Business Administration publishes an interest rate called the optional ''peg'' rate (13 CFR 120.214) on a quarterly basis. This rate is a weighted average cost of money to the government for maturities similar to the average SBA direct loan. This rate may be used as a base rate for guaranteed fluctuating interest rate SBA loans. This rate will be 1.88 percent for the April–June quarter of FY 2020.

Pursuant to 13 CFR 120.921(b), the maximum legal interest rate for any third party lender's commercial loan which funds any portion of the cost of a 504 project (see 13 CFR 120.801) shall be 6% over the New York Prime rate or, if that exceeds the maximum interest rate permitted by the constitution or laws of a given State, the maximum interest rate will be the rate permitted by the constitution or laws of the given State.

Linda Reilly,

Chief, 504 Loan Division, Office of Financial Assistance.

[FR Doc. 2020–06827 Filed 4–1–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF STATE

[Public Notice 11038]

60-Day Notice of Proposed Information Collection: Affidavit Regarding a Change of Name

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this Notice is to allow 60 days for public comment preceding submission of the collection to OMB.

DATES: The Department will accept comments from the public up to *June 1, 2020.*

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

- *Web:* Persons with access to the internet may comment on this notice by going to *www.Regulations.gov*. You can search for the document by entering ''Docket Number: DOS–2020–0004'' in the Search field. Then click the ''Comment Now'' button and complete the comment form.
- *Email: PPTFormsOfficer@state.gov.*
- *Regular Mail:* Send written comments to: PPT Forms Officer, U.S. Department of State, Bureau of Consular Affairs, Passport Services, Office of Program Management and Operational Support, 44132 Mercure Cir., P.O. Box 1199, Sterling, VA 20166–1199.

You must include the DS form number (if applicable), information collection title, and the OMB control number in any correspondence.

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Affidavit Regarding a Change of Name.
- *OMB Control Number:* 1405–0133.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* Department of State, Bureau of Consular Affairs, Passport Services, Office of Program Management and Operational Support (CA/PPT/S/PMO/CR).
- *Form Number:* DS–60.
- *Respondents:* Individuals.
- *Estimated Number of Respondents:* 2,592.
- *Estimated Number of Responses:* 2,592.
- *Average Time Per Response:* 40 minutes.
- *Total Estimated Burden Time:* 1,728 hours.
- *Frequency:* On Occasion.
- *Obligation to Respond:* Required to Obtain a Benefit.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

The Affidavit Regarding a Change of Name is submitted in conjunction with an application for a U.S. passport. It is used by Passport Services to collect information for the purpose of establishing that a passport applicant has adopted a new name without formal court proceedings or by marriage and has publicly and exclusively used the adopted name over a period of time (at least five years).

Methodology

When needed by an applicant for a passport, the Affidavit Regarding a Change of Name is either provided by the Department or downloaded from the Department's website at *eforms.state.gov* and completed by the affiant. It must be signed in the presence of a passport agent, passport acceptance agent, or notary public.

Zachary Parker,

Acting Director.

[FR Doc. 2020–06900 Filed 4–1–20; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Availability of the Record of Decision for the SR–241/SR–91 Tolled Express Lanes Connector Project Supplemental Environmental Impact Report/Environmental Impact Statement: Orange County, California

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice of availability of the Record of Decision (ROD) for the SR–241/SR–91 Tolled Express Lanes Connector Project Supplemental Environmental Impact Report/Environmental Impact Statement (Supplemental EIR/EIS).

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended (NEPA), and the Federal Land Policy and Management Act of 1976, as amended, the California Department of Transportation (Caltrans) has prepared a Record of Decision (ROD) for the Final Supplemental Environmental Impact Report/Environmental Impact Statement

(Supplemental EIR/EIS) developed for the SR–241/SR–91 Tolled Express Lanes Connector Project. By this Notice, the FHWA is announcing the availability of the ROD. This supplemental environmental analysis was prepared to analyze buildout of the Eastern Transportation Corridor (ETC), as approved in 1994. Caltrans District 12 issues this ROD to advise the public of their decision to approve the proposed tolled express lanes connector between State Route 241 and the 91 Express Lanes.

ADDRESSES: The ROD and other project records are available at the Caltrans District 12, 1750 East Fourth Street, Suite 100, Santa Ana, California 92705 and Foothill Eastern Transportation Corridor Agency (F/ETCA) office, 125 Pacifica, Suite 120, Irvine, California 92618.

FOR FURTHER INFORMATION CONTACT: Smita Deshpande, Generalist Branch Chief, Caltrans-District 12, ''Attn: 241–91 ROD'', 1750 East Fourth Street, Suite 100, Santa Ana, California 92705, telephone (657) 328–6151, or email *D12TolledExpressLanesConnector@dot.ca.gov.* For FHWA, contact David Tedrick, telephone (916) 498–5024, or email *david.tedrick@dot.gov.*

SUPPLEMENTARY INFORMATION: The California Department of Transportation (Caltrans) is the lead agency under the California Environmental Quality Act (CEQA). Caltrans is also the lead agency under the National Environmental Policy Act of 1969 (NEPA), as assigned by the Federal Highway Administration (FHWA), in accordance with NEPA (42 United States Code [U.S.C.] 4321 *et seq.*); and the Council on Environmental Quality (CEQ) Regulations implementing NEPA (40 Code of Federal Regulations [CFR] 1500–1508). Caltrans District 12, in cooperation with the Foothill/Eastern Transportation Corridor Agency (F/ETCA) proposes the State Route 241/State Route 91 (SR–241/SR–91) Express Lanes Connector to construct a median-to-median connector between SR–241 and the tolled lanes in the median of SR–91 (91 Express Lanes). The Proposed Project proposes to improve access and reduce congestion at the SR–241/SR–91 interchange by providing a direct connector between SR–241 and the 91 Express Lanes. The Propose Project, located at the junction of SR–241 and SR–91 in the cities of Anaheim, Yorba Linda, and Corona and the counties of Orange and Riverside, would provide improved access between SR–241 and SR–91 and is proposed to be a tolled facility with a total length of approximately 8.7 miles (mi). Currently, there is no direct connection between the SR–241 toll road and the 91 Express Lanes. SR–241 is a tolled facility, starting at the Oso Parkway interchange, in south Orange County, to its terminus at SR–91. The 91 Express Lanes is a two-lane tolled facility, in each direction, located in the median of SR–91, from State Route 55 (SR–55), to the Orange/Riverside County line (east of the SR–241 interchange). The existing SR–241/SR–91 interchange connects northbound SR–241 to non-tolled general purpose lanes of eastbound and westbound SR–91 and the eastbound and westbound SR–91 to southbound SR–241.

The Final Supplemental EIR/EIS was signed on January 7, 2020. The Notice of Availability for the Final Supplemental EIR/EIS was posted in the **Federal Register** on January 17, 2020 for a 30-day period ending on February 18, 2020. During the 30-day review period, Caltrans received letters and email correspondence from seven agencies. The Orange County Transportation Authority (OCTA) acknowledged receipt of the notice for the approval of the Final Supplemental EIR/EIS and did not provide further comments. The Orange County Cemetery District requested to be included in future correspondence pertaining to the Project. The California Department of Fish and Wildlife (CDFW), stated that they have no comments at this time. The California Transportation Commission (CTC) stated that they have no comments at this time and should be notified as soon as the environmental process is finalized. The Metropolitan Water District of Southern California (MWD) sent an email requesting a copy of the project location map and also provided a formal comment letter requesting that any design plans be submitted for their review and written approval to avoid potential conflicts with their facilities and right-of-way. The Bureau of Land Management (BLM) stated that they have no comments at this time. The United States Army Corps of Engineers (USACE) inquired with Caltrans staff regarding future coordination for funding and permitting. No comments in protest of the Final Supplemental EIR/EIS were received prior to issuance of the ROD.

Issued on: March 25, 2020.

Tashia J. Clemmons,

Director, Planning and Environmental, Federal Highway Administration, Sacramento, California.

[FR Doc. 2020–06916 Filed 4–1–20; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2020–0106]

Parts and Accessories Necessary for Safe Operation; Application for an Exemption From Nauto, Inc.

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of application for exemption; request for comments.

SUMMARY: The Federal Motor Carrier Safety Administration (FMCSA) requests public comment on an application for exemption from Nauto, Inc. (Nauto) to allow its multi-sensor device to be mounted lower in the windshield on commercial motor vehicles than is currently permitted.

DATES: Comments must be received on or before May 4, 2020.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket ID FMCSA–2020–0106 using any of the following methods:

- *Website: http://www.regulations.gov.* Follow the instructions for submitting comments on the Federal electronic docket site.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.
- *Hand Delivery:* Ground Floor, Room W12–140, DOT Building, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m. e.t., Monday-Friday, except Federal holidays.

Instructions: All submissions must include the Agency name and docket number for this notice. For detailed instructions on submitting comments and additional information on the exemption process, see the ''Public Participation'' heading below. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the ''Privacy Act'' heading for further information.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or to Room W12–140, DOT Building, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments

from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

Public participation: The *http://www.regulations.gov* website is generally available 24 hours each day, 365 days each year. You may find electronic submission and retrieval help and guidelines under the ''help'' section of the *http://www.regulations.gov* website as well as the DOT's *http://docketsinfo.dot.gov* website. If you would like notification that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgment page that appears after submitting comments online.

FOR FURTHER INFORMATION CONTACT: Mr. José R. Cestero, Vehicle and Roadside Operations Division, Office of Carrier, Driver, and Vehicle Safety, MC–PSV, (202) 366–5541, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

I. Public Participation and Request for Comments

FMCSA encourages you to participate by submitting comments and related materials.

Submitting Comments

If you submit a comment, please include the docket number for this notice (FMCSA–2020–0106), indicate the specific section of this document to which the comment applies, and provide a reason for suggestions or recommendations. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so the Agency can contact you if it has questions regarding your submission.

To submit your comments online, go to *www.regulations.gov* and put the docket number, ''FMCSA–2020–0106'' in the ''Keyword'' box, and click ''Search.'' When the new screen appears, click on ''Comment Now!'' button and type your comment into the text box in the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope. FMCSA will consider all comments and material received during the comment period and may grant or not grant this application based on your comments.

II. Legal Basis

FMCSA has authority under 49 U.S.C. 31315(b) to grant exemptions from certain parts of the Federal Motor Carrier Safety Regulations (FMCSRs). FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews safety analyses and public comments submitted, and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305). The decision of the Agency must be published in the **Federal Register** (49 CFR 381.315(b)) with the reasons for denying or granting the application and, if granted, the name of the person or class of persons receiving the exemption, and the regulatory provision from which the exemption is granted. The notice must also specify the effective period and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

III. Background

Under 49 CFR 381.315(a), FMCSA must publish a notice of each exemption request in the **Federal Register**. The Agency must provide the public with an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews the safety analyses and the public comments and determines whether granting the exemption would likely achieve a level of safety equivalent to or greater than the level that would be achieved by the current regulation (49 CFR 381.305). The decision of the Agency must be published in the **Federal Register** (49 CFR 381.315(b)). If the Agency denies the request, it must state the reason for doing so. If the decision is to grant the exemption, the notice must specify the person or class of persons receiving the exemption and the regulatory provision or provisions from which an exemption is granted. The notice must specify the effective period of the exemption (up to 5 years) and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.315(c) and 49 CFR 381.300(b)).

IV. Nauto's Application for Exemption

The Federal Motor Carrier Safety Regulations require devices meeting the definition of ''vehicle safety technology,'' including Nauto's multi-sensor device, to be mounted (1) not more than 4 inches below the upper edge of the area swept by the windshield wipers, or (2) not more than 7 inches above the lower edge of the area swept by the windshield wipers, and outside the driver's sight lines to the road and highway signs and signals. Nauto has applied for an exemption from 49 CFR 393.60(e)(1) to allow its multi-sensor device to be mounted lower in the windshield than is currently permitted. A copy of the application is included in the docket referenced at the beginning of this notice.

V. Request for Comments

In accordance with 49 U.S.C. 31315(b)(6), FMCSA requests public comment from all interested persons on Nauto's application for an exemption from 49 CFR 393.60(e)(1). All comments received before the close of business on the comment closing date indicated at the beginning of this notice will be considered and will be available for examination in the docket at the location listed under the ''Addresses'' section of this notice. Comments received after the comment closing date will be filed in the public docket and will be considered to the extent practicable. In addition to late comments, FMCSA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should continue to examine the public docket for new material.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020–06888 Filed 4–1–20; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2019–0260]

Parts and Accessories Necessary for Safe Operation; Application for an Exemption From National Tank Truck Carriers, Inc.

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of application for exemption; request for comments.

SUMMARY: The Federal Motor Carrier Safety Administration (FMCSA) requests public comment on an application for exemption from National Tank Truck Carriers, Inc. (NTTC) to allow motor carriers operating tank trailers to install a red or amber brake-activated pulsating lamp positioned in the upper center position or in an upper dual outboard position on the rear of the trailers in addition to the steady-burning brake lamps required by the Federal Motor Carrier Safety Regulations (FMCSR).

DATES: Comments must be received on or before May 4, 2020.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket ID FMCSA–2019–0260 using any of the following methods:

- *Website: http://www.regulations.gov.* Follow the instructions for submitting comments on the Federal electronic docket site.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.
- *Hand Delivery:* Ground Floor, Room W12–140, DOT Building, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m. e.t., Monday-Friday, except Federal holidays.

Instructions: All submissions must include the Agency name and docket number for this notice. For detailed instructions on submitting comments and additional information on the exemption process, see the ''Public Participation'' heading below. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the ''Privacy Act'' heading for further information.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or to Room W12–140, DOT Building, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

Public participation: The *http://www.regulations.gov* website is generally available 24 hours each day, 365 days each year. You may find electronic submission and retrieval help and guidelines under the ''help'' section of the *http://www.regulations.gov* website as well as the DOT's *http://docketsinfo.dot.gov* website. If you would like notification that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgment page that appears after submitting comments online.

FOR FURTHER INFORMATION CONTACT: Mr. Luke Loy, Vehicle and Roadside Operations Division, Office of Carrier, Driver, and Vehicle Safety, MC–PSV, (202) 366–0676, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

Background

Under 49 CFR 381.315(a), FMCSA must publish a notice of each exemption request in the **Federal Register**. The Agency must provide the public with an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews the safety analyses and the public comments and determines whether granting the exemption would likely achieve a level of safety equivalent to or greater than the level that would be achieved by the current regulation (49 CFR 381.305).

The decision of the Agency must be published in the **Federal Register** (49 CFR 381.315(b)). If the Agency denies the request, it must state the reason for doing so. If the decision is to grant the exemption, the notice must specify the person or class of persons receiving the exemption and the regulatory provision or provisions from which an exemption is granted. The notice must specify the effective period of the exemption (up to 5 years) and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.315(c) and 49 CFR 381.300(b)).

NTTC Application for Exemption

The FMCSRs require all exterior lamps (both required lamps and any additional lamps) to be steady-burning, with the exception of turn signal lamps, hazard warning signal lamps, school bus warning lamps, amber warning lamps or flashing warning lamps on tow trucks and commercial motor vehicles transporting oversized loads, and warning lamps on emergency and service vehicles authorized by State or local authorities. NTTC has applied for an exemption from 49 CFR 393.25(e) to allow motor carriers operating tank trailers to install a red or amber brake-activated pulsating lamp positioned in the upper center position or in an upper dual outboard position on the rear of the trailers in addition to the steady-burning brake lamps required by the FMCSRs. A copy of the application is included in the docket referenced at the beginning of this notice.

Request for Comments

In accordance with 49 U.S.C. 31315(b)(6), FMCSA requests public comment from all interested persons on NTTC's application. All comments received before the close of business on the comment closing date indicated at the beginning of this notice will be considered and will be available for examination in the docket at the location listed under the ''Addresses'' section of this notice. Comments received after the comment closing date will be filed in the public docket and will be considered to the extent practicable. In addition to late comments,

FMCSA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should continue to examine the public docket for new material.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020–06887 Filed 4–1–20; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open meeting of the Taxpayer Advocacy Panel Taxpayer Communications Project Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Taxpayer Communications Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. Due to the current health issue the nation is facing, we will not be able to meet the 15-calendar notice threshold. This meeting will still be held via teleconference.

DATES: The meeting will be held Tuesday, April 14, 2020.

FOR FURTHER INFORMATION CONTACT: Cedric Jeans at 1–888–912–1227 or 901–707–3935.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that a meeting of the Taxpayer Advocacy Panel Taxpayer Communications Project Committee will be held Tuesday, April 14, 2020, at 12:00 p.m. Eastern Time. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Cedric Jeans. For more information please contact Cedric Jeans at 1–888–912–1227 or 901–707–3935, or write TAP Office, 5333 Getwell Road, Memphis, TN 38118 or contact us at the website: *http://www.improveirs.org.* The agenda will include various IRS issues.

Dated: March 27, 2020.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2020–06840 Filed 4–1–20; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Recruitment Notice for the Taxpayer Advocacy Panel: Extension of Recruitment Period

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Extension of Recruitment Period.

SUMMARY: Notice of Open Season for Recruitment of IRS Taxpayer Advocacy Panel (TAP) Members.

DATES: February 18, 2020 through April 20, 2020.

FOR FURTHER INFORMATION CONTACT: Lisa Billups at 214–413–6523 (not a toll-free call)

SUMMARY: Notice of extension of the Taxpayer Advocacy Panel (TAP) recruitment period. In the **Federal Register** notice that was originally published on February 14, 2020, (Volume 85, Number 31, Page 8621) the **Federal Register** notice reported the recruitment period for the Taxpayer Advocacy Panel (TAP) was open from February 18, 2020 to March 30, 2020. This period is being extended to accept applications until April 20, 2020. All other details about the recruitment period remain unchanged.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Department of the Treasury and the Internal Revenue Service (IRS) are inviting individuals to help improve the nation's tax agency by applying to be members of the Taxpayer Advocacy Panel (TAP). The mission of the TAP is to listen to taxpayers, identify issues that affect taxpayers, and make suggestions for improving IRS service and customer satisfaction. The TAP serves as an advisory body to the Secretary of the Treasury, the Commissioner of Internal Revenue, and the National Taxpayer Advocate. TAP members will participate in subcommittees that channel their feedback to the IRS through the Panel's parent committee.

The IRS is seeking applicants who have an interest in good government, a personal commitment to volunteer approximately 200 to 300 hours a year, and a desire to help improve IRS customer service. As a federal advisory committee, TAP is required to have a fairly balanced membership in terms of the points of view represented. Thus, TAP membership represents a cross-section of the taxpaying public with at least one member from each state, the District of Columbia and Puerto Rico, in addition to one member representing international taxpayers. For application purposes, ''international taxpayers'' are defined broadly to include U.S. citizens working, living, or doing business abroad or in a U.S. territory. Potential candidates must be U.S. citizens, not a current employee of any Bureau of the Treasury Department or have worked for any Bureau of the Treasury Department within the three years of December 1 of the current year and must pass a federal tax compliance check and a Federal Bureau of Investigation criminal background investigation. Applicants who practice before the IRS must be in good standing with the IRS (meaning not currently under suspension or disbarment). Federally-registered lobbyists cannot be members of the TAP. The IRS is seeking members or alternates in the following locations: Alabama, Alaska, Arizona, California, DC, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

TAP members are a diverse group of citizens who represent the interests of taxpayers, from their respective geographic locations as well as taxpayers overall. Members provide feedback from a taxpayer's perspective on ways to improve IRS customer service and administration of the federal tax system, by identifying grassroots taxpayer issues. Members should have good communication skills and be able to speak to taxpayers about TAP and its activities, while clearly distinguishing between TAP positions and their personal viewpoints.

Interested applicants should visit the TAP website at *www.improveirs.org* for more information about TAP. Applications may be submitted online at *www.usajobs.gov.* For questions about TAP membership, call the TAP toll-free number, 1–888–912–1227 and select prompt 5. Callers who are outside of the U.S. should call 214–413–6523 (not a toll-free call).

The opening date for submitting applications is February 18, 2020 and the deadline for submitting applications is April 20, 2020. Interviews will be held. The Department of the Treasury will review the recommended candidates and make final selections. New TAP members will serve a three-year term starting in December 2020. (Note: highly-ranked applicants not selected as members may be placed on a roster of alternates who will be eligible to fill future vacancies that may occur on the Panel.)

Questions regarding the selection of TAP members may be directed to Lisa Billups, Taxpayer Advocacy Panel, Internal Revenue Service, 1111 Constitution Avenue NW, TA:TAP Room 1509, Washington, DC 20224, or 214–413–6523 (not a toll-free call).

Dated: March 30, 2020.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2020–06895 Filed 4–1–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF VETERANS AFFAIRS

Geriatrics and Gerontology Advisory Group, Notice of Meeting; Cancellation

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act that a meeting of the Geriatrics and Gerontology Advisory Group (the Committee) that was scheduled for April 1, 2020 has been postponed. Details on a future meeting will be posted at a later date.

Dated: March 30, 2020.

LaTonya L. Small,

Federal Advisory Committee Management Officer.

[FR Doc. 2020–06903 Filed 4–1–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF VETERANS AFFAIRS

National Research Advisory Council; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, that the National Research Advisory Council will hold a meeting on Wednesday, June 3, 2020, at 1100 1st, NE, Room 104, Washington, DC 20002. The meeting will convene at 9:00 a.m. and end at 3:30 p.m. This meeting is open to the public.

The purpose of the National Research Advisory Council is to advise the Secretary on research development conducted by the Veterans Health Administration, including policies and programs targeting the high priority of Veterans' health care needs.

On June 3, 2020, the agenda will include a discussion regarding a site visit, PREVENT, and a discussion on forming a sub-committee. Also, the Committee will explore potential recommendations to be included in the next annual report. No time will be allocated at this meeting for receiving oral presentations from the public. Members of the public wanting to attend, have questions or presentations to present may contact Dr. Marisue Cody, Designated Federal Officer, Office of Research and Development (10X2), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, at (202) 443–5681, or by email at *Marisue.Cody@va.gov* no later than close of business on May 27, 2020. All questions and presentations will be presented during the public comment section of the meeting. Because the meeting is being held in a Government building, a photo I.D. must be presented at the Guard's Desk as a part of the clearance process. Any member of the public seeking additional information should contact Dr. Cody at the above phone number or email address noted above.

Dated: March 27, 2020.

LaTonya L. Small,

Federal Advisory Committee Management Officer.

[FR Doc. 2020–06826 Filed 4–1–20; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

Vol. 85 Thursday,

No. 64 April 2, 2020

Part II

Department of Education

34 CFR Parts 600 and 668

Distance Education and Innovation; Proposed Rule

DEPARTMENT OF EDUCATION

34 CFR Parts 600 and 668

[Docket ID ED–2018–OPE–0076]

RIN 1840–AD38

Distance Education and Innovation

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the general, establishing eligibility, maintaining eligibility, and losing eligibility sections of the Institutional Eligibility regulations issued under the Higher Education Act of 1965, as amended (HEA), related to distance education and innovation. In addition, the Secretary proposes to amend the Student Assistance General Provisions regulations issued under the HEA.

DATES: The U.S. Department of Education (the ''Department'' or ''we'') must receive your comments on or before May 4, 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.

If you are submitting comments electronically, we strongly encourage you to submit any comments or attachments in Microsoft Word format. If you must submit a comment in Adobe Portable Document Format (PDF), we strongly encourage you to convert the PDF to print-to-PDF format or to use some other commonly used searchable text format. *Please do not submit the PDF in a scanned format.* Using a print-to-PDF format allows the Department to electronically search and copy certain portions of your submissions.

- *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:* The Department strongly encourages commenters to submit their comments electronically. However, if you mail or deliver your comments about the proposed regulations, address them to Scott Filter, U.S. Department of Education, 400 Maryland Ave. SW, Mail Stop 294–42, Washington, DC 20202.

Privacy Note: The Department's policy is to make comments received from members of the public available for public viewing 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: For further information, contact Scott Filter at (202) 453–7249 or *Scott.Filter@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 (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose of This Regulatory Action

The purpose of these distance education and innovation regulations is to reduce barriers to innovation in the way institutions deliver educational materials and opportunities to students, and assess their knowledge and understanding, while providing reasonable safeguards to limit the risks to students and taxpayers. Institutions of higher education (IHEs) may be dissuaded from innovating because of added regulatory burden and uncertainty about how the Department will apply its regulations to new types of programs and methods of institutional educational delivery. In the past, the Department has not updated its regulations frequently enough to keep pace with new types of technology or educational innovations. For example, the current regulations do not address subscription-based programs or consider programs made possible through artificial intelligence-driven adaptive learning. On the other hand, the regulations refer to outdated technologies, in some cases based on statutory language, such as ''facsimile transmission'' and ''video cassettes, DVDs, and CD–ROMs.'' Because of the time it takes to implement new regulations, it is unlikely that the Department will be able to keep pace with developing technologies and other innovations in real time. These proposed regulations attempt to remove barriers that institutions face when trying to create and implement new and innovative ways of providing education to students, and also provide sufficient flexibility to ensure that future innovations we cannot yet anticipate have an opportunity to move forward without undue risk of a negative program finding or other sanction on an institution.

The Department's proposed regulations are also designed to protect students and taxpayers from unreasonable risks. Inadequate consumer information could result in students enrolling in programs that will not help them meet their goals. In addition, institutions adopting innovative methods of educating students may expend taxpayer funds in ways that were not contemplated by Congress or the Department, resulting in greater risk to the taxpayers of waste, fraud, and unnecessary spending. These proposed regulations attempt to limit risks to students and taxpayers resulting from innovation by delegating various oversight functions to the bodies best suited to conduct that oversight—States and accreditors. This delegation of authority through the higher education regulatory triad entrusts oversight of most consumer protections to States, assurance of academic quality to accrediting agencies, and protection of taxpayer funds to the Department.

Through this regulatory action, the Department proposes to: (1) Amend the definitions of ''clock hour'' and ''credit hour'' to provide flexibility to distance education and other types of educational programs that emphasize demonstration of learning rather than seat time when measuring student outcomes, while still allowing those programs to participate in the Federal Student Aid programs authorized under title IV of the HEA (title IV, HEA programs), (2) amend the definitions of ''distance education'' and ''correspondence course'' to account for changes in distance education technology and the types of programs offered by institutions, *e.g.,* competency-based education (CBE) programs, (3) clarify, through new definitions, the requirements of regular and substantive interaction between students and instructors for a course to be considered distance education and not a correspondence course, (4) define ''incarcerated student'' and ''juvenile justice facility'' to clarify the Pell Grant eligibility requirements for incarcerated students, (5) allow students enrolled in foreign institutions to take courses at domestic institutions, (6) define ''subscription-based programs'' and establish the conditions for disbursement of title IV, HEA assistance in such programs, (7) clarify and simplify the requirements for ''direct assessment programs,'' including regulations for the determination of equivalent credit hours for such

programs, (8) define a ''week of instruction'' for asynchronous online programs to clarify how that term applies to distance education or correspondence courses, (9) amend regulations to ensure the treatment of students enrolled in distance or competency-based programs in a manner consistent with their peers in traditional programs, and (10) amend regulations regarding financial responsibility to codify and clarify requirements when there is an institutional change of ownership or control.

Summary of the Major Provisions of This Regulatory Action

The proposed regulations would—

- Clarify that when calculating the number of correspondence students, a student is considered ''enrolled in a correspondence course'' if correspondence courses constitute 50 percent or more of the courses in which the student enrolled during an award year;
- Limit the requirement for the Secretary's approval to an institution's first direct assessment program at each credential level;
- Require institutions to report to the Secretary when they add a second or subsequent direct assessment program or establish a written arrangement for an ineligible institution or organization to provide more than 25 percent, but no more than 50 percent, of a program;
- Require prompt action by the Department on any applications submitted by an institution to the Secretary seeking a determination that it qualifies as an eligible institution and any reapplications for a determination that the institution continues to meet the requirements to be an eligible institution for HEA programs;
- Allow students enrolled in eligible foreign institutions to complete up to 25 percent of an eligible program at an eligible institution in the United States; and clarify that, notwithstanding this provision, an eligible foreign institution may permit a Direct Loan borrower to perform research in the United States for not more than one academic year if the research is conducted during the dissertation phase of a doctoral program;
- Clarify the conditions under which a participating foreign institution may enter into a written arrangement with an ineligible entity;
- Provide flexibility to institutions to modify their curriculum at the recommendations of industry advisory boards and without relying on a traditional faculty-led decision-making process;
- Provide flexibility to institutions when conducting clock-to-credit hour conversions to eliminate confusion about the inclusion of homework time in the clock-hour determination;
- Clarify the eligibility requirements for a direct assessment program;
- Clarify, in consideration of the challenges to institutions posed by minimum program length standards associated with occupational licensing requirements, which vary from State to State, that an institution may demonstrate a reasonable relationship between the length of a program, as defined in 20 U.S.C. 1001(b)(1), and the entry-level requirements of the occupation for which that program prepares students;
- Clarify that a student is not considered to have withdrawn for purposes of determining the amount of title IV grant or loan assistance that the student earned if the student completes all the requirements for graduation for a non-term program or a subscription-based program, if the student completes one or more modules that comprise 50 percent or more of the number of days in the payment period, or if the institution obtains written confirmation that the student will resume attendance in a subscription-based or non-term program;
- Remove provisions pertaining to the use and calculation of the Net Present Value of institutional loans for the calculation of the 90/10 ratio for for-profit IHEs, because the provisions are no longer applicable;
- Clarify satisfactory academic progress requirements for non-term credit or clock programs, term-based programs that are not a subscription-based program, and subscription-based programs;
- Clarify that the Secretary will rely on the requirements established by an institution's accrediting agency or State authorizing agency to evaluate an institution's appeal of a final audit or program review determination that includes a finding about the institution's classification of a course or program as distance education, or the institution's assignment of credit hours;
- Clarify that the Secretary may deny an institution's application for certification or recertification to participate in the title IV, HEA programs if an institution is not financially responsible or does not submit its audits in a timely manner; and
- Clarify that an institution is not financially responsible if a person who exercises substantial ownership or control over an institution also exercised substantial ownership or control over another institution that closed without executing a viable teach-out plan or agreement.

Costs and Benefits: As further detailed in the *Regulatory Impact Analysis,* the benefits of the proposed regulations include—(1) updating and clarifying definitions of key terms related to distance education, correspondence courses, direct assessment and competency-based programs to support the continued development of these innovative educational methods; (2) identifying a disbursement process for a subscription model for competency-based education so schools know how their students can access title IV aid for them, removing one potential barrier to growth of such programs; and (3) eliminating references to outdated technologies and making the regulations flexible enough to accommodate further technological advancements. Institutions that choose to offer these programs would benefit from the clarifications of terms and processes involved in establishing and administering direct assessment programs and reduced barriers to entry. While those currently offering such programs or competency-based courses would be best positioned to offer new programs in the near-term, we expect additional institutions to take advantage of the opportunities to offer new programs. While it is more a function of continued evolution in the postsecondary market, removing the barriers to entry will increase competition and some institutions could face a cost associated with losing students to those that offer appealing new programs.

The emphasis on flexibility, workforce development, and innovative educational approaches could be beneficial to students. Students, especially non-traditional students that have been a key market for existing competency-based or distance education programs, could benefit from flexible pacing and different models for assessing progress. Additionally, while competency-based models are a relatively new segment of the postsecondary market, some evidence suggests that the self-pacing model and other efforts by institutions may allow students to graduate with lower debt, but it is not clear how that factor will develop as more institutions develop competency-based programs.[1]

The proposed regulations would involve a significant amount of monetary transfers among the Federal government, students, and institutions

[1] *www.texaspolicy.com/new-study-less-expensive-competency-based-education-programs-just-as-good-as-traditional-programs/.*

through increased Pell Grants and Federal student loans. The Department assumes students in the existing baseline who switch from one program to another will receive similar amounts of Federal aid and not have a significant budget impact. We estimate that new students attracted to the new competency-based or other programs developed in part because of the proposed regulations would have a net Federal budget impact over the 2020–2029 loan cohorts of $[−237] million in outlays in the primary estimate scenario and an increase in Pell Grant outlays of $1,021 million over 10 years, for a total net impact of $784 million. The Department provides additional detail related to budget estimates in the *Regulatory Impact Analysis* section and provides burden estimates in the *Paperwork Reduction Act* section of this NPRM.

Invitation to Comment: We invite you to submit comments regarding these proposed regulations. To ensure that your comments have maximum effect in developing the final regulations, we urge you to identify clearly the specific section or sections of the proposed regulations that each of your comments address, and provide relevant information and data whenever possible, even when there is no specific solicitation of data and other supporting materials in the request for comment. We also urge you to arrange your comments in the same order as the proposed regulations. Please do not submit comments that are outside the scope of the specific proposals in this NPRM, as we are not required to respond to such comments.

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 regulations. 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 the Department's programs and activities.

During and after the comment period, you may inspect all public comments about the proposed regulations by accessing *Regulations.gov*. You may also inspect the comments in person at 400 Maryland Ave. SW, Washington, DC, between 8:30 a.m. and 4:00 p.m., Eastern Time, Monday through Friday of each week except Federal holidays. To schedule a time to inspect comments, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

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 regulations. To schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Background

The Secretary proposes to amend §§ 600.2, 600.7, 600.10, 600.20, 600.21, 600.52, 600.54, 668.1, 668.2, 668.3, 668.5, 668.8, 668.10, 668.13, 668.14, 668.15, 668.22, 668.28, 668.34, 668.111, 668.113, 668.164, 668.171, 668.174, and 668.175 of title 34 of the Code of Federal Regulations (CFR). The regulations in 34 CFR part 600 pertain to institutional eligibility under the HEA. The regulations in 34 CFR part 668 pertain to student assistance general provisions. We are proposing these amendments to—(1) clarify that when calculating the number of correspondence students, a student is considered ''enrolled in a correspondence course'' if correspondence courses constitute 50 percent or more of the courses in which the student enrolled during an award year; (2) limit the requirement for the Secretary's approval to an institution's first direct assessment program at each credential level; (3) require prompt action by the Department on any applications submitted by an institution to the Secretary seeking a determination that it qualifies as an eligible institution and any reapplications for a determination that the institution continues to meet the requirements to be an eligible institution for title IV, HEA programs; (4) require institutions to report to the Secretary when they add a second or subsequent direct assessment program or establish a written arrangement for an ineligible institution or organization to provide more than 25 percent of a program; (5) allow students enrolled in eligible foreign institutions to complete up to 25 percent of an eligible program at an eligible institution in the United States; (6) clarify that an eligible foreign institution may permit an individual Direct Loan recipient to perform research in the United States for not more than one academic year, if the research is conducted during the dissertation phase of a doctoral program; (7) clarify the conditions under which a foreign school may enter into a written arrangement with an ineligible entity to provide educational services; (8) provide flexibility to institutions to modify curricula at the recommendations of industry advisory boards that include employers who hire program graduates, widely recognized industry standards and organizations, or industry-recognized credentialing bodies; (9) provide flexibility to institutions when conducting clock-to-credit hour conversions to eliminate confusion about the inclusion of homework time in the clock-hour determination; (10) clarify the requirements for a direct assessment program to qualify as an eligible program; (11) clarify the eligibility requirements for programs that prepare students for gainful employment in a recognized occupation by establishing how an institution may demonstrate a reasonable relationship between the length of a program, as defined in 20 U.S.C. 1001(b)(1), and the entry-level requirements of the occupation for which that program prepares students; (12) clarify that a student is not considered to have withdrawn if the student completes all the requirements for graduation from his or her educational program, if the student completes one or more modules that comprise 50 percent or more of the number of days in the payment period, or if the institution obtains written confirmation that the student will resume attendance in a subscription-based or non-term program; (13) remove provisions pertaining to the use and calculation of the Net Present Value of institutional loans for the calculation of the 90/10 ratio for for-profit institutions, because the provisions are no longer applicable; (14) clarify the requirements for satisfactory academic progress for students enrolled in non-term credit or clock programs, term-based programs that are not a subscription-based program, and subscription-based programs; (15) clarify that the Secretary will rely on the requirements established by an institution's accrediting agency to evaluate an institution's compliance when the institution appeals a final audit or program review determination that includes a finding about the institution's classification of a course or program as distance education, or the institution's assignment of credit hours; (16) clarify that the Secretary may deny an institution's application for certification or recertification to participate in the title IV, HEA programs if an institution is not financially responsible or does not submit its audits in a timely manner; (17) clarify that an institution is not financially responsible if a person who exercises substantial

ownership or control over an institution also exercised substantial ownership or control over another institution that closed without a viable teach-out plan or agreement approved by the institution's accrediting agency and faithfully executed by the institution; and (18) make technical and conforming changes.

Public Participation

On July 31, 2018, we published a notice in the **Federal Register** (83 FR 36814) announcing our intent to establish a negotiated rulemaking committee to prepare proposed regulations for the title IV, HEA programs. We also announced our intention to create two subcommittees for this committee. In addition, we announced three public hearings at which interested parties could comment on the topics suggested by the Department and could suggest additional topics that should be considered for action by the negotiating committee. The hearings were held on—

- September 6, 2018, in Washington, DC;
- September 11, 2018, in New Orleans, LA; and
- September 13, 2018 in Sturtevant, WI.

Transcripts from the public hearings are available at: *www2.ed.gov/policy/highered/reg/hearulemaking/2018/index.html*.

We also invited parties unable to attend a public hearing to submit written comments on the proposed topics and to submit other topics for consideration. Written comments submitted in response to the July 31, 2018, **Federal Register** notice may be viewed through the Federal eRulemaking Portal at *www.regulations.gov,* within docket ID ED–2018–OPE–0076. Instructions for finding comments are also available on the site under ''Help.''

Negotiated Rulemaking

Section 492 of the HEA, 20 U.S.C. 1098a, requires the Secretary to obtain public involvement in the development of proposed regulations affecting programs authorized by title IV of the HEA. After obtaining extensive input and recommendations from the public, including individuals and representatives of groups involved in the title IV, HEA programs, the Secretary in most cases, must subject the proposed regulations to a negotiated rulemaking process. If negotiators reach consensus on the proposed regulations, the Department agrees to publish without substantive alteration a defined group of regulations on which the negotiators reached consensus unless the Secretary reopens the process or provides a written explanation to the participants stating why the Secretary has decided to depart from the agreement reached during negotiations. Further information on the negotiated rulemaking process can be found at: *www2.ed.gov/policy/highered/reg/hearulemaking/hea08/neg-reg-faq.html*.

On October 15, 2018, the Department published a notice in the **Federal Register** (83 FR 51906) announcing its intention to establish one negotiated rulemaking committee—the Accreditation and Innovation Committee (committee)—to prepare proposed regulations for the title IV, HEA programs. The notice set forth a schedule for the committee meetings and requested nominations for individual negotiators to serve on the negotiating committee. We also announced the creation of three subcommittees—the Distance Learning and Innovation Subcommittee (referred to as the ''subcommittee'' in this document unless otherwise noted), the Faith-Based Entities Subcommittee, and the TEACH Grants Subcommittee—and requested nominations for individuals with pertinent expertise to participate on the subcommittees.

The Department sought negotiators to represent the following groups for the Accreditation and Innovation Committee: Students; legal assistance organizations that represent students; financial aid administrators at postsecondary institutions; national accreditation agencies; regional accreditation agencies; programmatic accreditation agencies; IHEs primarily offering distance education; IHEs eligible to receive Federal assistance under title III, parts A, B and F, and title V of the HEA, which include Historically Black Colleges and Universities, Hispanic-Serving Institutions, American Indian Tribally Controlled Colleges and Universities, Alaska Native and Native Hawaiian-Serving Institutions, and other institutions with a substantial enrollment of needy students as defined in title III of the HEA; two-year public IHEs; four-year public IHEs; faith-based IHEs; private, nonprofit IHEs; private, proprietary IHEs; employers; and veterans.

For the Distance Learning and Innovation Subcommittee, the Department sought negotiators to represent the following groups: Students; legal assistance organizations that represent students; private, nonprofit IHEs, with knowledge of direct assessment programs and competency-based education; private, for-profit IHEs, with knowledge of direct assessment programs and competency-based education; public IHEs, with knowledge of direct assessment programs and competency-based education; accrediting agencies; associations or organizations that provide guidance to or represent institutions with direct assessment programs and competency-based education; financial aid administrators at postsecondary institutions; academic executive officers at postsecondary institutions; nonprofit organizations supporting inter-State agreements related to State authorization of distance or correspondence education programs; and State higher education executives.

The Accreditation and Innovation negotiating committee included the following members:

Susan Hurst, Ouachita Baptist University, and Karen McCarthy (alternate), National Association of Student Financial Aid Administrators, representing financial aid administrators at postsecondary institutions.

Robyn Smith, Legal Aid Foundation of Los Angeles, and Lea Wroblewski (alternate), Legal Aid of Nebraska, representing legal assistance organizations that represent students.

Ernest McNealey, Allen University, and Eric Hill Hart (alternate), North Carolina A&T State University, representing IHEs that award or have awarded TEACH grants and that are eligible to receive Federal assistance under title III, Parts A, B, and F, and title V of the HEA, which include Historically Black Colleges and Universities, Hispanic-Serving Institutions, American Indian Tribally Controlled Colleges and Universities, Alaska Native and Native Hawaiian-Serving Institutions, Predominantly Black Institutions, and other institutions with a substantial enrollment of needy students as defined in title III of the HEA.

David Dannenberg, University of Alaska, Anchorage, and Tina Falkner (alternate), University of Minnesota, representing four-year public IHEs.

Terry Hartle, American Council on Education, and Ashley Ann Reich (alternate), Liberty University, representing private, nonprofit IHEs.

Jillian Klein, Strategic Education, Inc., and Fabian Fernandez (alternate), Schiller International University, representing private, proprietary IHEs.

William Pena, Southern New Hampshire University, and M. Kimberly Rupert (alternate), Spring Arbor University, representing IHEs primarily offering distance education.

Christina Amato, Sinclair College, and Daniel Phelan (alternate), Jackson College, representing two-year public IHEs.

Barbara Gellman-Danley, Higher Learning Commission, and Elizabeth Sibolski (alternate), Middle States Commission on Higher Education, representing regional accreditation agencies.

Laura King, Council on Education for Public Health, and Janice Knebl (alternate),

American Osteopathic Association Commission on Osteopathic College Accreditation, representing programmatic accreditation agencies.

Michale S. McComis, Accrediting Commission of Career Schools and Colleges, and India Y. Tips (alternate), Accrediting Bureau of Health Education Schools, representing national accreditation agencies.

Steven M. Sandberg, Brigham Young University, and David Altshuler (alternate), San Francisco Theological Seminary, representing faith-based IHEs.

Joseph Verardo, National Association of Graduate-Professional Students, and John Castellaw (alternate), University of Arizona, representing students.

Edgar McCulloch, IBM Corporation, and Shaun T. Kelleher (alternate), BAM Technologies, representing employers.

Daniel Elkins, Enlisted Association of the National Guard of the U.S., and Elizabeth Bejar (alternate), Florida International University, representing veterans.

Annmarie Weisman, U.S. Department of Education, representing the Department.

The negotiated rulemaking committee met to develop proposed regulations on January 14–16, 2019; February 19–22, 2019; March 25–28, 2019; and April 1–3, 2019.

The negotiated rulemaking committee also tasked a subcommittee to make recommendations on issues related to Distance Learning and Innovation. The subcommittee met on January 17–18, 2019; February 12–13, 2019; and March 11–12, 2019. The membership of the Distance Learning and Innovation Subcommittee included the following members:

Mary C. Otto, Campbell University, representing financial aid administrators at postsecondary institutions.

Jessica Ranucci, New York Legal Assistance Group, representing legal assistance organizations that represent students.

Merodie Hancock, Thomas Edison University, representing public IHEs, with knowledge of direct assessment programs and competency-based education.

Jody Feder, National Association of Independent Colleges and Universities, representing private, nonprofit IHEs, with knowledge of direct assessment programs and competency-based education.

Sue Huppert, Des Moines University, representing nonprofit organizations supporting inter-State agreements related to State authorization of distance or correspondence education programs.

Russell Poulin, The WICHE Cooperative for Educational Technologies, representing associations or organizations that provide guidance to or represent institutions with direct assessment programs and competency-based education.

Robert E. Anderson, State Higher Education Executive Officers, representing State higher education executives.

Jillian Klein, Strategic Education, Inc., representing private, for-profit IHEs, with knowledge of direct assessment programs and competency-based education.

Leah K. Matthews, Distance Education Accrediting Commission, representing accrediting agencies.

David Schejbal, Marquette University, representing academic executive officers at postsecondary institutions.

Amanda Martinez, American University, and Joseph Verardo, National Association of Graduate-Professional Students, representing students.

Carolyn Fast, Office of the New York State Attorney General, representing State attorneys general.

Gregory Martin and David Musser, U.S. Department of Education, representing the Department.

At its first meeting, the full negotiated rulemaking committee reached agreement on its protocols and proposed agenda. The protocols provided, among other things, that the committee would operate by consensus. Consensus means that there must be no dissent by any member for the committee to have reached agreement. Under the protocols, the Department would use the consensus-based language in its proposed regulations for each ''bucket'' of issues, as described in more detail below, on which final consensus was achieved. Furthermore, the Department would not substantively alter the consensus-based language of its proposed regulations unless the Department reopened the negotiated rulemaking process or provided a written explanation to the committee members regarding why it decided to depart from that language.

At the first meeting, the Department received a petition for membership from David Tandberg, Vice President of Policy Research and Strategic Initiatives at the State Higher Education Executive Officers Association, to represent State Higher Education Executive Officers. The negotiated rulemaking committee voted to include Mr. Tandberg on the full committee. The Department also received petitions to add other members. The Department received a petition to add a member representing State Attorneys General to the full committee and the Distance Education and Innovation subcommittee. The committee did not agree to add a member representing this constituency to the full committee but did agree by consensus to add Carolyn Fast, a representative of the New York Attorney General, as a member to the subcommittee.

During the first meeting, the negotiating committee agreed to negotiate an agenda of 22 issues related to distance learning and innovation, including some definitions and topics related to accreditation that have been addressed in another notice of proposed rulemaking published in the **Federal Register** on June 12, 2019 (84 FR 27404). These 22 issues were: Accreditation-related definitions; definitions of ''additional location'' and ''branch campus''; definition of ''clock hour''; definition of ''credit hour''; definitions of ''distance education'' and ''correspondence course''; definitions of ''incarcerated student'' and ''nonprofit''; State authorization of distance education; definitions of ''teach-out'' and ''teach-out agreement''; changes in ownership and eligibility of additional locations; limitations on taking coursework in the United States while enrolled at a foreign institution; written arrangements with ineligible institutions or organizations; subscription period disbursement; definition of a ''week of instruction for asynchronous online programs''; clock-to-credit hour conversion; direct assessment programs; certification procedures; limitation on hours in a program that exceeds the State minimum for employment; return of title IV funds; satisfactory academic progress; disclosure related to prior learning assessment; use of accrediting agency definitions for audit or program review appeals; and financial responsibility. Under the protocols, these issues were placed into a ''bucket'' on distance learning and innovation upon which a final consensus would be voted on by the full negotiated rulemaking committee.

During committee meetings, the committee reviewed and discussed the Department's drafts of regulatory language and the committee and subcommittee members' alternative language and suggestions. The committee was briefed by each of the subcommittees, including the Distance Learning and Innovation Subcommittee, through extensive written materials and in-person presentations. At the final meeting on April 3, 2019, the committee reached consensus on the Department's proposed regulations. For this reason, and according to the committee's protocols, all parties who participated or were represented in the negotiated rulemaking and the organizations that they represent have agreed to refrain from commenting negatively on the consensus-based regulatory language. For more information on the negotiated rulemaking sessions, please visit: *www2.ed.gov/policy/highered/reg/hearulemaking/2012/programintegrity.html#info*.

Summary of Proposed Changes

The proposed regulations would—

• Amend in § 600.2 the definitions of ''clock hour,'' ''correspondence course,'' ''credit hour,'' ''distance education,'' ''incarcerated student,'' and ''nonprofit institution'';

• Add in § 600.2 new definitions for ''academic engagement'' and ''juvenile justice facility'';

• Provide in § 600.7 that, when calculating the number of correspondence students for purposes of determining whether an institution exceeds statutory limitations on the number of such students it enrolls, a student is considered ''enrolled in correspondence courses'' if correspondence courses constituted more than 50 percent of the courses in which the student enrolled during an award year;

• Amend § 600.10 to require the Secretary's approval for an institution's first direct assessment program at each credential level;

• Amend § 600.20 to require prompt action by the Department on any materially complete applications submitted by participating IHEs to the Secretary seeking approval for new programs. Additionally, the Department proposes to amend this section to remove the requirement that an institution obtain approval to offer additional educational programs, unless the Secretary alerts the institution that a program must be approved;

• Establish new reporting requirements in § 600.21 to require an institution to report to the Secretary its addition of a second or subsequent direct assessment program or its establishment of a written arrangement for an ineligible institution or organization to provide more than 25 percent of a program pursuant to § 668.5(c);

• Amend in § 600.52 the definition of ''foreign institution'' to clarify that students enrolled in eligible foreign institutions may complete up to 25 percent of an eligible program at an eligible institution in the United States, and that an institution may permit an individual Direct Loan borrower to perform research in the United States for not more than one academic year, if conducted during the dissertation phase of a doctoral program;

• Clarify in § 600.54 the conditions under which a foreign school may enter into a written arrangement with an ineligible entity;

• Provide clarifying edits in § 668.1;

• Remove the definition of ''Academic Competitiveness Grant,'' amend the definition of ''full-time student'' to include students enrolled in subscription-based programs, provide clarifying edits to the definition of ''third-party servicer,'' and define ''subscription-based program'' in § 668.2;

• Amend § 668.3 to clarify the definition of ''a week of instructional time for a program offered using asynchronous coursework through distance education'';

• Amend § 668.5 to increase the flexibility of institutions using written arrangements to timely provide relevant educational program offerings, allowing institutions to modify their curriculum at the recommendations of industry advisory boards or faculty review committees, and calculating the percentage of a program that is offered by an ineligible institution or organization;

• Amend § 668.8 to provide additional flexibility for institutions that are conducting a clock-to-credit hour conversion by equating a semester or trimester hour to 30 clock hours of instruction;

• Amend § 668.10 to clarify the requirements for a direct assessment program to qualify as an eligible program;

• Amend § 668.13 to clarify the requirements the Secretary will use to certify a location as a branch campus and to grant renewal of certification to an institution if the Secretary does not make a determination within 12 months of the expiration of its current period of participation and provide a number of clarifying edits;

• Provide clarifying edits in § 668.14 and provide additional flexibility to programs described in 20 U.S.C. 1001(b)(1), in demonstrating a reasonable relationship between the length of the program and licensure requirements associated with the recognized occupation for which the program prepares students;

• Provide clarifying edits in § 668.15;

• Amend § 668.22 to remove any references to ''modules'' with respect to non-term credit hour and clock hour programs and clarify that a student is not considered to have withdrawn if the student completes all the requirements for graduation before completing the days or hours in the period that he or she was scheduled to complete, if the student completes one or more modules that comprise 50 percent or more of the number of days in the payment period, or if the institution obtains written confirmation that the student will resume attendance in a subscription-based or non-term program;

• Remove the provisions pertaining to the use and calculation of the Net Present Value of institutional loans from § 668.28, because those provisions are no longer applicable;

• Amend § 668.34 to clarify that an institution may establish a program's maximum time frame in credit hours or in calendar time, that a pace for evaluation for a non-term credit or clock hour program is not required due to the requirements that students complete half of the hours and weeks of instruction in an academic year before a subsequent disbursement of aid can be made, and that an institution may calculate a student's pace in a term-based program that is not a subscription-based program by dividing the cumulative number of hours the student has successfully completed by the cumulative number of hours the student has attempted or by determining the number of hours that the student should have completed at the evaluation point in order to complete the program within the maximum timeframe;

• Provide clarifying edits in § 668.111;

• Amend § 668.113 to clarify that in cases where an institution or third-party servicer appeals a final audit or program review determination that includes a finding about the institution's classification of a course or program as distance education, or the institution's assignment of credit hours, the Secretary relies on the requirements established by the institution's accrediting agency or State approval agency to evaluate the institution's or servicer's compliance;

• Provide clarifying and technical edits in § 668.164 for a subscription-based program by revising the early disbursement rules to clarify the earliest an institution may disburse funds to students in such a program;

• Amend § 668.171 to clarify that the Secretary may deny the institution's application for certification or recertification to participate in the title IV, HEA programs if an institution is not financially responsible or does not submit its audits timely;

• Amend § 668.174 to clarify that an institution is not financially responsible if a person who exercises substantial ownership or control over the institution also exercised substantial ownership or control over another institution that closed without a viable teach-out plan or agreement approved by the institution's accrediting agency and faithfully executed by the institution and to provide clarifying edits; and

• Provide clarifying edits in § 668.175.

Significant Proposed Regulations: We discuss substantive issues under the sections of the proposed regulations to which they pertain. Generally, we do not address proposed regulatory

provisions that are technical or otherwise minor in effect.

§ 600.2 Definitions

Academic Engagement

Statute: The HEA does not define ''academic engagement.''

Current Regulations: There is no regulatory definition of ''academic engagement.'' The regulations governing the return of title IV funds process under § 668.22 set certain requirements for activities that may be considered ''academic attendance'' or ''attendance at an academically-related activity'' and use those requirements as the basis for establishing a student's withdrawal date. The types of academic attendance identified in § 668.22(l)(7)(i)(A) include the following: (1) Physically attending a class where there is an opportunity for direct interaction between the instructor and students; (2) submitting an academic assignment; (3) taking an exam, interactive tutorial, or computer assisted instruction; (4) attending a study group assigned by the institution; (5) participating in an online discussion about academic matters; and (6) initiating contact with a faculty member to ask a question about the academic subject studied in the course. Section 668.22(l)(7)(i)(B) provides that certain types of activities may not be considered academic attendance or attendance at an academically-related activity, including (1) living in institutional housing; (2) participating in an institution's meal plan; (3) logging into an online class without active participation; and (4) participating in academic counseling or advisement.

Proposed Regulations: The Department proposes to incorporate the majority of the language in the regulations governing the return of title IV funds in § 668.22(l)(7) relating to requirements for academic attendance and attendance at academically-related activities into a definition of ''academic engagement'' under § 600.2. We propose to modify those requirements by specifying that academic engagement includes active participation by a student in activities related to their course of study, such as an online course with an opportunity for interaction or an interactive tutorial, webinar, or other interactive computer-assisted instruction. It does not include, for example, simply logging into an online platform. Such interaction could include the use of artificial intelligence or other adaptive learning tools so that the student is receiving feedback from technology-mediated instruction. We also propose to strike the phrase ''without active participation'' and replace it with ''without any further participation.''

Reasons: The definitions of ''academic attendance'' and ''attendance at an academically-related activity'' were included in a final rule published in the **Federal Register** on October 29, 2010 (75 FR 66832) to clarify the types of activities that the Department viewed as sufficient for an institution to use as a basis for establishing a student's withdrawal date for purposes of the return of title IV funds process. The Department proposes to exclude certain activities, such as participating in academic counseling or advisement or logging into an online class without participation, from the types of activities that can be considered academic attendance, because these activities have been sources of past abuse and, while potentially beneficial, may not by themselves help a student progress through their program.

During subcommittee meetings, the Department proposed to use the framework for defining ''academic attendance'' that had been established in the return of title IV funds regulations to establish requirements for earning a clock hour in a program using distance education or correspondence courses. The underlying concepts behind the requirements for attendance focus on student participation in activities that are academic in nature. Thus, they are easily applicable to the requirements for earning clock hours. Members of the subcommittee were generally supportive of this approach but proposed to move the requirements for academic attendance to the definitions under part 600 for consistency. The Department agreed to this approach, and it was later agreed to by the full committee.

In response to comments from members of the subcommittee and the full committee, the Department made several changes to the requirements for academic attendance as they existed in the return of title IV funds regulations. One subcommittee member expressed concern that participating in an online tutorial or webinar that was not interactive was more akin to reading or homework performed passively, and therefore should not be included in a definition of ''academic engagement.'' The Department added the word ''interactive'' before the words ''tutorial, webinar, or other interactive computer-assisted instruction'' to address this member's concern. This change clarifies that the Department expects that academic engagement will involve the opportunity for active engagement by a student rather than only the passive consumption of information. Active engagement in this regard could include the use of artificial intelligence or other adaptive learning tools so that the student is receiving feedback from technology-mediated instruction. The interaction need not be exclusively with a human instructor.

The Department also made changes in response to other comments from committee members. We revised paragraph (2)(i) of the definition, which had previously referred to physical attendance in a class, to include attendance at a synchronous online class where there is an opportunity for interaction between the instructor and students. This change reflects the committee's view that this type of academic engagement is similar in both classroom and online modalities. We also propose to include ''field or laboratory activity'' as academic attendance, because these activities are interactive and have traditionally been considered forms of academic engagement. Finally, to clarify an ambiguity raised by committee members, we rephrased paragraph (3)(iii) to omit the word ''active'' before ''participation'' and instead refer to ''any further participation.''

Clock Hour

Statute: The HEA does not define a ''clock hour.'' Section 481(a)(2) of the HEA defines an ''academic year for an undergraduate program,'' in part, as requiring a minimum of 24 semester or trimester credit hours or 36 quarter credit hours in a course of study that measures academic progress in credit hours or 900 clock hours in a course of study that measures academic progress in clock hours. Section 481(b) of the HEA defines an ''eligible program,'' in part, as a program of at least 600 clock hours, 16 semester hours, or 24 quarter hours or, in certain instances, a program of at least 300 clock hours, 8 semester hours, or 12 quarter hours.

Current Regulations: Section 600.2 defines a ''clock hour'' as a period of time consisting of a 50- to 60-minute class, lecture, or recitation in a 60-minute period; a 50- to 60-minute faculty supervised laboratory, shop training, or internship in a 60-minute period; or 60 minutes of preparation in a correspondence course.

Proposed Regulations: The proposed regulations would define a ''clock hour in a distance education program'' as 50 to 60 minutes in a 60-minute period of attendance in a synchronous class, lecture, or recitation where there is an opportunity for direct interaction between the instructor and students. The proposed regulations specify that a clock hour in a distance education program must meet all accrediting

agency and State requirements and that it does not meet the conditions of the definition if it exceeds an agency's restrictions on the number of clock hours that may be offered through distance education. As is always the case, the Department may take action if an agency is not following its policies. The proposed regulations would also require that an institution be technically capable of monitoring a student's attendance in 50 out of 60 minutes for each clock hour in a distance education program through technology that measures time spent on relevant work or other means.

Reasons: In recent years, distance learning technology has sufficiently advanced to permit institutions to conduct remotely synchronous, face-to-face instruction with students and to monitor the exact amount of time that students spend participating in these learning sessions. However, the current regulatory definition of ''clock hour'' has existed in substantially the same form since it was promulgated as part of the Basic Educational Opportunity Grant regulations on November 6, 1974 (39 FR 39412), except for an amendment to include a definition relating to correspondence programs. The current definition therefore predates the internet and the emergence of distance education programs.

The current definition of ''clock hour'' presumes that, in programs other than correspondence programs, students will be in a classroom, laboratory, or other physical setting and will be supervised by one or more faculty members. Because of this presumption, the Department has received numerous questions from institutions regarding whether the regulations permit any distance education coursework to use clock hours for title IV purposes. In response to these questions, the Department has previously adopted the position that a clock hour program can include clock hours earned through distance education, but only if the institution's or program's accrediting agency permits the institution to use that modality and the institution has sufficient technological resources to monitor a student's academic engagement in 50 to 60 minutes of distance education.

We propose to amend the definition of ''clock hour'' to codify this policy, and to further specify that only clock hours that involve synchronous instruction where students have an opportunity to interact with instructors meet the requirements of the proposed definition. We believe that this definition closely aligns with the requirements of the current definition of ''clock hour'' while incorporating reasonable requirements to ensure that institutions can monitor a student's participation during each hour. The proposed definition would also clearly distinguish between activities that have historically been included in the definition of ''clock hour,'' such as instruction and hands-on training, and activities such as reading or studying that would have been considered homework and would not have counted toward the student's completion of clock hours under the current regulations.

States and accrediting agencies may also have an interest in limiting the number of hours that students are permitted to earn through distance education or setting specific standards for hours earned through online training, particularly when the hours are associated with programs or professions that require hands-on training. The Department proposes to clarify that any hours that are not approved or permitted by States or accrediting agencies would not meet the requirements of the Department's definition of ''clock hour'' as the Department is relying upon those approvals to make its determinations.

Correspondence Course

Statute: The HEA does not define ''correspondence course.'' Institutional eligibility requirements in section 102(a)(3) of the HEA provide that institutions offering more than 50 percent of their courses by correspondence or enrolling 50 percent or more of their students in correspondence courses, are ineligible for title IV, HEA program assistance.

Current Regulations: The definition of ''correspondence course'' in § 600.2 states that interaction between the instructor and the student in such a course is limited, is not regular and substantive, and is primarily initiated by the student. The definition also notes that a correspondence course is typically designed so that a student proceeds through the course at the student's own pace.

Proposed Regulations: The Department proposes to change the definition of ''correspondence course'' to refer to ''instructors'' rather than ''the instructor'' and to strike the sentence indicating that correspondence courses are typically self-paced.

Reasons: Much of the distinction between correspondence courses and distance learning courses depends upon the role of the instructor. However, the term ''instructor'' has been the subject of questions from the field and a recent audit by the Department's Office of the Inspector General. We also believe that the definition should be changed because approaches other than a single instructor at the front of a traditional lecture hall may be effective at helping students learn.

The current definition of ''correspondence course'' suggests that only one instructor is responsible for a given course and is involved with the majority of academic interactions with students. However, the Department is aware of many postsecondary programs that use more than one instructor to teach a course, including those that rely heavily on the use of non-credentialed graduate students to provide a significant amount of instruction or grading. Other arrangements utilize a team approach to educating a student where each member of the team may perform a different function. In some team—taught courses or programs, each instructor uses his or her specialized expertise to serve students in different ways. These arrangements occur in correspondence courses as well as in in-person courses. Therefore, the Department proposes to make the term ''instructors'' plural in the definition of a ''correspondence course.'' The Department also seeks to clarify that instructional support roles directly related to the course meet the definition of ''instructor'' as long as the roles of such personnel meet qualifications for instruction established by the institution's accrediting agency.

The current definition of ''correspondence course'' indicates that correspondence courses are typically self-paced. While self-pacing is a facet of many correspondence courses, the Department does not consider whether a course is self-paced when distinguishing a correspondence course from a course offered using distance education. Instead, the Department evaluates the level of interaction between students and instructors in such courses. Therefore, the sentence relating to self-pacing in correspondence courses is both unnecessary and confusing, and the Department proposes to strike it.

Credit Hour

Statute: The HEA does not define ''credit hour.'' Section 481(a)(2) of the HEA defines an ''academic year for an undergraduate program,'' in part, as requiring a minimum of 24 semester or trimester credit hours or 36 quarter credit hours in a course of study that measures academic progress in credit hours or 900 clock hours in a course of study that measures academic progress in clock hours. Section 481(b) of the HEA defines an ''eligible program,'' in

part, as a program of at least 600 clock hours, 16 semester hours, or 24 quarter hours or, in certain instances, a program of at least 300 clock hours, 8 semester hours, or 12 quarter hours. Sections 428(b)(1), 428B(a)(2), 428H(d)(1), 455(a)(1), and 484(b)(3) and (4) of the HEA specify that a student must be carrying at least one-half of the normal full-time work load for the student's course of study to qualify for a loan under parts B or D of title IV of the HEA. Section 401 of the HEA provides that a student's Federal Pell Grant must be adjusted based on the student's enrollment status and that a student must be enrolled at least half time to be eligible for a second consecutive Federal Pell Grant in an award year.

Current Regulations: The definition of ''credit hour'' in § 600.2, except as it pertains to the requirements for clock-to-credit hour conversion, is an amount of work represented in intended learning outcomes and verified by evidence of student achievement that is an institutionally established equivalency that reasonably approximates not less than—

- One hour of classroom or direct faculty instruction and a minimum of two hours of out of class student work each week for approximately fifteen weeks for one semester or trimester hour of credit, or ten to twelve weeks for one quarter hour of credit, or the equivalent amount of work over a different amount of time; or
- Other academic activities as established by the institution including laboratory work, internships, practica, studio work, and other academic work leading to an award of credit hours.

Proposed Regulations: The Department proposes to retain, in large part, the current definition of ''credit hour,'' including time-based requirements relative to classroom instruction and other academic activities. The Department proposes that the amount of student work defined by the institution as appropriate in meeting the requirement for a credit hour be approved by its accrediting agency or State approval agency. In addition, current language defining a ''credit hour,'' in part, ''as an amount of work represented by intended learning outcomes and verified by evidence of student achievement'' would be modified to reference work defined by an institution that is consistent with commonly accepted practice in postsecondary education. Finally, we propose to add language clarifying that, in determining the amount of work associated with a credit hour, an institution may take into account a variety of delivery methods, measurements of student work, academic calendars, disciplines, and degree levels. This would incorporate into the regulation, sub-regulatory guidance in Dear Colleague Letter GEN–11–06 [2] relevant to the current definition of ''credit hour.''

Reasons: The current regulatory definition of ''credit hour'' was established in 2010 (75 FR 66831), based on the HEA use of credit hour as a proxy for learning. Accrediting agencies have held institutions to various credit hour standards prior to that regulation. The credit hour's legacy dates to Andrew Carnegie and his desire to measure faculty workload in order to help them earn a pension. It was not designed to measure student learning, but has been used by accrediting agencies as an imperfect measure of student progress.[3] Those agencies' definitions have, in turn, been used by institutions to determine the types and amounts of title IV aid for which students are eligible. Over the last decade, as a result of new educational delivery methods and growth in distance education program offerings and enrollment, the Department believes that it is necessary to adopt a broader definition of ''credit hour'' that focuses on student learning rather than seat time and is flexible enough to account for innovations in the delivery models used by institutions. It is also important to recognize that the Department has no evidence that students complete the requisite two hours of out of class work required by the current definition, nor has the Department ever enforced or required institutions to prove that such homework is being completed. Additionally, the Department is concerned that students enrolled in most laboratory classes do not receive credit for out-of-class hours, even though such classes typically do have intense homework requirements that are necessary to carry out work in the laboratory.[4] [5]

During the first meeting of the subcommittee, the Department proposed revising the definition of ''credit hour'' to eliminate time-based requirements and allow institutions to develop their own definitions, provided they met accrediting agency requirements. Citing the need for a definition of ''credit hour'' that creates some measure of consistency across higher education, the subcommittee generally opposed removing time-based requirements associated with direct faculty instruction, out of class student work, and other academic activities from the definition. The proposed definition includes language ultimately agreed upon by the subcommittee, and on which consensus was reached, that retains existing time-based standards. While the Department and others expressed concern about the 2010 credit hour regulation as written, some subcommittee members believed that subsequent guidance, in particular, Dear Colleague Letter GEN–11–06, provided needed clarity.[6] The sub-regulatory guidance in the Dear Colleague Letter permits an institution to consider a variety of delivery methods, measurements of student work, academic calendars, disciplines, and degree levels in determining the amount of work associated with a credit hour. We agree that the Dear Colleague Letter established appropriately flexible standards and accommodates different types of programs, while ensuring consistency among postsecondary institutions in how credit hours are defined. Therefore, we agreed with the subcommittee recommendation to adopt language from Dear Colleague Letter GEN–11–06 into the proposed regulations. However, the Department continues to be concerned that, despite agreement that the institutions must be consistent in the way that they assign credit hours, in practice institutions and accreditors assign different values to laboratory classes than they do to lecture classes.[7] [8] [9] [10] [11] For example, a student who takes a lecture class that meets for three hours per week, and who is expected to do two hours of homework for each hour spent in class, is awarded three credits. This, despite ample evidence that most students do not spend anywhere near the amount of time doing homework that they are given credit for in the credit hour definition. On the other hand, a student who spends three hours in a laboratory class, and who is more likely to actually complete homework assignments since laboratory classes generally require

[2] *ifap.ed.gov/dpcletters/GEN1106.html.*

[3] *www.newamerica.org/education-policy/higher-education/higher-ed-watch/the-curious-birth-of-the-credit-hour/.*

[4] *www.asccc.org/content/credit-where-credit-due-incongruities-value-lab-and-lecture.*

[5] *www.dailytexanonline.com/2019/02/14/ut-students-deserve-more-credit-for-required-lab-courses.*

[6] *ifap.ed.gov/dpcletters/GEN1106.html*

[7] *www.lasc.edu/students/Credit%20Hour%20Definition%20for%20LASC.pdf.*

[8] *docs.accet.org/downloads/docs/doc15.pdf.*

[9] *academicprograms.humboldt.edu/sites/default/files/howtocalculatescu.pdf.*

[10] *oucc.dasa.ncsu.edu/courseleaf-2/instructional-formats/.*

[11] *www.ccsf.edu/en/employee-services/office-of-instruction/curriculum_committee/policies_resolutions/lecture_lab_hours.html.*

considerable preparation as well as laboratory reports after-the-fact, receives only one credit. As mentioned previously, because the credit hour was developed to measure eligibility for faculty employment benefits and since laboratory classes are often taught by graduate students or part-time faculty, there was less interest in assigning a credit value that would result in higher wages to individuals in these roles. This is unfair to students and it means that a student in a STEM major is likely to spend many more hours in class than a non-STEM major who is completing an equivalent number of credits in lecture classes. This leaves fewer hours available for a STEM student to work or participate in extracurricular activities and could contribute to STEM attrition. The Department wishes to call attention to the need to be consistent in the way that institutions and accreditors measure a credit hour, and that it may no longer be justifiable to treat lecture and laboratory classes differently when assigning credit. The new definition of a credit hour demands equitable treatment of student work; therefore, the amount of credit awarded for laboratory classes should be equivalent to that awarded for lecture classes.[12]

Distance Education

Statute: Section 103 of the HEA defines ''distance education'' as education that uses one or more technologies to deliver education to students who are separated from the instructor and to support regular and substantive interaction between the students and the instructor, either synchronously or asynchronously. The definition contains a list of technologies.

Current Regulations: Section 600.2 states that ''distance education'' means education that uses one or more technologies to deliver instruction to students who are separated from the instructor and to support regular and substantive interaction between the students and the instructor, either synchronously or asynchronously. The technologies may include the internet; one-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devices; audio conferencing; or video cassettes, DVDs, and CD–ROMs, if the cassettes, DVDs, or CD–ROMs are used in a course in conjunction with any of the other technologies listed.

Proposed Regulations: The Department proposes to amend the definition of ''distance education'' to refer to ''the instructor or instructors'' rather than simply ''the instructor.'' We also propose to eliminate references to the various types of media described under paragraph (2)(iv) of the definition and replace those references with the phrase ''other media.''

We propose to add a paragraph (3) to the definition that would define an ''instructor'' as an individual responsible for delivering course content and who meets the qualifications for instruction established by the institution's accrediting agency.

We also propose to add a paragraph (4) to the definition that would define ''substantive interaction'' as engaging students in teaching, learning, and assessment, consistent with the content under discussion, and including at least two of the following—providing direct instruction; assessing or providing feedback on a student's coursework; providing information or responding to questions about the content of a course or competency; facilitating a group discussion regarding the content of a course or competency; or other instructional activities approved by the institution's or program's accrediting agency.

We propose to add a paragraph (5) to the definition that would require that an institution ensures regular interaction between a student and an instructor or instructors by, prior to the student's completion of a course or competency, providing the opportunity for substantive interactions with the student on a predictable and regular basis commensurate with the length of time and the amount of content in the course or competency, and monitoring the student's academic engagement and success and ensuring that an instructor is responsible for proactively engaging in substantive interaction with the student when needed, on the basis of such monitoring, or upon request by the student.

Reasons: Since the Higher Education Opportunity Act of 2008 created a statutory definition of ''distance education,'' there have been significant improvements in distance education technology, including interactive software that supports student learning and learning analytics tools that help institutions better understand their students' strengths and weaknesses, as well as students' level of academic engagement.

Some of the improvements in distance education technology have contributed to increased interest in CBE programs that measure student progress based on their demonstration of specific competencies rather than sitting in a seat or at a computer for a prescribed period of time. Many CBE programs are designed to permit students to learn at their own pace while having access to instructional resources and faculty support when assistance is needed. As postsecondary institutions have begun to experiment and innovate with new instructional modalities, including CBE, that are facilitated by distance education technology, the Department has been asked regularly about the meaning of several terms in the definition of ''distance education'' that, in this context, are ambiguous or unclear. The majority of these questions have related to the statutory requirement for distance education to ''support regular and substantive interaction between the students and the instructor,'' which is the primary factor (in addition to the types of technology that may be used) that distinguishes distance education from correspondence courses. Ambiguity with respect to this phrase has complicated the Department's enforcement of the law through the resolution of audits or program reviews. Efforts to provide clarity through a series of sub-regulatory guidance documents have provided some assurance to institutions, but uncertainty remains about both the content of the guidance and its permanence because it is not in the regulations.

The lack of clarity in the definition of ''distance education'' has also prevented some institutions from using certain innovative technology or pedagogical techniques in online programs for fear of being found to be out of compliance with the Department's regulations. The repercussions for violating the requirements of the definition of ''distance education'' can be particularly severe because an online course that does not meet the requirements for distance education is treated as a correspondence course, which could limit eligibility for title IV, HEA assistance for students enrolled in such a course, and could also cause an institution to lose eligibility for title IV, HEA program funds entirely if it offers too many correspondence courses or enrolls too many correspondence students. Therefore, the Department seeks to more clearly distinguish between correspondence courses and distance education courses.

Consistent with our proposed changes to the definition of ''correspondence course,'' we propose adding the words ''or instructors'' after the phrase ''the

[12] *static.newamerica.org/attachments/2334-cracking-the-credit-hour/Cracking_the_Credit_Hour_Sept5_0.ab0048b12824428cba568ca359017ba9.pdf.*

instructor'' in the definition of ''distance education'' to clarify that an institution can fulfill the requirements of the definition by ensuring that students regularly and substantively interact with multiple qualified instructors rather than a single individual. We also proposed to simplify the definition by replacing references to the various types of media that can be used to deliver distance education in conjunction with the internet, one-way and two-way electronic transmissions, and audio conferencing with the phrase ''other media.''

The Department originally proposed to reformulate the concept of ''instructor'' in the definition of ''distance education'' by adding an option for students to interact with members of an ''instructional team,'' which could be comprised of more staff members than a single instructor. The subcommittee generally expressed support for the concept of an instructional team but indicated a preference for a strong role for subject-matter experts on such teams. However, the subcommittee did not agree on the extent to which subject-matter experts, as opposed to other staff members, would be required to interact with students. Some subcommittee members indicated that an instructional team should include a subject-matter expert who had the ''primary responsibility'' for interacting with students, whereas other members of the instructional team would identify problem areas and refer students to subject-matter experts when needed. Other members of the subcommittee indicated that requiring people to refer students to subject-matter experts does not reflect the current or future state of distance education, which is increasingly using analytics to identify struggling or accelerated learners in order to refer them to subject-matter experts or additional adaptive learning experiences to support their learning needs.

The subcommittee ultimately agreed with a proposal to define an ''instructor'' as a content expert whose qualifications would be determined by an institution's accrediting agency. Accrediting agencies were chosen for this role because they are responsible for academic oversight and for setting standards related to academic quality. The full committee largely adopted the subcommittee's approach to the requirements for an ''instructor,'' but decided to replace the concept of ''content expert'' with language that expressed that an instructor was someone who had responsibility for delivering course content, as opposed to merely advising students about the courses in which a student should enroll or about administrative or technical matters.

The Department originally proposed to define ''substantive interaction'' as interaction that was ''related to course material under discussion'' to limit the types of interactions to those specific to the course. The subcommittee generally opposed that definition, because it did not specifically address teaching and learning. Following discussion of the topic, the subcommittee tentatively agreed to define ''substantive'' as engaging students in teaching, learning, and assessment, consistent with the content under discussion, and to identify providing direct instruction, assessing or providing feedback on a student's coursework, providing information or responding to questions about the content of a course or competency, and facilitating a group discussion regarding the content of a course or competency as specific activities that would be considered ''substantive'' for purposes of fulfilling the requirement for supporting ''regular and substantive interaction.'' These activities were chosen because they represent traditional instructional tasks associated with teaching and learning, and because several subcommittee members wished to ensure that the definition did not de-emphasize learning in favor of administrative check-ins with students. The committee largely adopted the subcommittee's approach to the definition of ''substantive interaction,'' but in recognition of the possibility that alternative methods of instruction could be as effective or more effective than established methods, the committee agreed to add a fifth option that would include other instructional activities that are approved by an institution's accrediting agency or, in event that one or more of an institution's programs is programmatically accredited, by the relevant programmatic accrediting agency (or agencies). The committee also agreed to define ''substantive interaction'' as including at least two instructional activities in order to prevent a course from qualifying as ''distance education'' if the institution provides only a single limited form of interaction as part of that course.

During the initial discussions in the subcommittee, the Department sought to reach agreement on possible requirements for the ''regularity'' of substantive interactions between students and instructors that were clear and easy to understand. Using those guidelines, the Department proposed one option that would have required one substantive interaction in every week of instruction for a course that was worth at least three credit hours, or one substantive interaction for every two weeks of instruction for a course that was worth fewer than three credit hours. However, the subcommittee expressed concerns about that proposal and any other one-size-fits-all requirement for how often substantive interactions must occur, citing the wide variety of different types of online programs and pedagogical techniques used in postsecondary education. Several subcommittee members also indicated that requirements for regularity that were too restrictive would impose unnecessary administrative burdens on institutions and students, such as mandating that an instructor ''check in'' with a student even if the student did not need or request such a check-in or requiring students to submit blog posts or other similar assignments that may be tied more to a mandate for quantity than quality. One subcommittee member proposed tying the number and frequency of required substantive interactions to the number of credit hours associated with the courses in which a student was enrolled and the timeframe in which those courses would take place, but the Department indicated that it had attempted to develop a requirement using that framework and had determined that any such system would be too complex and administratively burdensome to implement.

Most of the subcommittee members ultimately agreed to a compromise in which an institution would ensure regular interaction by either scheduling substantive interactions on a predictable and regular basis, or by monitoring a student's academic engagement and promptly and proactively engaging in substantive interaction with the student on the basis of that monitoring. The committee subsequently decided to require institutions to offer predictable and regular opportunities for substantive interaction and to monitor each student's academic engagement and success in order to ensure that instructors engage with the student as needed. The committee also revised the wording of the proposed definition to require scheduled opportunities for interaction rather than scheduled interactions in order to emphasize that the regulations should not require every student to participate in every scheduled interaction.

Incarcerated Student

Statute: Section 401 of the HEA prohibits the award of a Federal Pell Grant to an individual who is

incarcerated in a Federal or State penal institution or who is subject to an involuntary civil commitment upon completion of a period of incarceration for a forcible or non-forcible sexual offense (as determined in accordance with the Federal Bureau of Investigation's Uniform Crime Reporting Program).

Section 472 of the HEA states that the cost of attendance for incarcerated students can only include tuition and fees and, if required, books and supplies. Section 484 of the HEA states that no incarcerated student is eligible to receive a loan. However, the term ''incarcerated student'' is not defined in the HEA.

Current Regulations: Current regulations define ''incarcerated student'' as a student who is serving a criminal sentence in a Federal, State, or local penitentiary, prison, jail, reformatory, work farm, or other similar correctional institution. A student is not considered incarcerated if that student is in a half-way house or home detention or is sentenced to serve only on weekends.

Proposed Regulations: We propose to add ''juvenile justice facility'' to the list of correctional institutions in the definition of ''incarcerated student.'' We also propose to add that for the purposes of Pell Grant eligibility under § 668.32(c)(2)(ii), a student who is incarcerated in a juvenile justice facility, or in a local or county facility, is not considered to be incarcerated in a Federal or State penal institution, regardless of which governmental entity operates or has jurisdiction over the facility, including the Federal government or a State, but is considered incarcerated for purposes of determining the cost of attendance under HEA section 472 in determining eligibility for and the amount of a Pell Grant.

Reasons: The Department proposes to add the term ''juvenile justice facility'' to the definition in response to questions raised during Department technical assistance events regarding whether these facilities are correctional institutions. A subcommittee member believed that the addition of the term ''juvenile justice facility'' could be misinterpreted by the public to mean that the Department is attempting to restrict access to Federal Pell Grants to students serving in a juvenile justice facility. Several main committee members agreed.

Current § 668.32(c)(2)(ii) states that an individual incarcerated in a Federal or State penal institution is not eligible for a Federal Pell Grant. The Department proposes to add that a student who is incarcerated in a juvenile justice facility is not considered to be incarcerated in a Federal or State penal institution, regardless of which governmental entity operates or has jurisdiction over the facility, to ensure that students incarcerated in a juvenile justice facility continue to be eligible for Federal Pell Grants. A reference to section 472 of the HEA was added because the same rules apply for determining the cost of attendance for all incarcerated students. These amendments to the definition of ''incarcerated student'' represent no substantive change to current practice.

Juvenile Justice Facility

Statute: There is no statutory reference to ''juvenile justice facility'' in the HEA.

Current Regulations: There is no current regulatory definition of ''juvenile justice facility.''

Proposed Regulations: The Department proposes to define a ''juvenile justice facility'' as a public or private residential facility that is operated primarily for the care and rehabilitation of youth who, under State juvenile justice laws—

(1) Are accused of committing a delinquent act;

(2) Have been adjudicated delinquent; or

(3) Are determined to be in need of supervision.

Reasons: The Department proposes to add a definition of ''juvenile justice facility'' to codify current sub-regulatory guidance published on December 8, 2014 (DCL ID: GEN 14–21) [13] and to provide sufficient clarity where the term is referenced in the Department's regulations and materials, including in the definition of ''incarcerated student.''

Nonprofit Institution

Statute: Section 103 of the HEA defines the term ''nonprofit'' as a school, agency, organization, or institution owned and operated by one or more nonprofit corporations or associations, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

Current Regulations: Paragraph (1) of the definition of ''nonprofit institution'' in § 600.2 defines a ''nonprofit institution'' as an institution that—

- Is owned and operated by one or more nonprofit corporations or associations, no part of the net earnings of which benefits any private shareholder or individual;
- Is legally authorized to operate as a nonprofit organization by each State in which it is physically located; and
- Is determined by the U.S. Internal Revenue Service to be an organization to which contributions are tax-deductible in accordance with section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)).

Paragraph 3 of this definition repeats the language in paragraph (1), stipulating that an institution is a ''nonprofit institution'' if is determined by the U.S. Internal Revenue Service to be an organization to which contributions are tax deductible in accordance with section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)).

Proposed Regulations: The Department proposes to delete paragraph (3) from the definition of ''nonprofit institution.''

Reasons: The language in paragraph (3) is entirely redundant of paragraph (1)(iii). Members of the subcommittee and the full committee endorsed this change.

§ 600.7 Conditions of Institutional Ineligibility

Statute: Section 102(a)(3) of the HEA states that an institution does not meet the definition of an ''institution of higher education'' if the institution offers more than 50 percent of its courses by correspondence (unless the institution meets the definition in section 3(3)(C) of the Carl D. Perkins Career and Technical Education Act) or enrolls 50 percent of more of its students by correspondence. The statute specifically excludes courses offered by telecommunication from consideration in those calculations and provides that an institution may be exempted from the limitation on correspondence students by the Secretary for good cause if the institution provides a 2- or 4-year program of instruction for which the institution awards an associate or baccalaureate degree, respectively.

Current Regulations: Section 600.7(a)(1)(i) and (ii) incorporates the statutory limitations on the number of correspondence courses that an institution may offer and the number of correspondence students that an institution may enroll. Section 600.7(b)(1)(i) defines a correspondence course for this purpose as either a complete educational program offered by correspondence, or one course provided by correspondence in an on-campus (residential) educational program. Section 600.7(b)(1)(ii) states that a course must be considered as being offered once during an award year regardless of the number of times it is

[13] *ifap.ed.gov/dpcletters/GEN1421.html.*

offered during the year. Section 600.7(b)(1)(iii) provides that a course that is offered both on campus and by correspondence must be considered two courses for the purposes of determining the total number of courses the institution provided during an award year. There are currently no regulations that clarify which students are ''enrolled in correspondence courses.''

Proposed Regulations: The Department proposes to add a new paragraph (b)(2) to provide that a student is considered ''enrolled in correspondence courses'' if correspondence courses constitute more than 50 percent of the courses in which the student enrolled during an award year.

Reasons: Currently, the regulations do not address when a student who is enrolled in some correspondence coursework should be counted as ''enrolled in correspondence courses'' for the purpose of determining whether an institution has exceeded the limitation on the number of correspondence students it may enroll during an award year. This has led to confusion regarding an important institutional eligibility factor for the title IV, HEA programs.

During the negotiations, the Department initially proposed to define a ''student enrolled in correspondence courses'' as one whose enrollment during an award year was entirely in correspondence courses. Several subcommittee members indicated that this would create a loophole whereby an institution could avoid considering a student to be a correspondence student by having the student enroll in a single distance education or in-person course. Some subcommittee members indicated that enrollment in 50 percent or 75 percent correspondence courses would avoid that loophole. The Department incorporated those suggestions by using a ''more than 50 percent'' threshold of enrollment in correspondence courses because it means a student would be mostly enrolled in such courses.

Date, Extent, Duration, and Consequence of Eligibility (§ 600.10)

Statute: Section 498 of the HEA requires the Secretary to determine the legal authority to operate within a State, the accreditation status, and the administrative capability and financial responsibility of an IHE. Section 498(b) requires the Secretary to provide a single application form that requires sufficient information and documentation from institutions to determine that the requirements of eligibility, accreditation, financial responsibility, and administrative capability are met.

Section 481(b) of the HEA defines the types of educational programs for which students can receive aid under the title IV, HEA programs and includes among those programs instructional programs that use direct assessment of student learning, or recognize the direct assessment of student learning by others, in lieu of measuring student learning in credit hours or clock hours. Section 481(b)(4) provides that, in the case of a direct assessment program for which eligibility is being determined for the first time, the Secretary must make the eligibility determination before the program is considered eligible for title IV participation.

Current Regulations: Section 600.10(c)(1)(iii) provides that an institution that seeks to establish eligibility for a direct assessment program must obtain the Secretary's approval every time the institution adds a program.

Proposed Regulations: The proposed regulations would require an institution to seek and obtain the Department's approval of a direct assessment program when the institution adds such a program for the first time, and when the institution offers the first direct assessment program at each level of offering (*e.g.,* a first direct assessment master's degree program or bachelor's degree program) than what the Secretary had previously approved.

Reasons: We believe that once an institution demonstrates that it can capably administer a direct assessment program, there is little risk that the same institution would not properly administer other direct assessment programs. In reviewing initial direct assessment requests, the Department will review the institution's processes related to title IV aid administration but will not evaluate academic content or academic quality of programs, except to confirm that an accrediting agency has specifically approved each program. Accordingly, once an institution has demonstrated its capability to administer these programs, there is little value in the Department reviewing subsequent programs.

Under the proposed regulations, an institution would not be required to submit a second or subsequent direct assessment program to the Department for approval unless otherwise required to do so under § 600.20(c)(1). The committee requested an exception to this rule, however, when an institution adds a direct assessment program at a different level of offering than what the Secretary had previously approved, arguing that such a change was worthy of additional scrutiny. The Department agrees that an institution may have different administrative procedures, capacity, and expertise in place for graduate versus undergraduate programs or for two-year versus four-year programs, so additional review would have merit in these circumstances.

The Department has revised the consensus language to clarify that the first program at each credential level must be approved. The language could have been read to imply that each program at a new credential level would need to be approved (but not at the first credential level). Instead, the Department would approve a first direct assessment program (for example, a bachelor's degree program) and then, to ensure an institution has sufficient capacity and expertise, also approve the first master's degree program. Since the Department is not approving subsequent bachelor's degree programs, there would be no reason to approve subsequent master's degree programs and that was not the goal of the consensus language.

§ 600.20 Notice and Application Procedures for Establishing, Reestablishing, Maintaining, or Expanding Institutional Eligibility and Certification

Statute: Section 498 of the HEA requires the Secretary to determine an institution's legal authority to operate within a State, its accreditation status, and its administrative capability and financial responsibility for purposes of determining the institution's eligibility to participate in title IV, HEA programs. In making such determinations, the Secretary considers information and documentation provided by the institution.

Current Regulations: Section 600.20(d)(1)(ii)(A) requires an institution that notifies the Secretary of its intent to add an educational program for which it is required to apply to the Secretary for approval under § 600.10(c), to ensure such notification is received by the Secretary at least 90 days before the first day of class of the educational program. An institution that properly submits its notification of intent to add an educational program is not required to obtain approval to offer the additional program unless the Secretary alerts the institution at least 30 days before the first day of class that the program must be approved for title IV, HEA purposes.

Proposed Regulations: The proposed regulations would remove § 600.20(d)(1)(ii)(B), which provides that an institution submitting a notice in accordance with § 600.20(d)(1)(ii)(A) is not required to obtain approval to offer the additional program unless alerted by

the Secretary at least 30 days before the first day of class that the program must be approved. Additionally, the Department proposes to modify § 600.20(a) and (b) to commit the Secretary to take prompt action in response to any initial eligibility application or reapplication received from an institution.

Reasons: The current regulations create an unnecessarily prolonged process for approval of new programs, especially since an institution trying to timely offer new programs to meet student demand or workforce needs cannot reasonably wait until 30 days prior to the start of the program to advertise or enroll students in the program. The regulations also do not include a time frame for the Secretary to notify an institution that approval by the Secretary is necessary. This could create a situation where the Department's approval is delayed for so long that the institution's State authorizing agency or its accrediting agency requires the institution to start over and submit a new application and fees and undergo an additional site visit at the institution's expense. Since the Department does not determine program quality, the Department should not second-guess the accrediting agency or State authorizing agency approval of new programs. After the approval process has concluded, the Secretary notifies the institution of the outcome. The proposed regulations recognize the appropriate role of accrediting agencies and State authorizing agencies in determining the quality of new programs and reflects the Department's intent that the Department should not block an institution's addition of new programs except in rare and unique circumstances related to the Department's regulatory requirements or in relation to requirements that are specifically indicated in an institution's program participation agreement (PPA).

§ 600.21 Updating Application Information

Statute: Section 498(b) of the HEA requires the Secretary to provide a single application form that requires sufficient information and documentation from institutions to determine that the requirements of eligibility, accreditation, administrative capability, and financial responsibility are met.

Section 481(b) of the HEA provides for the eligibility of direct assessment programs, and HEA section 481(b)(4) states that, in the case of a direct assessment program for which eligibility is being determined for the first time, the Secretary must make the eligibility determination before the program is considered eligible for title IV participation.

Current Regulations: Section 600.21 requires an institution to notify the Department of various changes to certain information regarding the institution no later than 10 days after the change occurs in the information. Section 600.10 requires the Department to approve all direct assessment programs, necessitating submission of information regarding those programs to the Secretary and obviating the need for a separate reporting requirement under § 600.21. The regulations currently do not require institutions to notify the Department when they add a program in which more than 25 percent of the program is provided by an ineligible institution or organization.

Proposed Regulations: The Department proposes to add two new reporting requirements to § 600.21. Under the proposed regulations, an institution would be required to report the following changes to the Secretary, no later than 10 days after the change occurs:

- The addition of a second or subsequent direct assessment program at the same credential level; and
- The establishment of a written arrangement for an ineligible institution or organization to provide more than 25 percent of a program under § 668.5(c).

The Department also revises § 600.21(a)(11) to remove citations and a reference to ''updating certification pursuant to § 668.414(b).''

Reasons: Section 600.10(c)(1)(iii) requires the Department to approve each direct assessment program an institution offers. Under the proposed regulations, the Department would review and approve such programs only the first time an institution offers such a program and the first time it offers a direct assessment program at a higher degree level. Since the Department would no longer have a role in approving direct assessment programs after the first one is approved, unless the new direct assessment program is at a different credential level, the Department would need to create a reporting mechanism to track such programs. Therefore, without a conforming change to § 600.21, the Department would only be notified that an institution had added its first direct assessment program at each degree level and would not be told about subsequent direct assessment programs. Because direct assessment programs are still a relatively recent development in postsecondary education, the Department has an interest in monitoring the growth and expansion of such programs even though there is no compelling reason for the Department to approve each one. Therefore, we propose to add a requirement in § 600.21 for an institution to report the addition of a second or subsequent direct assessment program no later than 10 days after the first day that the program is offered.

Similarly, because the Department has an interest in understanding the extent to which written arrangements are used to deliver title IV eligible programs, we propose to require an institution to report when it enters into a written arrangement with an ineligible institution or organization to provide more than 25 percent of a program under § 668.5(c). This will enable the Department to monitor such arrangements and ensure that institutions have sought and received approval for such arrangements from their accrediting agencies.

The changes to § 600.21(a)(11) remove references to sections that were modified or eliminated in the final Gainful Employment regulation.[14]

§ 600.52 Definitions

Statute: Section 102 of the HEA establishes that for the purposes of part D of title IV (Federal Direct Student Loan Program), an institution outside the United States that is comparable to an IHE as defined in section 101 of the HEA and that has been approved by the Secretary for the purpose of part D of title IV, meets the definition of an IHE for title IV purposes. Section 102 further directs the Secretary to establish criteria by regulation for the approval of institutions outside the United States and for the determination that such institutions are comparable to an IHE as defined in section 101 of the HEA.

Current Regulations: The definition of a ''foreign institution'' in § 600.52 precludes such an institution, except with respect to clinical training offered under § 600.55(h)(1), § 600.56(b), or § 600.57(a)(2), from having any type of written arrangement, within the meaning of § 668.5, with any institutions or organizations within the United States for students to take courses from such institutions or organizations. Additionally, a foreign institution may not permit students to enroll in any course offered by the foreign institution in the United States, including research, work, internship, externship, or special studies. The definition does, however, contain an exception for independent research done by an individual student in the United States for not more than one

[14] 84 FR 31392.

academic year, if that research is conducted during the dissertation phase of a doctoral program and the research can only be performed in the United States.

Proposed Regulations: The Department proposes to revise paragraph (1)(ii)(B) of the definition of ''foreign institution'' to allow an eligible foreign institution to enter into a written arrangement with an eligible institution within the United States to provide no more than 25 percent of the courses required for a student's eligible program. The proposed regulations would further permit students enrolled in a program at an eligible foreign institution to complete up to 25 percent of an eligible program by enrolling in coursework, research, work, internship, externship, or special studies offered by an eligible institution in the United States. The current exception for independent research done by an individual student in the United States for not more than one academic year for research conducted during the dissertation phase of a doctoral program (and the research can only be performed at a facility in the United States) would be retained but moved to paragraph (2) of the definition and would not be subject to the overall restriction on the percentage coursework offered by the institution in the United States. Accordingly, a doctoral candidate conducting research in the United States under this exception would be able to do so for a full academic year even if that academic year comprises more than 25 percent of the doctoral program. However, it would not be permissible for a student enrolled in a doctoral program, who, prior to the dissertation phase of that program, has completed any portion of it by taking coursework in the United States (as permitted under the proposed definition of ''foreign institution,'' paragraph (1)(ii)(B) and (1)(ii)(C)), to later conduct independent research in the United States that cumulatively exceeds 25 percent of the program. The Department seeks comments regarding whether this limitation as proposed is necessary and appropriate or should be broadened such that a doctoral student, having already completed 25 percent of his or her eligible program by taking coursework in the United States, would be permitted an additional full academic year to conduct independent research there as well.

In several places, the Department has modified the existing and consensus regulations to remove the word ''State'' and replace it with ''United States'' in order to clarify that the distinction being made relates to whether an institution is located in any State (*i.e.* the United States), rather than one State or another.

Reasons: Current restrictions on foreign institutions executing written arrangements with institutions or organizations in the United States or permitting students enrolled in eligible programs to enroll in any coursework offered in the United States are based on the Department's long-held position that U.S. students borrowing from the Direct Loan program for enrollment in a program at an eligible foreign institution should reside in the country where that institution is located. The proposed regulations are consistent with that position. However, we believe that the current regulations are needlessly restrictive and unfairly circumscribe the overall educational experience that foreign institutions may offer their U.S. students. There are several legitimate reasons why a foreign institution might want to permit U.S. students enrolled in its eligible programs to complete part of their education in the United States. For example, a student may wish to continue his or her education while residing at home during the institution's summer recess or pursue opportunities for a specific internship or externship that is only in the United States, or may experience personal difficulties that would necessitate study in the United States for a limited time period.

While introducing flexibilities that the Department believes will enable foreign institutions to provide U.S. students an improved educational experience, these proposed regulations retain key safeguards that would ensure program integrity and reinforce the expectation that U.S. students enrolling in an eligible foreign institution do so with the intent of taking coursework from that institution and, for the period of matriculation, residing in the country where it is located. Toward that end, the Department proposes to limit to 25 percent the portion of an eligible program offered at a foreign institution that may be provided by an institution in the United States either under a written arrangement or through the student enrolling in coursework, internship, externship, or special studies at an eligible institution in the United States. Additionally, such coursework or other types of work could only be offered by institutions meeting the definition of an ''eligible institution.'' The Department seeks comments regarding whether the options available to students for study or internships in the United States under this proposed flexibility should be expanded to include organizations that are not eligible institutions. We wish to clarify that these proposed regulations would not permit students who are enrolled in an eligible foreign institution but taking coursework in the United States under a written arrangement to receive title IV, HEA assistance other than a Direct Loan. While the terms of such an arrangement may stipulate that the host institution (the U.S. institution in this case) is responsible for the functions of awarding and disbursing title IV aid, that institution may only award Direct Loans and not other types of aid for which a student at a foreign institution is ineligible.

§ 600.54 Criteria for Determining Whether a Foreign Institution Is Eligible To Apply To Participate in the Direct Loan Program

Statute: Section 102 of the HEA establishes that for the purposes of part D of title IV (Federal Direct Student Loan Program), an institution outside the United States that is comparable to an IHE as defined in section 101 of the HEA and that has been approved by the Secretary for the purpose of part D of title IV, meets the definition of an IHE for title IV purposes. Section 102 further directs the Secretary to establish criteria by regulation for the approval of institutions outside the United States and for the determination that such institutions are comparable to an IHE as defined in section 101 of the HEA.

Current Regulations: Section 600.54(c) prohibits a foreign institution from entering into a written arrangement under which an ineligible institution or organization provides any portion of one or more of the eligible foreign institution's programs.

Proposed Regulations: The Department proposes to revise § 600.54(c) to permit written arrangements between an eligible foreign institution and an ineligible entity, provided the ineligible entity is an institution that satisfies the definition in paragraphs (1)(iii) and (iv) of ''foreign institution'' and the ineligible foreign institution provides 25 percent or less of the educational program.

Reasons: We believe that the current regulatory prohibition on eligible foreign institutions entering into written arrangements with ineligible foreign institutions unfairly restricts U.S. students enrolled abroad from taking advantage of an important option available to their counterparts attending domestic institutions, namely the opportunity to take courses at any number of host institutions under an agreement that allows credits earned at those institutions to count toward matriculation in the student's program

of study at his or her home institution. Currently, eligible foreign institutions may enter into written arrangements with other eligible foreign institutions, but due to the limited number of those institutions, students' options are similarly limited.

These proposed regulations would broaden the educational experiences available to U.S. students enrolled in eligible foreign institutions while providing assurance that the quality of academic instruction offered students at ineligible host institutions is reasonably equivalent to what they receive at their home institutions. As discussed above, ineligible foreign institutions would be required to meet the definition of ''foreign institution'' under paragraphs (1)(iii) and (iv) of that definition in order to enter into written arrangements with eligible foreign institutions. Those provisions require the ineligible institution to be legally authorized by the educational ministry, council, or equivalent agency of the country in which the institution is located to provide an education beyond the secondary level; and award degrees, certificates, or other recognized educational credentials in accordance with § 600.54(e) that are officially recognized by the country in which the institution is located.

§ 668.1 Scope

Statute: Title I, part A of the HEA establishes the general provisions that define ''institution of higher education'' for the purposes of title IV programs, including public or nonprofit institutions and proprietary institutions of higher education.

Current Regulations: Section 668.1 defines the scope for part 668, which establishes general rules that apply to an institution that participates in any title IV, HEA program. This section also provides that an institution's use of a third-party servicer does not alter the institution's responsibility for compliance with the regulations in part 668. This section also states that the term ''institution'' includes those that are defined in 34 CFR 600.4 (definition of ''institution of higher education''), 600.5 (definition of ''proprietary institution of higher education''), and 600.6 (definition of ''postsecondary vocational institution''). This section lists the following programs as title IV, HEA programs: Federal Pell Grant, Academic Competitiveness Grant (ACG), Federal Supplemental Educational Opportunity Grant, the Leveraging Educational Assistance Partnership Program, the Federal Stafford Loan Program, the Federal PLUS Program, the Federal Consolidation Loan Program, the Federal Work-Study Program, the William D. Ford Federal Direct Loan Program, the Federal Perkins Loan Program, the National SMART Grant program, and the TEACH Grant program.

Proposed Regulations: The Department proposes to add the phrase ''unless otherwise specified'' in paragraph (b), which states that for this part, an ''institution'' includes the definition of ''institution of higher education'' established in 34 CFR 600.4, the definition of a ''proprietary institution of higher education'' established in 34 CFR 600.5, and the definition of a ''postsecondary vocational institution'' as established in 34 CFR 600.6.

Reasons: This proposed addition is a technical change to indicate that the Department will note if there is any change to the definition of ''institution'' throughout Part 668. For example, if a regulation only applies to a postsecondary vocational institution, the Department would note that in an appropriate regulation. Otherwise, the term ''institution'' includes all three types of institutions, as defined in §§ 600.4, 600.5, and 600.6.

§ 668.2 Definitions

Academic Competitiveness Grant

Statute: Section 401(A) previously authorized the Academic Competitiveness Grant program.

Current Regulations: Section 668.2 defines the ''Academic Competitiveness Grant (ACG) Program'' as a grant program authorized by Title IV–A–1 of the HEA under which grants are awarded during the first and second academic years of study to eligible financially needy undergraduate students who successfully complete rigorous secondary school programs of study.

Proposed Regulations: The Department proposes to eliminate the definition of ''Academic Competitiveness Grant (ACG) program.''

Reasons: We propose to eliminate the definition of the ''Academic Competitiveness Grant program,'' because the program is no longer authorized by the HEA and regulatory provisions using the definition are therefore no longer effective.

Full-Time Student

Statute: The definition of ''academic and award year,'' in section 481 of the HEA, provides that a full-time student is expected to complete at least 24 semester or trimester hours or 36 quarter credit hours in a course of study that measures its program length in credit hours, or 900 clock hours in a course of study that measures its program length in clock hours.

Current Regulations: Section 668.2 defines a ''full-time student'' as an enrolled student who is carrying a full-time academic workload, as determined by the institution, under a standard applicable to all students enrolled in a particular educational program. That definition also states that, for a term-based program, the student's workload may include repeating any coursework previously taken in the program but may not include more than one repetition of a previously passed course. The definition sets requirements for an institution's minimum standard for full-time enrollment in an undergraduate program, including:

- For a program that measures progress in credit hours and uses standard terms (semesters, trimesters, or quarters), 12 semester hours or 12 quarter hours per academic term.
- For a program that measures progress in credit hours and does not use terms, 24 semester hours or 36 quarter hours over the weeks of instructional time in the academic year, or the prorated equivalent if the program is less than one academic year.
- For a program that measures progress in credit hours and uses nonstandard-terms (terms other than semesters, trimesters, or quarters) the number of credits determined by dividing the number of weeks of instructional time in the term by the number of weeks of instructional time in the program's academic year; and multiplying the resulting fraction determined by the number of credit hours in the program's academic year.
- For a program that measures progress in clock hours, 24 clock hours per week.
- A series of courses or seminars that equals 12 semester hours or 12 quarter hours in a maximum of 18 weeks.
- The work portion of a cooperative education program in which the amount of work performed is equivalent to the academic workload of a full-time student.
- For correspondence coursework, a full-time course load must be commensurate with the full-time definitions listed above, and at least one-half of the coursework must be made up of non-correspondence coursework that meets one-half of the institution's requirement for full-time students.

There is currently no regulatory definition of a ''subscription-based program,'' nor a definition of a ''full-

time student in a subscription-based program'' in § 668.2.

Proposed Regulations: In the definition of ''full-time student,'' we propose to exclude subscription-based programs from the types of term-based programs in which a student's workload may include no more than one repetition of a previously passed course. We also propose to add a new paragraph (8) to this definition that describes the requirements for full-time enrollment in a subscription-based program as completion of a full-time course load commensurate with the ''full-time'' definitions in paragraphs (1), (3), and (5) through (7) of the definition of ''full-time student.''

Reasons: The Department proposes changes to the definition of ''full-time student'' to provide clarity for subscription-based programs in accordance with discussion during negotiated rulemaking that concluded that current regulations were insufficient to accommodate new technology-driven models of education. The Department wishes to express our continuing concern that there is often a disconnect between the requirements for licensure and the requirements for employment. We encourage employers to be cognizant of the limitations the Department places on students when preparing to enter a field that is subject to licensure requirements.

The requirements for subscription-based programs are not addressed in the current regulations because they are generally programs that have become possible or practicable only with the development of more recent technology-driven models in direct assessment programs.

Under subscription-based models, a student does not progress until demonstrating competency in a given skill or subject area, as opposed to completing a course with a defined timeframe in a traditional educational program. In a traditional course, a student may have passed the course but failed to master some of the material. Alternatively, sections of the same course taught by different instructors could present different information. However, subscription-based programs measure student progress based on demonstrated competencies rather than the passage of time. There would be no reason for a student who demonstrated all of the necessary competencies to complete a subscription-based course to be given an opportunity to repeat the course. Therefore, the regulatory provision allowing a student to retake a completed course for title IV, HEA purposes is nonsensical when applied to a subscription-based direct assessment program.

Finally, because the Department is also proposing a definition for ''subscription-based program,'' the inclusion of that term in ''full-time student'' is a necessary conforming change in order to ensure that student eligibility for those enrolled in a subscription-based program can be established.

Subscription-Based Program

Statute: Under sections 428G(a) and 455(a) of the HEA the interval between the first and second installment of Federal Direct Loan student loan payments must not be less than one-half of the period of enrollment, except in the case of programs offered in semesters, quarters, or a similar division of the period of enrollment. Section 401(b)(2)(B) provides that in any case where a student attends an institution on a less than full-time basis, the amount of Pell Grant funds to which the student is entitled shall be reduced in proportion to the student's enrollment in accordance with a schedule of reductions established by the Secretary. Section 401(e) of the HEA states that Pell Grant payments shall be made in accordance with regulations promulgated by the Secretary. Section 484(b)(2) of the HEA provides that to be eligible for a loan under the Direct Loan program, a student must be carrying at least one-half the normal full-time work-load for the course of study that the student is pursuing, as determined by an eligible institution. The HEA does not refer to the term ''subscription-based education.''

Current Regulations: Section 668.4(a) provides that for a student enrolled in an eligible program that measures progress in credit hours and uses standard terms (semesters, trimesters, or quarters), or for a student enrolled in an eligible program that measures progress in credit hours and uses nonstandard-terms that are substantially equal in length, the payment period is the academic term. Section 668.4(b) provides that for a student enrolled in an eligible program that measures progress in credit hours and uses nonstandard-terms that are not substantially equal in length, for purposes of the Pell Grant, FSEOG, and TEACH Grant programs the payment period is the term, but for purposes of the Direct Loan Program the payment period is the period of time in which the student successfully completes half of the credit hours and weeks of instructional time in the academic year, or, if the program or the remaining portion of the program that the student is attending is shorter than an academic year, half of the credit hours and weeks of instruction in the program or remaining portion of the program, respectively. Section 668.4(c) provides that for an academic program that does not have academic terms or a program that measures progress in clock hours, the payment period is the period of time in which the student successfully completes half of the credit hours and weeks of instructional time in the academic year, or, if the program or the remaining portion of the program that the student is attending is shorter than an academic year, half of the credit hours and weeks of instruction in the program or remaining portion of the program, respectively. The current regulations do not refer to subscription-based programs.

Proposed Regulations: We propose to define ''subscription-based program'' as a standard or nonstandard-term direct assessment program in which the institution charges a student for each term on a subscription basis with the expectation that the student will complete a specified number of credit hours during that term. We propose to clarify that coursework in a subscription-based program is not required to begin or end within a specific timeframe in each term, and that students in subscription-based programs must complete a cumulative number of credit hours (or the equivalent) during or following the end of each term before receiving subsequent disbursements of title IV, HEA program funds. We also propose to require that an institution must establish a single enrollment status that will apply to a student throughout the student's enrollment in a subscription-based program, except that a student may change his or her enrollment status no more often than once per academic year. Finally, we propose to explain the method for determining the number of credit hours (or the equivalent) that a student in a subscription-based program must complete before receiving subsequent disbursements as follows:

- An institution first determines, for each term, the number of credit hours (or the equivalent) associated with the institution's minimum standard for the student's enrollment status (for example, full-time, three-quarter time, or half-time) for that period. An institution would be required to adjust this figure to at least one credit (or the equivalent) for a student who is enrolled less than half-time.
- Following this determination, the institution adds together the number of credit hours (or the equivalent) determined for each term that the

student enrolled in and attended, excluding the current and most recently attended terms.

Reasons: The current regulatory requirements for disbursements by payment period in term-based and non-term programs are designed to ensure that institutions are permitted to make all title IV, HEA program disbursements at the same time using consistent definitions of payment periods that apply to all programs. The requirements for term-based programs are intended to maintain a simple and consistent aid delivery system for term-based programs by making each term a payment period in cases where an institution's terms are of sufficient length and have discrete start and end dates. The Secretary's approach for non-term credit hour and clock hour programs ensured that institutions offering such programs would be prohibited from making a second disbursement of Federal student loan funds until the later of the calendar midpoint of the loan period or the date that the student completes half the academic coursework in the loan period.

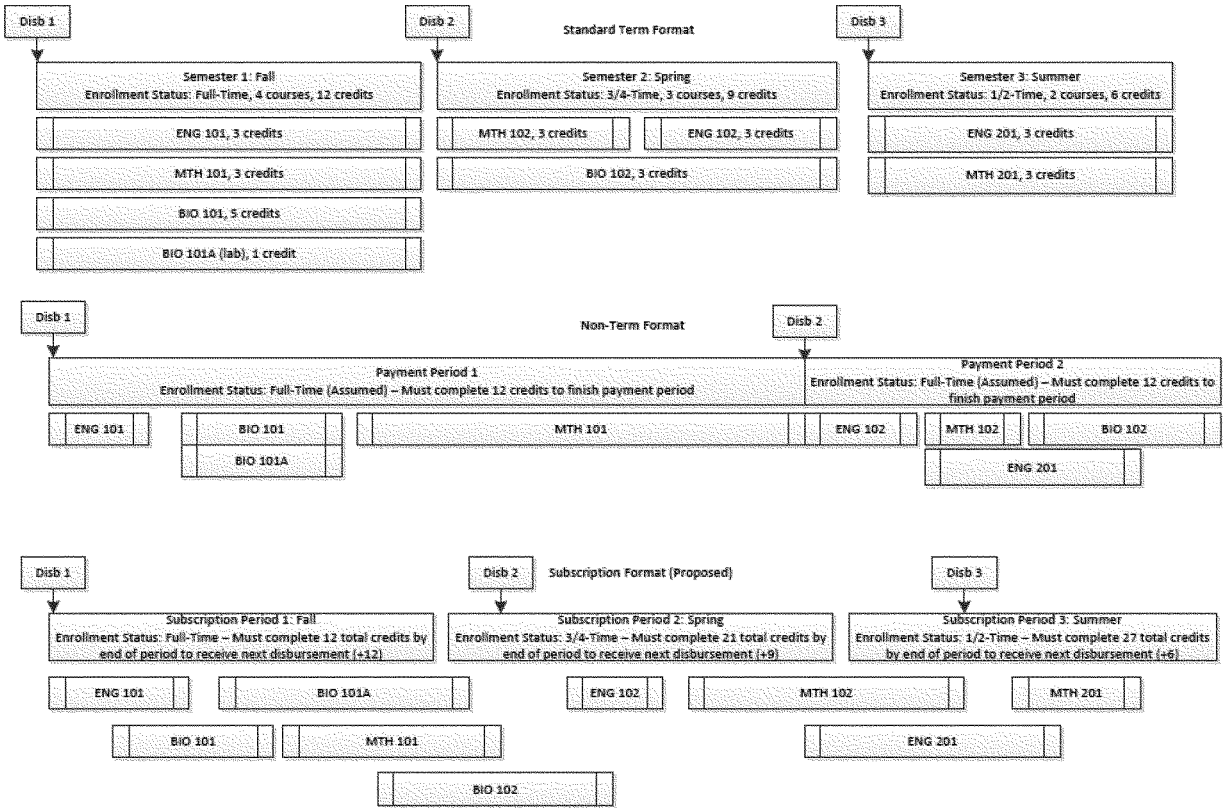
CBE programs, including direct assessment programs, measure a student's academic progress by assessing the student's learning, typically based on the student's demonstration of proficiency or mastery of a defined set of competency standards. Because advancement in CBE programs is not tied to scheduled time periods, many CBE programs allow students to set their own pace for progressing through a program. Therefore, under the current statutory and regulatory requirements for title IV aid disbursement, an institution providing a CBE program has two choices: The institution can either set a discrete period of time during which a student must begin and end work on a given competency in order to use standard or nonstandard terms, or, if the institution chooses to operate the program as a non-term program, the student's title IV aid may be disbursed only after the student has completed both a specific predefined portion of coursework and a predefined period of calendar time. Requiring competency-based coursework to begin and end within a specific timeframe limits a student's flexibility to work at his or her own pace and could artificially delay a student's progress if the institution was required to deny a student's request to begin a new competency near the end of a term. Conversely, implementing a non-term disbursement system for a CBE program is more complicated than for a non-term program that has a strict progression. Substantial variation in the speed at which students progress through the program would require an institution to carefully monitor each student to ensure that it did not make a disbursement before the student had completed the requisite weeks of instruction and credit hours (or the equivalent). Therefore, the current requirements for disbursement in term-based and non-term programs make it substantially more difficult for institutions to implement CBE programs in which students work at their own pace without adopting a complicated and administratively burdensome disbursement methodology.

In a **Federal Register** notice published July 31, 2014 (79 FR 44429), the Secretary established the Competency-Based Education Experiment in order to test new approaches to disbursing title IV, HEA assistance to students in CBE programs. The experiment permitted an institution to disburse title IV, HEA assistance for institutional charges as soon as a student completed a required number of competencies while requiring disbursements of aid for indirect costs (such as living expenses) at regular intervals related to the completion of a certain number of weeks of instruction. A number of institutions participating in the experiment indicated to the Department that there were administrative challenges to implementing the experiment resulting from the requirement to track separately a student's completion of competencies and the student's completion of calendar time and make disbursements of title IV, HEA assistance separately for direct and indirect costs, respectively. Institutions also indicated that there were specific challenges associated with implementing that form of disbursement for programs that charged students a set amount for a defined period of time rather than charging an amount for each required competency in the program. The Secretary responded by expanding the Competency-Based Education experiment in a **Federal Register** notice published November 18, 2015 (80 FR 72052). The expanded experiment permitted an institution to participate in one of three different versions of the experiment, including a new version that provided waivers and modifications of regulatory requirements specifically designed to support disbursement in subscription-based programs.

The new version of the experiment (referred to as ''Subscription-Based Disbursement'') allowed participating institutions to include in a determination of a student's enrollment status competencies that began prior to the start of the subscription period as long as it did not include such competencies in the same student's enrollment status for more than one payment period. Participating institutions were required to disburse title IV, HEA assistance based on the number of competencies that the institution expected the student to complete during a given subscription period. Participating institutions also identified drawbacks to this version of the experiment, noting that the version limited flexibility by requiring institutions to ''lock'' enrollment on a given date several weeks after the beginning of a payment period. The experiment also required an institution to identify specific competencies that had been counted in a student's enrollment status and ensure that such competencies were never included in enrollment status again, resulting in substantial administrative burden for the institution monitoring a student's progress.

During the second meeting of the subcommittee, the Department proposed to implement a term-based method of disbursing title IV, HEA assistance in direct assessment programs, to limit the administrative burden for institutions, increase the flexibility for students to complete competencies at their own pace, and maintain the integrity of the title IV, HEA programs. The Department's proposed disbursement method would permit an institution to treat a subscription period as a payment period, but would avoid requiring institutions to identify specific competencies to assign to a given payment period, instead requiring a student to complete a certain number of competencies in past subscription periods to receive title IV, HEA assistance in subsequent subscription periods. The Department's proposal would also permit an institution to allow students to work on competencies at any time, rather than requiring students to begin and end work on a given competency within the specific timeframe established for the subscription period. This would provide substantially greater flexibility for students to study on their own schedule, rather than adhering to a schedule mandated by the Department's regulations.

As part of its presentation to the subcommittee, the Department provided an example illustrating the differences between the proposed subscription-based disbursement method and the current disbursement requirements for term-based and non-term credit hour programs.



The example demonstrates that under the Department's proposed disbursement method for subscription-based programs, students would be permitted to take coursework that overlaps or extends beyond the start and end dates of payment periods, unlike in term-based credit hour programs under the current regulations. Additionally, the example showed that under the proposed subscription-based disbursement method, an institution would not be required to wait until the middle of a student's academic year in order to make a second or subsequent disbursement of title IV, HEA assistance, as is currently required for credit hour non-term programs. Under subscription-based disbursement, students could receive disbursements of title IV, HEA assistance at the beginning of each payment period, but only if the student had completed the requisite number of credit hours or the equivalent associated with the student's enrollment status in all prior payment periods.

The Department proposed limiting the use of this disbursement method to direct assessment programs that charged students for each term on a subscription basis with the expectation that the student complete a specified number of competencies during that term. The Department would prefer to allow all CBE programs to use the method, but the HEA does not provide a definition of ''CBE programs'' on which the Secretary could rely for this purpose. The subcommittee did not object to the proposed limitations on the types of programs that would be permitted to adopt the proposed disbursement method.

Following the Department's presentation, subcommittee members identified two concerns with the Department's proposed approach:

1. The approach would require institutions using this disbursement method to track each student's completion of credit hours or the equivalent, which is an administratively burdensome process that can be confusing for students.

2. The approach would be disadvantageous to students who fall behind on completing coursework, because it would cut off those students' ability to receive title IV, HEA assistance. Institutions would have little incentive to let such students continue if the students were unable to pay for institutional charges without such assistance.

One subcommittee member presented an alternative to the Department's proposal that would have permitted disbursement based on attempted coursework rather than completed coursework and would have allowed an institution to include a competency in a student's enrollment status more than once if the competency overlapped more than one subscription period. The Department could not support that framework, because we believe it could lead to abuse by allowing institutions to pay title IV aid for the same course twice. This potential for abuse was also the reason that the Department proposed to prevent institutions with subscription-based programs from including repeated coursework in a student's enrollment status.

The Department indicated that it believes that the completion framework is the best way to permit adequate flexibility related to the timeframe for completing coursework while ensuring integrity of the title IV, HEA programs. As an added protection for students, in the third subcommittee meeting, the Department and the subcommittee agreed to revise the proposal to provide a single additional subscription period to permit students to catch up without losing eligibility for title IV, HEA assistance if the students had failed to complete a sufficient number of credit hours. That agreement also provided that an institution using the subscription-based disbursement method would be required to establish a single enrollment status (*i.e.,* full-time, three-quarters time, half-time, or less-than-half time) that would apply to a student throughout his or her program.

Under the language agreed upon by the subcommittee, students would be permitted to transfer into different versions of the same program—for example, from the full-time version to the half-time version—no more than once per academic year. This limitation is intended to permit students to reduce or increase their enrollment status according to changing personal needs while avoiding ''gaming'' in which students repeatedly switch between enrollment statuses for no reason except to avoid completion requirements. The subcommittee agreed to this limitation in order to address the Department's concerns about the integrity of the Title IV programs.

The subcommittee also agreed to establish a minimum enrollment status requirement of one credit or the equivalent per term for less-than-half-time subscription-based programs. This requirement was established because, in the absence of a statutory or regulatory definition of a ''less-than-half-time student,'' a *de minimis* standard for completion is needed in order to ensure that students in less-than-half-time programs make at least some progress in each subscription period in order to qualify for subsequent disbursements of title IV, HEA assistance.

The full committee accepted the subcommittee's agreement regarding the requirements for subscription-based programs and recommended no further changes.

Third-Party Servicer

Statute: Section 481(c) of the HEA defines the term ''third-party servicer'' as ''any individual, any State, or any private, for-profit or nonprofit organization'' that enters into a contract with an eligible IHE to administer any aspect of the institution's student assistance programs or a guaranty agency, or an eligible lender, to administer any aspect of such agency's or lender's student loan programs.

Current Regulations: Section 668.2 defines a ''third-party servicer'' as an entity that enters into a contract with an eligible institution to administer any aspect of the institution's participation in any title IV, HEA program. Under paragraph (1)(i) of the definition of ''third-party servicer,'' the Secretary considers administration of participation in a title IV, HEA program to include, among other things, certifying loan applications.

Proposed Regulations: We propose to replace the words ''Certifying loan applications'' with ''Originating loans'' in paragraph (1)(i)(D) of the definition of ''third-party servicer.''

Reasons: We propose to change ''certifying loan applications'' to ''originating loans'' to capture current terminology used in the student loan award and application process. The proposed change would not change current practices but merely update the terminology used.

§ 668.3 Academic Year

Statute: Section 481(a)(2) of the HEA provides that, for purposes of the title IV, HEA programs, an ''academic year'' requires a minimum of 30 weeks of instructional time for a credit hour program and a minimum of 26 weeks of instructional time for a clock-hour program. An academic year for an undergraduate program of study must additionally include at least 24 semester or trimester hours, 36 quarter hours, or 900 clock hours.

Current Regulations: Section 668.3 defines the minimum requirements for an institution's definition of an ''academic year,'' and defines certain terms related to that definition. The regulations currently define a ''week of instructional time'' as any week in which at least one day of regularly scheduled instruction or examinations occurs or, after the last scheduled day of classes for a term or payment period, at least one day of study for final examinations occurs. The definition currently excludes vacation periods, homework, or periods of orientation or counseling.

Proposed Regulations: The Department proposes to revise the definition of a ''week of instructional time'' as it pertains to an institution's definition of an ''academic year.'' The definition would be separated into two parts: One that applies to traditional postsecondary programs and one that applies to programs using asynchronous coursework through distance education or correspondence courses. The definition applying to traditional programs would remain unchanged and would be included as paragraph (2)(i) of the definition. The Department proposes to add a new paragraph (2)(ii) to establish the requirements for a week of instructional time in a program using asynchronous coursework through distance education or correspondence courses. For those programs, a week of instructional time would be defined in paragraph (2)(ii)(A) as a week in which the institution makes available the instructional materials, other resources, and instructor support necessary for academic engagement and completion of course objectives. The Department proposes to establish in paragraph (2)(ii)(B) that in a program using asynchronous coursework through distance education (not a correspondence course) the institution must also expect enrolled students to perform educational activities demonstrating academic engagement during the week. We also propose to amend paragraph (3) of the definition, relating to the types of activities excluded from the definition of a ''week of instructional time,'' to remove references to vacation periods and homework and instead refer to scheduled breaks and activities not included in the definition of ''academic engagement'' under 34 CFR 600.2.

Reasons: The Department proposes to clarify the definition of a ''week of instructional time'' to accommodate programs without scheduled instruction, specifically distance education and correspondence courses that are offered asynchronously.

The definition of a ''week of instructional time'' is an important component in the regulatory requirements for the proration of Pell Grant and Direct Loan funds, but the definition currently states that a week of instructional time must include at least one day of scheduled instruction. This requirement, which is not included in the statute, effectively makes it impossible for institutions to offer title IV-eligible postsecondary programs without scheduling at least one day of instruction per week. Because the statutory definition of ''distance education'' under HEA section 103(7) specifically includes asynchronous instruction, we believe the current regulations are not consistent with Congress' overall intent and must be revised to accommodate distance education coursework offered asynchronously.

The Department originally proposed to apply the alternative definition of a ''week of instructional time'' to both direct assessment programs and programs using asynchronous coursework through distance education or correspondence. However, one subcommittee member opposed including direct assessment programs in the definition, noting that direct assessment is a large category that may or may not include distance education. Based on that concern, the Department agreed to limit the alternative definition to only distance education and correspondence programs offered asynchronously. Several subcommittee members also expressed concern about the limited requirements for a week of instruction, indicating that a requirement for an institution to merely provide the materials and instructional support for student engagement did not seem comparable to the requirements

for programs with scheduled instruction. Acknowledging this concern, the Department proposed adding a separate requirement for asynchronous programs offered through distance education (as opposed to correspondence courses) that would ensure that such programs created an expectation for academic engagement (in accordance with the proposed definition of that term in § 600.2) while also ensuring that the appropriate materials and instructional support were available to students.

Following the first subcommittee meeting, the Department proposed to exempt distance education or correspondence programs from the prohibition on including homework in the concept of ''instructional time'' since such programs are generally completed at home and the concept of homework is less clear in such programs. However, one subcommittee member indicated that allowing institutions to count homework as meeting requirements for a week of instructional time in a distance education or correspondence program would provide an advantage for such programs over traditional programs with classroom instruction. The Department responded to this concern by revising that part of the definition to exclude activities not included in the definition of academic engagement under 34 CFR 600.2 instead of homework. This would provide institutions with additional flexibility to design innovative, non-traditional programs while still protecting taxpayers.

The subcommittee members did not object to that language or other aspects of the definition presented by the Department at the third subcommittee meeting. The committee accepted the definition as written, except that it proposed to replace the phrase ''vacation periods'' with ''scheduled breaks'' to use a phrase more commonly understood among postsecondary institutions. The Department agreed to this change as part of consensus with the committee.

§ 668.5 Written Arrangements To Provide Educational Programs

Statute: While the HEA does not reference written arrangements, it does allow the Department to establish criteria for institutions to follow as part of the institution's PPA to participate in the title IV, HEA programs.

Current Regulations: Section 668.5 establishes the framework for written arrangements between two eligible institutions or written arrangements between an eligible institution and an ineligible institution or organization to provide part of an educational program. This section does not address workforce responsiveness or the methodology for calculating the portion of a program offered by an ineligible institution or organization. Additionally, it does not address an institution's acceptance of transfer credits or use of prior learning assessment or other non-traditional methods of providing academic credit, or the internship or externship portion of a program.

Proposed Regulations: The Department proposes to revise § 668.5 by adding new paragraphs (f) *Workforce responsiveness,* (g) *Calculation of percentage of a program,* and (h) *Non-applicability to other interactions with outside entities.* The Department proposes to clarify that institutions utilizing written arrangements may align or modify their curriculum in order to meet the recommendations or requirements of industry advisory boards or industry-recognized credentialing bodies. This flexibility to account for established industry standards in designing programs would extend to institutional governance or decision-making changes where an institution looks to such standards as an alternative to allowing or requiring faculty control or approval.

The Department also proposes to clarify the calculation for determining the percentage of the program that is provided by an ineligible institution or organization under § 668.5(c) in paragraph (g). The number of semester, trimester, or quarter credit hours, clock hours, or the equivalent that are provided by the ineligible organization or organizations would be divided by the total number of semester, trimester, or quarter credit hours, clock hours, or the equivalent required for completion of the program. A course would be considered to be provided by an ineligible institution or organization if the contracted organization with which the institution has a written arrangement has authority over the design, administration, or instruction in the course. Lastly, the Department proposes to clarify that neither the acceptance by the institution of transfer credits, the use of prior learning assessment or other non-traditional methods of providing academic credit, nor the internship/externship portion of a program, if governed by accrediting agency standards that require the oversight and supervision of the institution are subject to the provisions of § 668.5 in paragraph (h).

The Department further proposes to revise the existing regulatory language pertinent to written arrangements between two or more eligible institutions that are owned or controlled by the same individual, partnership, or corporation in § 668.5(a)(2), and written arrangements between an eligible institution and an ineligible institution or organization in § 668.5(c)(1). In the case of the former, the proposed regulations would remove current § 668.5(a)(2)(ii), which requires that, under the terms of a written arrangement between two or more eligible institutions owned or controlled by the same individual, partnership, or corporation, the institution granting the degree or certificate must provide more than 50 percent of the eligible program. With respect to the latter provision, proposed § 668.5(c)(1)(i) would require an ineligible institution or organization that is party to a written arrangement with an eligible institution to demonstrate (1) experience in the delivery and assessment of the program or portion of the program they will be contracted to deliver under the provisions of the written arrangement and (2) that the program has been effective in meeting the stated learning objectives. The Department has also added citations to the consensus language in order to reference the appropriate portion of the substantive change regulations in § 602.22.

Reasons: The Department believes the proposed revisions to § 668.5 would better facilitate educational innovations and allow institutions increased flexibility in partnering with entities to provide critical workforce training that may be beyond the capability of institutions to offer on their own. The proposed revisions are also intended to clarify the requirements for institutions to seek and receive approval from accrediting agencies to engage in such partnerships in some circumstances.

Specifically, the proposed addition of paragraph (f) *Workforce responsiveness* would make clear an institution's prerogative to modify its curriculum or academic requirements to meet the needs of industry advisory boards and employers who hire program graduates. Proposed § 668.5(c)(1)(i) would balance this flexibility by requiring that an ineligible organization that enters into a written arrangement with an eligible institution demonstrate experience in the delivery and assessment of the program or portion of the program the ineligible institution will be contracted to deliver under the provisions of the written arrangement and that the program has been effective in meeting the stated learning objectives. However, the Department seeks comment on whether this requirement would be difficult to meet as it may require an institution to ''demonstrate experience

in the delivery and assessment of the program'' and show that the program has been ''effective'' before it can enroll students in partnership with an institution. The Department has removed other similar ''experience'' requirements, including in § 602.12.

We propose to add paragraph (g) to establish specific requirements for how an institution must determine the percentage of a program that an ineligible organization will offer through a written arrangement. The current regulations do not establish specific requirements for performing this calculation, which has resulted in ambiguity regarding when an institution is subject to requirements under § 668.5(c)(3)(ii) for accrediting agency approval of the arrangement. Our intent is to offer a clear and simple method for an institution to determine the portion of the program offered by an ineligible institution or organization by dividing the number of hours provided by the ineligible organization by the total number of hours in the program. We propose to include in the numerator of this calculation the credit hours, clock hours, or the equivalent associated with any course in which the ineligible organization has authority over the design, administration, or instruction in the course, including the establishment of requirements for successful completion of the course, delivering instruction, or assessing student learning. These criteria were chosen because they reflect a circumstance in which the ineligible institution exerts full control over one or more of the fundamental academic functions associated with a given course, and such transfer of academic authority merits additional oversight by an institution's accrediting agency when undertaken for a significant portion of the educational program.

In other words, this provision is reserved for cases where the eligible institution is relying upon the outside entity to offer part of a program just as it might defer to the expertise of another eligible institution. This section would not be utilized, for example, in cases where an institution seeks support moving a ground-based program online or where an institution utilizes third-party resources, instructors, or expertise to deliver part of a program through its own ground-based or online resources unless the entity providing such resources or support is actually performing instructional functions instead of the eligible institution. Written arrangements are focused exclusively on the delivery of instruction, and are separate and distinct from online program management, hiring a third party for food service, and other efforts by institutions to utilize a third-party service provider in an area it does not have core expertise.

In seeking to better prepare students for the workplace and provide them with a competitive advantage in securing employment, many institutions include internship options alongside their curriculum. Through policy guidance, the Department has concluded that written arrangements are not necessary for these internships, nor do the restrictions on such arrangements apply to the internship or externship portion of a program if the internship or externship is governed by accrediting agency standards that require the oversight and supervision of the institution, and students are monitored by qualified institutional personnel. The addition of proposed paragraph (h) *Non-applicability of other interactions with outside entities* would codify this guidance in the regulations. This paragraph would also clarify the Department's position that the limitations on written arrangements do not apply to acceptance by the institution of transfer credits or use of prior learning assessment or other non-traditional methods of providing academic credit.

The Department proposes to eliminate § 668.5(a)(2)(ii), requiring that under a written arrangement between two or more eligible institutions owned or controlled by the same individual, partnership, or corporation, the institution granting the degree or certificate provide more than 50 percent of the eligible program, because we believe that the provision is needlessly restrictive. Although institutions that are party to such a written arrangement may share ownership or control, each institution must meet the criteria to be an eligible institution.

The Department initially proposed to relax the limitations on the percentage of a program that may be provided by an ineligible institution or organization through a written arrangement. The Department sought comment from the subcommittee on appropriate limitations for these arrangements. The Department's goal was to facilitate partnerships between the eligible institutions offering programs and organizations that can provide instruction using trade experts in a workplace environment that mirrors what graduates will encounter in their places of employment. Members of the subcommittee generally opposed making any changes to the restrictions currently found in § 668.5(c)(3). Subcommittee members expressed the collective opinion that the existing allowances already provide sufficient flexibility for the purposes expressed by the Department and that permitting any larger portion of an educational program to be offered by an ineligible entity would call into question whether that program was in fact being offered by an eligible institution.

In the absence of agreement between the Department and non-Federal subcommittee members, the matter was referred to the main negotiating committee without recommended proposed regulatory language. Non-Federal negotiators expressed concerns similar to those of the subcommittee. A minority of negotiators suggested that greater accreditor oversight would adequately ensure program integrity in the case of educational programs largely provided by ineligible entities. In light of these concerns, the Department withdrew its initial proposal to allow an increased portion of educational programs to be offered by noneligible entities.

Instead, in response to concerns about the amount of processing time required for institutions' requests to obtain accreditor approval to execute written arrangements involving more than 25 but less than 50 percent of a program being provided by an ineligible entity, negotiators agreed to add language to § 602.22(a) that would require an accreditor to make a final decision on such requests within 90 days. Accreditors would also be able to designate agency senior staff to approve or disapprove the request, instead of requiring board approval, which should allow more timely decisions. This would ensure that programs designed to respond to immediate workforce needs are not needlessly delayed.

668.8 Eligible Program

Statute: Section 481(a)(2) of the HEA defines an academic year for an undergraduate program, in part, as requiring a minimum of 24 semester or trimester credit hours or 36 quarter credit hours in a course of study that measures academic progress in credit hours or 900 clock hours in a course of study that measures academic progress in clock hours. Section 481(b) of the HEA defines an eligible program, in part, as a program of at least 600 clock hours, 16 semester hours, or 24 quarter hours or, in certain instances, a program of at least 300 clock hours, 8 semester hours, or 12 quarter hours. Sections 428(b)(1), 428B(a)(2), 428H(d)(1), 455(a)(1), and 484(b)(3) and (4) of the HEA specify that a student must be carrying at least one-half of the normal full-time work load for the student's

course of study to qualify for a loan under parts B or D of title IV of the HEA. Section 401 of the HEA provides that a student's Federal Pell Grant must be adjusted based on the student's enrollment status and that a student must be enrolled at least halftime to be eligible for a second consecutive Federal Pell Grant in an award year. Section 496(a)(5)(H) of the HEA requires that an accrediting agency assess an institution's measure of program length.

Current Regulations: Section 668.8(e) states that the number of clock hours in ''short-term'' programs, that is, programs subject to the requirements of § 668.8(d)(3)(i) through (iv), may not exceed by more than 50 percent the minimum number of clock hours required for licensure in the recognized occupation for which the program prepares students, as established by the State in which the program is offered, if the State has established such a requirement, or as established by any Federal agency.

Section 668.8(k) requires an institution offering a program in credit hours that is less than two academic years in length and does not lead to an associate degree, bachelor's degree, a professional degree, or an equivalent degree as determined by the Secretary; or, alternatively, does not provide for each course within that program to be acceptable for full credit toward as associate degree, bachelor's degree, professional degree, or equivalent degree as determined by the Secretary, to use the formula in section 668.8(l) to determine the number of credit hours in that program. The formula for converting clock hours to credit hours requires that a semester or trimester hour include at least 37.5 clock hours of instruction and a quarter hour at least 25 hours of instruction. However, if student work outside of class combined with clock hours of instruction meets or exceeds these numeric values (the institution's accrediting agency, or recognized State agency for vocational institutions, must not have identified any deficiencies with the institution's policies and procedures for determining the number of credit hours it awards), the institution may convert clock hours to credit hours using a minimum standard by which a semester or trimester hour must include at least 30 clock hours of instruction and a quarter hour at least 25 clock hours of instruction.

Proposed Regulations: The Department proposes to revise § 668.8(e)(1)(iii) to state that an eligible short-term program must demonstrate reasonable program length, in accordance with § 668.14(b)(26).

Additionally, the Department proposes revisions to § 668.8(l), which contains the formula for calculating a clock-to-credit hour conversion. Under the proposed regulations, the minimum number of clock hours that must be included in a semester or trimester credit hour would be reduced from 37.5 to 30, and the minimum number of clock hours that must be included in a quarter credit hour would be reduced from 25 to 20. All references to work outside of class would be removed and have no bearing on the conversion formula.

Reasons: The limits on program length for short-term programs in § 668.8 reflect those in § 668.14, which applies to all gainful employment programs for which an institution must demonstrate a reasonable relationship between the length of the program and entry-level requirements for the recognized occupation for which the program prepares the student. We are proposing revisions to § 668.14(b)(26) that would make changes to the standard used to demonstrate that reasonable relationship. The consensus language mirrored most, but not all, of the provisions of § 668.14(b)(26). For this reason, the Department is instead proposing to simply refer to this provision to make the regulations in each section as consistent and clear as possible.

Regarding the proposed revisions to the formula for calculating a clock-to-credit hour conversion, the Department believes the current formula described above has proved confusing for institutions while yielding little in way of increased program integrity.

When the clock-to-credit conversion was originally established in final regulations published July 23, 1993 (58 FR 39618), the Secretary adopted a regulatory formula based upon the statutory definition of an ''academic year,'' which included at least 24 semester or trimester hours, 36 quarter hours, or 900 clock hours of instruction. During that rulemaking, the original conversion ratios adopted by the Secretary were obtained by dividing 900 clock hours by 24 semester hours or 36 quarter hours, yielding ratios of 37.5 clock hours for each semester hour and 25 clock hours for each quarter hour, respectively. However, the Secretary acknowledged in the final rule that the formula did not account for the fact that credit hours have traditionally assumed both in-class and out-of-class work, whereas clock hours have been defined only in terms of in-class instructional hours. Thus, the formula did not account for the number of hours of outside preparation assumed for credit hours. To address this problem, the Secretary revised the formula to reduce the ratios to 30 clock hours for each semester hour and 20 clock hours for each quarter hour with a presumption that at least some out-of-class work was being performed for each credit hour subject to the conversion.

In final regulations published October 29, 2010 (75 FR 66832), the Secretary revised the conversion formula in an attempt to more strictly reflect the statute's definition of an academic year. The ratio was set at 37.5 clock hours for each semester hour and 25 clock hours for each quarter hour with an option for an institution to use the original 30-to-1 and 20-to-1 ratios if the institution (1) documented adequate out-of-class work to make up the other hours; and (2) had not been cited by its accrediting agency for problems with its establishment of credit hours.

In the period since that regulation was published, the Secretary has identified a number of significant problems regarding the implementation and enforcement of the conversion requirements. As noted above with respect to the proposed definition of a ''credit hour,'' even absent the conversion requirement, the Department has no evidence that students complete the requisite two hours of out of class work required by the current definition of a credit hour. Neither the Department nor accrediting agencies are capable of systematically evaluating whether students actually perform work outside of class, and thus are forced to rely on each institution's assertion that it expects students to perform such work under the current regulations. Additionally, the revised conversion formula added substantial complication to an institution's calculation of each student's eligibility for title IV, HEA funds and resulted in a diminished amount of aid for students during portions of programs without written expectations of out-of-class work, such as laboratory or clinical requirements, despite the fact that many students perform substantial out-of-class work during those experiences.

Given these problems, the Secretary proposes to revert to the original conversion ratios that presume an amount of out-of-class work in accordance with an accrediting agency's requirements for the establishment of credit hours. The proposed changes would establish equitable, measurable, and clear conversion standards keyed only to instructional hours, eliminating the ambiguity associated with the consideration of outside work.

§ 668.10 Direct Assessment Program

Statute: Section 481(b)(4) of the HEA provides that instructional programs that use direct assessment of student learning or recognize the direct assessment of student learning by others, in lieu of measuring student learning in credit hours or clock hours, are eligible to participate in title IV, HEA programs as long as the assessment is consistent with the institution's or program's accreditation. The statute also requires the Secretary to approve an institution's first direct assessment program.

Current Regulations: Section 668.10(a) defines a ''direct assessment program'' as an instructional program that, in lieu of credit hours or clock hours as a measure of student learning, utilizes direct assessment or recognizes the direct assessment of student learning by others, and specifies that the assessment must be consistent with the accreditation of the institution or program utilizing the results of the assessment. The regulations clarify that ''direct assessment of student learning'' is a measure by the institution of what a student knows and can do in terms of the body of knowledge making up the educational program, and that such measures provide evidence that a student has command of a specific subject, content area, or skill or that the student demonstrates a specific quality associated with the subject matter of the program. The regulations provide several examples of direct assessments. Section 668.10(a) also clarifies that references to credit or clock hours as a measurement in that section apply to direct assessment programs and that, because direct assessment programs do not utilize credit or clock hours as a measure of student learning, an institution must establish a methodology to reasonably equate the direct assessment program (or the direct assessment portion of any program, as applicable) to credit or clock hours for the purpose of complying with applicable regulatory requirements and provide a factual basis satisfactory to the Secretary for its methodology.

Section 668.10(a) also contains definitions for a number of terms that exist elsewhere in the regulations for the title IV, HEA programs, including the definitions of ''academic year,'' ''payment period,'' ''week of instructional time,'' and ''full-time student.'' The definitions for ''academic year'' and ''week of instructional time'' are different for direct assessment programs. In § 668.10(a), an ''academic year'' is a minimum of 30 weeks of instruction and 24 semester or trimester credit hours, 36 quarter credit hours, or 900 clock hours, whereas there are exceptions to those requirements under § 668.3. The definition of a ''week of instruction'' in § 668.10(a) is one in which at least one day of educational activity occurs, which differs from the definition of the term for all other programs in § 668.3(b)(2) insofar as the definition in § 668.3(b)(2) requires one day of scheduled instruction rather than educational activity and does not include a lengthy discussion of the types of educational activities that are included in the definition in § 668.10(a).

Section 668.10(b) establishes the requirements for an application for an institution to offer a direct assessment program that is eligible to participate in title IV, HEA programs. Such an application must include—

- A description of the educational program, including the educational credential offered (degree level or certificate) and the field of study;
- A description of how the assessment of student learning is done;
- A description of how the direct assessment program is structured, including information about how and when the institution determines on an individual basis what each student enrolled in the program needs to learn;
- A description of how the institution assists students in gaining the knowledge needed to pass the assessments;
- The number of semester or quarter credit hours, or clock hours, that are equivalent to the amount of student learning being directly assessed;
- The methodology the institution uses to determine the number of credit or clock hours to which the program is equivalent;
- The methodology the institution uses to determine the number of credit or clock hours to which the portion of a program an individual student will need to complete is equivalent;
- Documentation from the institution's accrediting agency indicating that the agency has evaluated the institution's offering of direct assessment program(s) and has included the program(s) in the institution's grant of accreditation;
- Documentation from the accrediting agency or relevant State licensing body indicating agreement with the institution's claim of the direct assessment program's equivalence in terms of credit or clock hours; and
- Any other information the Secretary may require in determining whether to approve the institution's application.

Under § 668.10(c), an eligible direct assessment program must meet the requirements in § 668.8 including, if applicable, minimum program length and qualitative factors.

Under § 668.10(d), no program offered by a foreign institution that involves direct assessment is an eligible program.

Under § 668.10(e), a direct assessment program may use learning resources (*e.g.,* courses or portions of courses) that are provided by entities other than the institution providing the direct assessment program without regard to the limitations on contracting for part of an educational program in § 668.5(c)(3).

Under § 668.10(f), title IV, HEA program funds may be used only for learning that results from instruction provided, or overseen, by the institution, not for the portion of the program that the student has demonstrated mastery of prior to enrollment in the program or tests of learning that are not associated with educational activities overseen by the institution.

Under § 668.10(g), title IV, HEA program eligibility is limited to direct assessment programs approved by the Secretary, and title IV, HEA program funds may not be used for the course of study described in § 668.32(a)(1)(ii) and (iii) if offered by direct assessment, or remedial coursework described in § 668.20 offered by direct assessment, except that remedial instruction that is offered in credit or clock hours in conjunction with a direct assessment program is eligible for title IV, HEA program funds.

Under § 668.10(h), the Secretary's approval of a direct assessment program expires on the date that the institution changes one or more aspects of the program described in the institution's application and specifies that an institution making such changes must obtain prior approval from the Secretary through a reapplication under the requirements in § 668.10(b).

Proposed Regulations: The Department proposes to simplify and clarify numerous aspects of the regulations for direct assessment programs. We propose to revise the definition of ''direct assessment'' to state that it is a measure of a student's knowledge, skills, and abilities designed to provide evidence of the student's proficiency in the relevant subject area. We propose to add a new paragraph (a)(3) that would require an institution to establish a methodology to reasonably equate each module in the direct assessment program to either credit hours or clock hours, expressing that this methodology must be consistent with the requirements of the institution's accrediting agency or State approval agency. We propose to revise redesignated paragraph (a)(4) to state

that all regulatory requirements in that section that refer to credit or clock hours as a measurement apply to direct assessment programs according to whether they use credit or clock hour equivalencies, respectively. We propose to add a paragraph (a)(5) to clearly state that a direct assessment program that is not consistent with the requirements of an institution's accrediting agency or State approval agency is not an eligible program, and in order for direct assessment programs to be considered eligible programs, the agency must have evaluated the programs based on the agency's accreditation standards and criteria, included them in the institution's grant of accreditation or preaccreditation, and reviewed and approved the institution's claim of each direct assessment program's equivalence in terms of credit or clock hours. We propose to remove the definitions of ''academic year,'' ''payment period,'' ''week of instructional time,'' and ''full-time student'' in § 668.10(a) and refer instead to requirements appearing elsewhere in the regulations.

We propose to revise § 668.10(b) to require an institution to submit for the Secretary's approval only the first direct assessment program that it offers, whereas additional direct assessment programs at an equivalent or lower academic level may be determined to be eligible without further approvals from the Secretary except as required by § 600.10(c)(1)(iii), § 600.20(c)(1), or § 600.21(a), as applicable, if such programs are consistent with the policies and procedures of the institution's accreditation or State approval agency. We propose to require an institution to explain how it excludes from consideration of a student's eligibility for title IV, HEA program funds any credits or competencies earned on the basis of prior learning. Failing to do so could result in a negative audit finding or program review. We also propose to remove current paragraph (b)(10), which states that the application must include any other information the Secretary may require.

We propose to remove current § 668.10(c), which states that a direct assessment program must meet the requirements in § 668.8.

We propose to revise the prohibitions on the types of coursework for which direct assessment can be used while maintaining eligibility for title IV, HEA funds to state that such coursework can be eligible, but only if the Secretary has already approved one or more direct assessment programs at the institution and the institution's offering of direct assessment coursework is consistent with the institution's accreditation and State authorization, if applicable. If an institution meets such requirements, it may offer the course of study described in § 668.32(a)(1)(ii) and (iii) and (a)(2)(i)(B), or remedial coursework described in § 668.20, using direct assessment for title IV, HEA purposes.

We propose to clarify that student progress in a direct assessment program can be measured using a combination of credit hours and credit hour equivalencies or clock hours and clock hour equivalencies.

We propose to remove current § 668.10(h), which states that the Secretary's approval of a direct assessment program expires on the date that the institution changes one or more aspects of the program described in the institution's application and that an institution making such changes must reapply for approval of the program.

Reasons: The current regulations for direct assessment programs are lengthy, complicated, and in several areas, redundant of other regulations. The Department proposes to simplify the direct assessment regulations and, wherever possible, to refer to other regulatory requirements rather than restating such requirements or modifying them specifically for direct assessment programs.

The Department proposes to require approval only of an institution's first direct assessment program to comply with statutory requirements while limiting administrative burden. The current regulations requiring the Department's approval of each new direct assessment program and any change to an existing direct assessment program imposes substantial administrative burden on institutions that wish to offer direct assessment programs. Furthermore, the Department's experience with the direct assessment application process has shown that institutions that have completed the application process for their first direct assessment program largely understand the requirements for such programs and have overcome technical and operational difficulties implementing the title IV, HEA program regulations associated with such programs and can therefore be trusted to do so in the best interest of students and taxpayers. Published metrics from institutions offering multiple such programs have shown signs of success. For example, Western Governors University states that 97 percent of employers surveyed felt graduates were prepared for their jobs and that graduates are able to finish their bachelor's degree in 2.5 years on average, resulting in cost savings to students.[15] [16] Similarly, the University of Wisconsin's Flex Option program found that 98 percent of graduates would recommend their program.[17] By eliminating the requirement to review subsequent programs, the Department would reduce the administrative burden on the institution while maintaining substantial oversight over the institution's implementation of direct assessment programs during the initial approval process.

We propose to require an institution to explain how it excludes credit earned through prior learning assessment from consideration of a student's eligibility for title IV, HEA program funds, because the Department remains concerned that institutions may include such coursework in their determination of a student's eligibility. The nature of CBE programs, including direct assessment programs, is such that an institution is often assessing a student's proficiency or learning in a given area without regard to whether it has provided instruction in that area, making it more difficult for the institution to separate credit earned through prior learning assessment and credit earned through instruction by the institution. The Department proposes requiring an institution to explain its approach in this area to ensure that it has considered how it will comply with the Department's prohibition on payment of title IV, HEA assistance for credit earned through prior learning assessment.

We propose to permit institutions to offer coursework described in § 668.32(a)(1)(ii) and (iii) and (a)(2)(i)(B), or remedial coursework described in § 668.20, using direct assessment, because such coursework does not meaningfully differ from coursework in other eligible programs. The Department believes that an institution that has been approved to offer a direct assessment program is capable of applying the normal title IV, HEA regulatory requirements to these types of coursework. Similarly, we propose to permit institutions to offer programs that are offered in part through credit hours or clock hours and in part through credit hour equivalencies or clock hour equivalencies to increase the amount of flexibility institutions have when designing educational programs. Although this increased flexibility would afford institutions more latitude in the design of direct assessment

[15] *www.wgu.edu/online-business-degrees/bachelors-programs.html.*

[16] *www.wgu.edu/blog/how-long-to-online-degree1902.html.*

[17] *flex.wisconsin.edu/wp-content/uploads/2019/10/FY19_UW-Flexible-Option-Annual-Report.pdf.*

programs than currently exists, proposed new paragraph (a)(3) (discussed above) would require an institution to establish a methodology to reasonably equate each module in the direct assessment program to either credit hours or clock hours. For example, a program would not be permitted to switch between clock hours and credit hour equivalencies. Accordingly, transitions within programs would occur between traditional coursework and direct assessment under like measures, posing little risk to the integrity of the title IV, HEA programs.

§ 668.13 Certification Procedures

Statute: Section 498(a)of the HEA requires the Secretary to determine an institution's legal authority to operate within a State, its accreditation status, and its administrative capability and financial responsibility when determining the institution's eligibility to participate in title IV, HEA programs.

Current Regulations: Section 668.13(a) sets the requirements for the certification that an institution must complete to be eligible to participate in the title IV, HEA programs. It requires institutions that are participating for the first time in the title IV, HEA programs or that have undergone a change in ownership to complete training provided by the Secretary. Those individuals that are required to complete the training include the title IV administrator and the institution's chief administrator. The regulations do not specifically address the Secretary's responsibilities with respect to an application from an institution for recognition of a branch campus. Section 668.13(b) directs the Secretary to extend, on a month-to-month basis, an institution's existing certification, provided the institution has submitted an application for renewal of certification that is materially complete at least 90 days prior to expiration of its current period of participation. However, the regulations do not specify a timeframe for the Secretary to decide on the application. Section 668.13(c) sets the conditions for which the Secretary may provisionally certify an institution, and paragraph (d) allows the Secretary to revoke an institution's provisional certification if the Secretary determines that the provisionally certified institution is unable to meet its responsibilities under its PPA.

Proposed Regulations: The Department proposes to add a new paragraph (ii) to § 668.13(a)(1), clarifying that on an application from an institution, the Secretary certifies a location of an institution as a branch if it satisfies the definition of ''branch'' in § 600.2. The Department also proposes to renumber paragraph (a)(1) as (a)(1)(i). The Department proposes to add § 668.13(b)(3), indicating that in the event the Secretary does not make a determination to grant or deny certification within 12 months of the expiration date of an institution's current period of participation, the institution will automatically be granted renewal of certification, which may be provisional for cause, but not automatically because the Department failed to make an affirmative decision within the twelve-month timeframe. The Department also proposes to clarify in a new paragraph (c)(1)(i)(F) that the Secretary may provisionally certify an institution if the institution is a participating institution that has been provisionally recertified under the automatic recertification requirement under paragraph (b)(3). References to transmission of documentation by facsimile in § 668.13(d) would be replaced by the phrase ''electronic transmission'' and the option to mail documentation through means other than the U.S. Postal Service would be recognized.

Reasons: Current regulations do not directly address the actions to be taken by the Secretary upon receipt of an application from an institution for certification of a branch location. The proposed addition of paragraph (ii) to § 668.13(a)(1) would provide that the Secretary will certify a location of an institution as a branch if it satisfies the definition of a ''branch campus.''

As noted above, when an institution that is currently certified submits a materially complete application for recertification to the Department no later than 90 calendar days before its PPA expires, its PPA remains valid, and its eligibility to participate in the title IV, HEA programs is extended on a month-to-month basis until its application is either approved or not approved. Although an institution's eligibility is extended on a month-to-month basis for as long as is necessary for the Secretary to render a decision on its application for renewal of certification, we are aware of the uncertainty experienced by institutions in cases where the decision period is lengthy. The proposed regulations would address this by providing that renewal of an institution's certification is automatically granted if the Secretary has not made a determination to grant or deny certification within 12 months of the expiration of the current period of participation. Because the renewal of an institution's certification may be provisional (for as little as one year in length), the Department would retain the requisite degree of control over the certification process.

§ 668.14 Program Participation Agreement

Statute: Section 487(a) of the HEA requires that, in order to be eligible to participate in title IV, HEA programs, an institution must be an IHE or an eligible institution that has entered into a program participation agreement with the Secretary.

Current Regulations: Section 668.14(b) identifies the terms to which an institution must agree when entering into a PPA. Paragraph (b)(10) provides that an institution that advertises job placement rates as a means of attracting students must make available to prospective students the most recent available data concerning employment statistics and relevant State licensing requirements of the State in which the institution is located. Under paragraph (b)(26), if an educational program offered by an institution is required to prepare a student for gainful employment in a recognized occupation, the institution must be able to demonstrate a reasonable relationship between the length of the program and the entry-level requirements for the recognized occupation for which the program prepares the student. The Secretary considers the relationship to be reasonable if the number of clock hours in the program does not exceed by more than 50 percent the minimum number of clock hours required for training in the occupation for which the program prepares the student, as established by the State in which the institution is located, if the State has established such a requirement, or as established by a Federal agency. Under paragraph (b)(31), the institution is required to submit a teach-out plan to its accrediting agency.

Proposed Regulations: The Department proposes to clarify the requirements in § 668.14(b)(10) by specifying that the institution must make available to prospective students the most recent data available concerning employment statistics, graduation statistics, and any other information to substantiate the truthfulness of its advertisements that used job placement rates as a means of attracting students. Additionally, the Department proposes to remove the requirement to provide the source of such statistics and any associated timeframes and methodology. The Department proposes to replace the phrase ''an educational program offered by the institution'' with the phrase ''the course of instruction'' in paragraph

(b)(10)(ii). Proposed changes to § 668.14(b)(26) would still require an institution to demonstrate a reasonable relationship between the length of the program and the entry-level requirements for which the program prepares the student. However, the requirement for a reasonable relationship would be satisfied if the number of clock hours in the program does not exceed the greater of 150 percent of the minimum number of clock hours required for training in the occupation for which the program prepares the student, as established by the State in which the institution is located, if the State has established such a requirement, or as established by a Federal agency; or the minimum number of clock hours required for training in a recognized occupation for which the program prepares the student established in a State adjacent to the State in which the institution is located. In paragraph (b)(31), the regulations list certain circumstances under which an institution must provide a teach-out plan to its accrediting agency. The Department proposes to further require that the institution update its teach-out plan under those circumstances. The Department also references 34 CFR 668.43(a)(5)(v) to more clearly connect this provision with recently published provisions relating to State Authorization of Distance Education.

The changes to § 668.43(b)(26) remove a reference to a section that was eliminated in the final Gainful Employment regulation.[18]

Reasons: The Department proposes a technical change in paragraph (b)(10) to change the word ''it'' to ''the institution.'' The Department believes this will clarify the wording in this paragraph to ensure that institutions understand their responsibilities if they use job placement rates as a means of attracting students. In paragraph (b)(10)(i), the Department proposes to delete the phrase ''including the source of such statistics and any associated time frames and methodology,'' because the Department believes this language is redundant with the other requirements in that paragraph to provide the most recent available data to students and any information necessary to substantiate the truthfulness of the advertisements, which may include methodologies. In paragraph (b)(10)(ii), the Department proposes to replace the phrase ''an educational program offered by the institution'' to ''the course of instruction'' to ensure that institutions are providing proper information to prospective students when they are interested in enrolling at that institution. The Department believes that if an institution uses job placement rates for any educational offerings, even if it is not an official educational program, the institution should be able to provide updated data and prove the truthfulness of such advertising.

A number of occupations, such as massage therapy and cosmetology, are subject to varying licensure requirements from one State to another. This can present a difficult challenge to both institutions and students. This can lead to difficulty not only in meeting licensing requirements, but also in transferring credits. Students who reside in and attend a program in one State may seek to be employed in an adjacent State where the minimum number of hours required for licensure is at least 150 percent of the minimum number of clock hours required for training in the occupation for which the program prepares the student, as established by the State in which the institution is located. For example, New Jersey requires 500 hours for a massage therapy license, but New York requires 1,000 hours.[19] [20]

To reduce unnecessary barriers to employment that the Department's limitations on program length create, the Department proposes that a program meets the reasonable length requirement if it does not exceed 150 percent of the hours required by the State in which it is located t, or it does not exceed 100 percent of the requirements of an adjacent State. This would help ensure that institutions can offer programs that meet the professional licensure requirements of multiple nearby States, even when one or more of those nearby States maintain entry-level requirements that are greater than 150 percent of entry-level requirements in the State where the institution is located. This change would help institutions in multi-State regions to better meet the needs of students.

The Department initially proposed changes to § 668.14(b)(26) to allow a program length equal to 100 percent of the requirements in any State. Members of the subcommittee generally opposed providing this degree of latitude. Subcommittee members suggested that institutions might set a program's length at 100 percent of the longest minimum requirement of any State, without regard to whether graduates of that program seek employment in that State.

Subsequently, the Department proposed limiting program length to 100 percent of the minimum program length required for licensure in an adjoining State. Although this proposal enjoyed majority support among subcommittee members, several members continued to express concern about changing the requirements in any way, suggesting that it would encourage institutions to add hours to programs beyond those necessary for students to become employed. These members argued that the current 150 percent threshold is reasonable and sufficient to accommodate most cases where nearby States have higher requirements. We also raise concerns that students face disparate treatment because Title IV funds can be used by a student who wishes to pursue a graduate degree simply because they are interested in a topic, but cannot be used by a student in a CTE program who wants to complete coursework to develop advanced skills and competencies that go beyond basic licensure requirements. We agree that we do not want schools to inflate the number of hours in a program beyond those that a student needs to complete in order to get a good job in their field, but at the same time, we need to afford those pursuing career and technical education the same opportunities to develop advanced competencies in order to qualify for higher paying and more secure jobs.

One subcommittee member suggested that where institutions needed more hours than 150 percent of State requirements, an accrediting agency could be the arbiter of whether additional hours were necessary. Since accreditors are typically more knowledgeable about occupational standards and the needs of employers, the Department was supportive of that recommendation.

Discussions among the committee members mirrored those that took place in the subcommittee. Ultimately, negotiators reached consensus on the second proposal, which would limit program length to the greater of 150 percent of the minimum program length required for licensure in the State in which the institution is located or 100 percent of the minimum program length required for licensure in an adjoining State.

The Department proposes to require an institution to update its teach-out plan if the Secretary initiates the limitation, suspension, or termination of the institution's participation in the title IV, HEA programs; the institution's accrediting agency acts to withdraw, terminate, or suspend the accreditation or pre-accreditation of the institution; the institution's State licensing or authorizing agency revokes the

[18] 84 FR 31392.

[19] *www.op.nysed.gov/prof/mt/mtlic.htm.*

[20] *www.njconsumeraffairs.gov/mbt/Pages/individual.aspx.*

institution's license; or the institution otherwise intends to cease operations. We believe that an institution should update its teach-out plan to protect students in the event that steps are taken that may ultimately lead to an institution's closure. The Department believes that it is vital for an institution to have an updated plan when certain negative events may occur to provide the best protections to students and the taxpayers.

§ 668.15 Factors of Financial Responsibility

Statute: Section 487(a) of the HEA provides that in order to be an eligible institution for the purposes of any title IV, HEA program, an institution must be an IHE or an eligible institution for a particular program and enter into a program participation agreement.

Section 498(c) requires the Secretary to determine whether an institution has the financial responsibility to provide the services described in its official publications, provide the administrative resources necessary to comply with title IV requirements, and to meet all its financial obligations. Institutions that do not meet those requirements may still be deemed financially responsible if they submit a third-party financial guarantee, such as a bond or letter of credit. Determinations about an institution's financial responsibility is based on audited and certified financial statements of the institution.

Current Regulations: Section 668.15(a) requires that for an institution to begin and to continue participation in any title IV, HEA program, it must demonstrate to the Secretary that it is financially responsible under the requirements in § 668.15.

Proposed Regulations: The Department proposes to change the title of Section 668.15 to ''Factors of financial responsibility for changes in ownership or control.'' Additionally, the Department proposes to revise paragraph (a) to provide that, to begin and continue to participate in any title IV, HEA program after a change in ownership or control, an institution must demonstrate to the Secretary that the institution is financially responsible under the requirements established in § 668.15.

Reasons: The proposed regulations would codify the current practice of the Department to use the factors of financial responsibility when it is notified of an institution's change in ownership or control. The Department seeks to clarify that the regulations governing the factors of financial responsibility must be addressed when there is a change of ownership or control of an IHE.

§ 668.22 Treatment of Title IV Funds When a Student Withdraws

Statute: Section 484B(a)(1) of the HEA provides that if a recipient of title IV, HEA assistance withdraws from an institution during the payment period or period of enrollment in which the recipient began attendance, the institution must perform a calculation under that section to determine the amount of funds to be returned to the title IV, HEA programs. Section 484B(b) states that an institution must return the lesser of the amount of title IV, HEA assistance not earned by the student or an amount equal to the total institutional charges incurred by the student for the period multiplied by the percentage of title IV, HEA assistance not earned by the student, and section 484B(a)(3)(B)(i) defines the ''percentage earned'' as equal to the percentage of the payment period or period of enrollment for which assistance was awarded that was completed as of the day the student withdrew, provided that such date occurs on or before the completion of 60 percent of the payment period or period of enrollment. Section 484B(a)(3)(B)(ii) provides that a student has earned 100 percent if the day the student withdrew occurs after the student has completed 60 percent of the period.

Current Regulations: Section 668.22 contains several references to programs that are no longer authorized, specifically the ACG, the National SMART Grant, the Federal Perkins Loan, and the Federal Family Education Loan (FFEL) program, including:

- § 668.22(a)(3), which identifies the types of title IV, HEA assistance that are included in the return of title IV funds calculation; and
- § 668.22(i), which explains the order in which funds from the various title IV, HEA programs must be returned.

Section 668.22(a)(2)(i) provides that a student is considered to have withdrawn during a payment period or period of enrollment:

- In the case of a program that is measured in credit hours, if the student does not complete all the days in the payment period or period of enrollment that the student was scheduled to complete prior to withdrawing;
- In the case of a program that is measured in clock hours, if the student does not complete all the clock hours in the payment period or period of enrollment that the student was scheduled to complete prior to withdrawing.

Paragraph (a)(2)(i) also provides that for students in non-term or nonstandard-term programs, a student is considered to have withdrawn if he or she is not scheduled to begin another course within a payment period or period of enrollment for more than 45 calendar days after the end of the module the student ceased attending, unless the student is on an approved leave of absence.

Under § 668.22(a)(2)(ii), a student enrolled in a program that is offered in modules is not considered to have withdrawn if the institution obtains written confirmation from the student at the time that would have been a withdrawal of the date that he or she will attend a module that begins later in the same payment period or period of enrollment, except that such module must begin no later than 45 days after the end of the module the student has ceased attending if the student is enrolled in a non-term or nonstandard-term program. Furthermore, if an institution has obtained written confirmation of future attendance, a student may change the date of return to a module that begins later in the same payment period or period of enrollment provided that the student does so in writing prior to the return date that he or she had previously confirmed. Students in non-term or nonstandard-term programs may only select a date of return to a module that begins no later than 45 days after the end of the module the student ceased attending. If an institution obtains written confirmation of future attendance in these circumstances, but the student does not return as scheduled, the student is considered withdrawn from the period and the student's withdrawal date is the withdrawal date that would have applied if the student had not provided written confirmation of a future date of attendance in accordance with the regulations.

Section 668.22(a)(6) explains that post-withdrawal disbursements must be made from available grant funds before available loan funds and that if outstanding charges exist on the student's account, the institution may credit the student's account up to the amount of outstanding charges with all or a portion of any grant funds that make up the post-withdrawal disbursement in accordance with § 668.164(d)(1) and (d)(2) and loan funds that make up the post-withdrawal disbursement in accordance with § 668.164(d)(1), (d)(2), and (d)(3) only after obtaining confirmation from the student or parent (in the case of a parent PLUS loan) that they wish to have the loan funds disbursed.

Section 668.22(b)(1) provides that a withdrawal date for a student who withdraws from an institution that is required to take attendance is the last date of academic attendance as determined by the institution from its attendance records. Section 668.22(c)(3) provides that an institution that is not required to take attendance may choose to use as a student's withdrawal date the student's last date of attendance at an academically-related activity provided that the institution documents that the activity is academically-related and documents the student's attendance at the activity.

Section 668.22(d) includes the requirements for an approved leave of absence, which include a requirement that upon the student's return from the leave of absence, the student must be permitted to complete the coursework he or she began prior to the leave of absence. The requirement for a student to be permitted to resume coursework does not apply to clock hour or non-term credit hour programs.

Section 668.22(f)(2)(i) provides that, for credit hour programs, in calculating the percentage of the payment period or period of enrollment completed, it is necessary to take into account the total number of calendar days that the student was scheduled to complete prior to withdrawing without regard to any course completed by the student that is less than the length of the term, except that the total number of days does not include scheduled breaks of at least five consecutive days, days in which the student was on an approved leave of absence or, for a period in which any of the courses in the program are offered in modules, any scheduled breaks of at least five consecutive days when the student is not scheduled to attend a module or other course offered during that time.

Section 668.22(l) establishes several definitions related to the return of title IV funds requirements, including:

- Under paragraph (l)(6), a program is ''offered in modules'' if a course or courses in the program do not span the entire length of the payment period or period of enrollment; and
- Under paragraph (l)(7), ''academic attendance'' and ''attendance at an academically-related activity'' include, but are not limited to, physically attending a class where there is an opportunity for direct interaction between the instructor and students; submitting an academic assignment; taking an exam, an interactive tutorial, or computer-assisted instruction; attending a study group that is assigned by the institution; participating in an online discussion about academic matters; and initiating contact with a faculty member to ask a question about the academic subject studied in the course. However, ''academic attendance'' and ''attendance at an academically-related activity'' do not include activities where a student may be present, but not academically engaged, such as living in institutional housing; participating in the institution's meal plan; logging into an online class without active participation; or participating in academic counseling or advisement.

Proposed Regulations: In § 668.22(a)(2)(i)(C), the Department proposes to eliminate the reference to non-term programs and add standard term programs (except for subscription-based programs) to the types of programs in which students must be considered withdrawn if they have ceased attendance and are not scheduled to begin another course within a payment period for more than 45 calendar days after the end of the module they ceased attending. We propose to add a new clause (a)(2)(i)(D) that explains that a student in a non-term program or a subscription-based program is considered withdrawn if the student is unable to resume attendance within a payment period or period of enrollment for more than 60 calendar days after ceasing attendance.

We propose to establish in § 668.22(a)(2)(ii) two new exceptions to the requirements for determining that a student has withdrawn. First, we would not consider a student to have withdrawn if the student completes all the requirements for graduation from his or her program before completing the days or hours in the period that he or she was scheduled to complete. Second, in a program offered in modules, we would not consider a student to have withdrawn if the student completes:

- One module that includes 50 percent or more of the number of days in the payment period;
- A combination of modules that when combined contain 50 percent or more of the number of days in the payment period; or
- Coursework equal to or greater than the coursework required for the institution's definition of a half-time student under § 668.2 for the payment period.

We propose to specify that an electronic confirmation is one type of written confirmation that a student can provide to avoid being considered withdrawn and having title IV, HEA assistance returned as part of the return of title IV funds process.

We propose to eliminate the reference to non-term programs and include standard term programs (except for subscription-based programs) among the types of programs in which students cannot avoid being considered withdrawn, even with a written confirmation of future attendance, if the next module the student plans to attend begins later than 45 days after the end of the module the student ceased attending. We also propose to provide that, for non-term and subscription-based programs, a student is not considered to have withdrawn if the institution obtains written confirmation from the student at the time that would have been a withdrawal of the date that he or she will resume attendance, and that date is no later than 60 calendar days after the student ceased attendance. The regulations would also prescribe that students enrolled in subscription-based programs may only avoid withdrawal through a written confirmation of future attendance if they indicate that they plan to resume attendance during the same payment period or period of enrollment.

In the regulations explaining how a student may change the date of his or her planned return after providing written confirmation of future attendance, we propose to eliminate the reference to non-term programs and include standard term programs (except for subscription-based programs), among the types of programs in which students cannot change the date of their return to a module that begins later than 45 calendar days after the end of the module the student ceased attending. We also propose that, for non-term and subscription-based programs, the student can change his or her date of return if the student's program permits the student to resume attendance no later than 60 calendar days after the student ceased attendance.

We propose to strike references to title IV, HEA programs under which financial aid is no longer authorized to be awarded or disbursed, specifically the Federal Perkins Loan, FFEL, ACG, and National SMART Grant programs, in each place they appear in § 668.22. We also propose to add Iraq and Afghanistan Service Grants to the types of grants that are included in the return of title IV funds calculation and insert those grants as the second type of grant to be returned by an institution if the institution is subject to a return of grant funds. Iraq and Afghanistan Service Grants would be returned after Pell Grants, but before FSEOG Program aid. The resulting order of return of would be:

1. Unsubsidized Federal Direct Stafford loans.

2. Subsidized Federal Direct Stafford loans.

3. Federal Direct PLUS loans made to a parent to pay expenses on behalf of the student.

4. Federal Pell Grants.

5. Iraq and Afghanistan Service Grants.

6. FSEOG Program grants.

7. TEACH Grants.

We propose to make technical changes in various places in § 668.22 to correct references to parts of the cash management regulations that were changed in the final regulations published October 30, 2015 (80 FR 67126).

Under the requirements for a leave of absence in § 668.22(d)(1)(vii), we propose to add subscription-based programs to the types of programs that do not require the institution to permit the student to complete coursework he or she began prior to the leave of absence to grant an approved leave of absence.

We propose to amend § 668.22(l)(6) to clarify that a program is ''offered in modules'' if the program uses a standard term or nonstandard-term academic calendar, is not a subscription-based program, and a course or courses in the program do not span the entire length of the payment period or period of enrollment. Non-term programs would no longer be considered programs ''offered in modules'' in any circumstances.

We propose to amend the definitions of ''academic attendance'' and ''attendance at an academically-related activity'' in § 668.22(l)(6) to refer to the proposed definition of ''academic engagement'' in § 600.2 rather than listing the specific activities that would be included and excluded from those definitions.

Reasons: In general, the Department proposes to remove any references to ''modules'' with respect to non-term credit hour and clock hour programs and replace such references with separate requirements relating specifically to non-term programs. The Department's requirements for programs offered in modules are primarily intended to address abuse in term-based programs, and the Department maintains separate requirements for non-term programs that obviate the need for many of the requirements relating to modules.

The primary purpose of the regulations related to modules was to prevent an institution from considering a student to have completed a payment period or period of enrollment by virtue of completing a very short module at the beginning of a term. However, a payment period in a non-term program is defined in § 668.4(c) as the period of time during which a student completes half the credit hours or clock hours in the academic year or program, whichever is shorter, and a period of enrollment for such a program is always comprised of two payment periods. Thus, completion of a single course or module in a non-term program does not automatically result in the student's completion of the entire period for purposes of the return of title IV funds calculation even absent the regulations for modules.

There were some instances in which the Department did not maintain separate requirements for non-term programs that accomplish the same thing as the requirements for programs offered in modules, and in those cases, we propose to add separate requirements that would be specific to non-term programs. For example, the Department's various regulations related to written confirmation of a student's intent to return at a later point in a payment period or period of enrollment currently apply to all programs using modules, including non-term programs using credit hours or clock hours. Because we are eliminating all references to modules with respect to non-term programs, we propose to alter the requirements related to written confirmation to specify that students in non-term programs may provide written confirmation of their intent to return if their program permits a return within 60 days of the date that the student ceased attendance. These requirements are intended to be like the requirements for programs offered in modules.

The Department also proposes to make standard term programs subject to the limitations on the timeframe for a student to return following a written confirmation of future attendance. Though it is less common for a module in a standard term program to begin more than 45 days following the end of a prior module, the Department maintains the same concerns about long periods of non-attendance for standard term programs as it does for nonstandard-term and non-term programs, and believes that students should be treated consistently in these situations.

We propose to make several changes regarding whether a student is considered withdrawn in order to address specific unintended circumstances that have arisen as a result of the current regulations. First, we propose that a student who has completed all the requirements for graduation should not be considered withdrawn under any circumstances, since such a student has effectively completed his or her educational program and should not be penalized for doing so faster than anticipated.

Second, we are proposing changes related to withdrawals in programs offered in modules, because the current regulations have created unintended consequences that have created inequitable outcomes for students who withdrew from such programs. Under the current regulations, a student is considered withdrawn from a credit hour program if the student ceases attendance before completing all the days that he or she was scheduled to attend in the payment period or period of enrollment. This requirement does not pose a problem when all classes during a period occur during the same timeframe. However, when the student's classes occur during different timeframes—that is, when the student is enrolled in a program offered in modules—substantial complications can arise, especially when a student is permitted to make changes to his or her enrollment throughout the payment period or period of enrollment. For example, consider a student who is enrolled in two modules in a single payment period. The student attends the first module, but then decides to withdraw. If the student follows the institution's process for formally withdrawing from the institution and drops all classes in both modules at the same time, the student will be considered withdrawn and the institution will include in the denominator of the student's return of title IV funds calculation all the days in both modules. However, if the student decides to drop the classes in the second module first, waits a week, and then drops the classes in his or her current module, the denominator of the student's return of title IV funds calculation will include only the days in the first module. Depending on how much of the first module the student has attended at the time he or she withdraws, this decision could have substantial effects on the amount of title IV, HEA assistance the student has earned, potentially resulting in a difference of thousands of dollars in aid eligibility between the two scenarios. This difference in treatment has no policy purpose but can have negative effects on a student that chooses to drop all of his or her courses at the same time.

In order to mitigate these problems, the Department proposes two remedies. First, we propose to consider students to have completed a payment period or period of enrollment in certain circumstances when the student has

completed coursework in such a period. Second, we propose to treat a student as being scheduled to complete the days in a module if any coursework in that module was used to determine the amount of the student's eligibility for title IV, HEA funds.

The Department proposes to revise its approach to the treatment of students who complete some, but not all, of the coursework they were scheduled to attend during a payment period to ensure more equitable treatment of such students while maintaining the integrity of the title IV, HEA programs. When the return of title IV funds requirements were first implemented in 1999, the Department took the position that a student who completed any coursework in a payment period or period of enrollment was not considered to have withdrawn. The Department revised its approach in 2010 after it became aware of instances of abuse in which institutions established very short modules (*e.g.,* one or two weeks in duration) that were easy for students to complete, and then used such completions as a basis to avoid return of title IV funds provisions for those students even if the students completed no other part of the period. The Department now proposes to treat a student as having completed a period if the student has completed a substantial portion of the time or coursework that the student was scheduled to attend during the period. We believe that this approach would prevent the types of abuse described above while also avoiding punitive consequences for students who complete a substantial amount of coursework during the period.

In discussions with the subcommittee, the Department originally proposed that, under the proposed regulations, a student would be considered to have completed a payment period or period of enrollment if the student completed a module or a set of modules that constituted at least 50 percent of the days in the period. The Department's intent was that a student would be considered to have completed the period if the student completed coursework constituting at least half of the days in the period, not including the days in scheduled breaks. While the subcommittee generally accepted the Department's rationale for this change, one subcommittee member proposed to also consider a student to have completed a period if the student completed the equivalent of half-time coursework during that period. Acknowledging that this approach would also address the Department's concerns about a student avoiding a withdrawal by completing a minimal amount of coursework, the Department adopted the subcommittee member's suggestion.

The Department also proposes to introduce a new method of determining the number of days that should be used in the denominator of a return of title IV funds calculation when a student withdraws from a program offered in modules to simplify the calculation and reduce the administrative burden associated with such calculations. Currently, a student is considered to be scheduled to attend a module if he or she is scheduled to attend the module on the day of the withdrawal. However, a student's enrollment in modules can fluctuate during a payment period or period of enrollment, and as described above, there are circumstances in which dropping or adding courses before or after withdrawing can have a significant impact on a student's return of title IV funds calculation without a specific policy purpose. To limit the uncertainty inherent in these situations, the Department proposes to establish a clear system for identifying the number of days that a student is scheduled to attend in a payment period when the student's coursework uses modules. An institution awards and disburses a student's title IV assistance using an enrollment status that is based on a determination of a student's schedule at a specific point in time, and the Department proposes to use the student's schedule at that fixed point to determine the number of days the student is scheduled to attend during the period for return of title IV funds purposes. Using this approach, subsequent fluctuations in the student's enrollment would have no effect on the number of days in the denominator of the return of title IV funds calculation if the student withdraws, resulting in a greater degree of certainty for students, a diminished likelihood of improper payments, and reduced administrative burden for institutions performing such calculations.

Finally, the Department proposes to eliminate all references to title IV, HEA programs under which financial aid is no longer authorized to be awarded or disbursed and add programs that have been authorized since the last time the regulations were changed, to reflect statutory requirements and provide additional clarity in the regulations.

The committee discussed clarifying changes to the requirements related to considering a student to have completed a period if the student completed a module or set of modules comprising at least 50 percent of the period and ultimately reached consensus on the language. The changes would clarify that the 50 percent threshold could be reached either with a single module or a combination of modules that, when combined, contain 50 percent or more of the number of days in the payment period.

§ 668.28 Non-Title IV Revenue (90/10)

Statute: Section 487 of the HEA requires that, to be an eligible institution, an institution must enter into a program participation agreement with the Secretary that, in the case of a proprietary IHE, stipulates that such institution must derive not less than ten percent of its revenues from sources other than title IV, HEA program funds. The percentage of revenues from sources other than title IV, HEA program funds is calculated according to the formula prescribed in § 668.21(d)(1) (90/10 calculation). Institutions failing to meet the required ten percent threshold for revenue derived from a source other than title IV, HEA program funds, would be subject to the sanctions described in § 668.21(d)(2) of this section.

Current Regulations: Section 668.28, in paragraph (a)(5), addresses the proper treatment of revenue generated from institutional aid in the 90/10 calculation. Specifically, for loans made to students (by the institution) on or after July 1, 2008, and prior to July 1, 2012, institutions are instructed to include as revenue, the net present value of the loans made to students during the fiscal year. Paragraph (b)(1) of this section contains the formula for determining net present value. As an alternative to performing the calculation, institutions are permitted under paragraph (b)(2) to use 50 percent of the total amount of loans that the institution made during the fiscal year as the net present value, with the restriction that it may not sell any of the loans until they have been in repayment for at least two years.

Proposed Regulations: The Department proposes to remove paragraph (b), pertaining to net present value, in its entirety.

Reasons: For loans made to students before July 1, 2008, and on or after July 1, 2012, the applicable regulations in § 668.28(a)(5)(ii) and § 668.28(a)(5)(iii) respectively instruct institutions to include as revenue in the 90/10 calculation only the amount of payments made on those loans that the institution received during the fiscal year. The intervening four-year period during which net present value was to be used has elapsed. And because revenue under the net present value calculation is derived only from loans

made during a given fiscal year, future payments are not a consideration. Accordingly, the regulatory formula for calculating net present value is unnecessary.

§ 668.34 Satisfactory Academic Progress

Statute: Section 484(a)(2) of the HEA requires that a student make satisfactory progress in the student's course of study to be eligible to receive title IV, HEA program funds. Section 484(c) of the HEA provides that a student is making satisfactory progress if the institution reviews the progress of the student at the end of each academic year, or its equivalent, and the student has a cumulative C average, or its equivalent, or academic standing consistent with the requirements for graduation, as determined by the institution, at the end of the student's second academic year. Section 484(c)(2) of the HEA provides that a student who has failed to maintain satisfactory progress and, subsequent to that failure, has academic standing consistent with the requirements for graduation, as determined by the institution, may again be determined eligible for assistance under title IV, HEA programs.

Current Regulations: Section 668.34 requires that an institution's satisfactory academic progress (SAP) policy specify, for all programs, the pace at which a student must progress through his or her educational program to ensure that the student will complete the program within the maximum timeframe, as defined in in paragraph (b) of this section. The pace at which a student is progressing must be calculated by dividing the cumulative number of hours the student has successfully completed by the cumulative number of hours the student has attempted. Maximum timeframe is currently defined in § 668.34(b) as, for an undergraduate program measured in credit hours, a period that is no longer than 150 percent of the published length of the educational program, as measured in credit hours. For an undergraduate program measured in clock hours, maximum timeframe is defined as a period of time that is no longer than 150 percent of the published length of the educational program, as measured by the cumulative number of clock hours the student is required to complete and expressed in calendar time.

Proposed Regulations: The Department proposes to revise current § 668.34(a)(5)(ii) to provide that the requirement for an institution's SAP policy to specify the pace at which a student must progress through his or her educational program to ensure that the student will complete the program within the maximum timeframe, applies only to credit hour programs using standard or nonstandard-terms that are not subscription-based programs. For those programs, institutions would, in addition to dividing the cumulative number of hours the student has successfully completed by the cumulative number of hours the student has attempted, have the option of calculating pace by determining the number of hours that the student should have completed at the evaluation point in order to complete the program within the maximum timeframe.

The proposed regulations would continue to require that an institution's SAP policy specify, for all programs, a maximum timeframe within which students must complete the educational program in order to be eligible to receive title IV, HEA program funds. However, under proposed § 668.34(b), maximum timeframe for an undergraduate program measured in credit hours could be a period expressed in calendar time, as well as measured in credit hours (the only option permitted under current regulations) that is no longer than 150 percent of the published length of the educational program.

Regardless of whether pace is calculated by dividing the cumulative number of hours successfully completed by the number of hours attempted or determining the number of hours that the student should have completed at the evaluation point, it must be a measure of whether a student is on track to complete the program within the maximum timeframe. For example, a four-year, degree-granting program might consist of 120 credit hours. Expressed in credit hours, the 150 percent maximum timeframe for such a program is 180 attempted credit hours. A cumulative pace of completion of 66.666 percent (rounded to 67 percent), evaluated at each evaluation point, ensures that a student will be able to complete his or her program within the 150 percent maximum timeframe.

Alternatively, the institution could, under these proposed regulations, choose to define the 150 percent maximum timeframe for this program in calendar time, meaning that a student would have six years to complete a four-year program. However, it still must be determined at each evaluation point whether the student has successfully completed enough credit hours to enable completion of the program within the six-year maximum timeframe. Assuming the institution checks SAP for this program on an annual basis, a student must have successfully completed at least 20 credit hours after the first year, 40 credit hours after the second year, 60 credit hours after the third year etc. to maintain a pace necessary to complete all 120 credit hours in the program within the maximum timeframe of six years.

Reasons: The definition of a payment period in § 668.4(c), as it pertains to a program that measures progress in credit hours and does not have academic terms or for a program that measures progress in clock hours, requires a student to successfully complete all the credit or clock hours, and all the weeks in that payment period. Only then does the student progress to the next payment period and become eligible for the disbursement of title IV, HEA funds associated with that payment period. Unlike for students in term-based, credit hour programs, it is not possible for a student enrolled in a non-term credit hour or clock hour program to receive subsequent disbursements until all the hours for which he or she has already been paid are successfully completed. The de facto 100 percent pace requirement imposed by the definition of a payment period for programs that measure progress in credit hours without terms or clock hours obviates the need for an institution's SAP policy to specify the pace at which a student must progress through his or her educational program to ensure that he or she will complete the program within the maximum timeframe. We believe this proposed change will significantly reduce the administrative burden on institutions offering non-term programs in performing redundant SAP calculations associated with pace.

As noted earlier, under proposed § 668.2 (see the discussion related to § 668.2), the Department would add a new definition of ''subscription-based program,'' clarifying that students in subscription-based programs must complete a cumulative number of credit hours (or the equivalent) during or following the end of each term before receiving subsequent disbursements of title IV, HEA program funds. The current regulations require an institution to evaluate a student's pace of completion by dividing completed credits over attempted credits. This calculation is difficult to apply in competency-based programs, including subscription-based programs, because there is often no set period of time during which a student ''attempts'' a competency in such programs; rather, the student works on a competency until he or she can demonstrate mastery of it. Given the limitations in this proposed definition on a student's eligibility to receive additional

disbursements, we believe it is unnecessary and needlessly burdensome for an institution's SAP policy to include pace requirements for subscription-based programs.

Finally, the Department proposes to provide additional flexibility by giving institutions the option of expressing the maximum timeframe (for an undergraduate program measured in credit hours) in calendar time. Measuring maximum timeframe in credit hours, with pace determined by dividing the cumulative number of successfully completed credit hours by the cumulative number of attempted hours, more easily accounts for variances in enrollment status. However, using calendar time may make more sense for certain programs, especially those where coursework or enrollment status is prescribed.

Members of the subcommittee were generally supportive of the proposed changes to § 668.34. One member expressed the desire for more flexibility in applying SAP to subscription-based programs given that the Department's proposed disbursement changes for such programs would already require students to make progress in order to receive subsequent disbursements of title IV, HEA assistance. The proposed regulations in this section applicable to subscription-based programs reflect discourse which occurred, both in the subcommittee and among negotiators, within the wider context of defining subscription-based programs (refer to the discussion of *subscription-based programs* under § 668.2 *Definitions*).

§ 668.111 Scope and Purpose

Statute: Section 487(b) of the HEA provides that an institution that has received written notice of a final audit determination or a program review determination may seek a review of the determination by the Secretary.

Current Regulations: Section 668.111 explains the scope of Subpart H—Appeal Procedures for Audit Determinations and Program Review Determinations. The regulations indicate that subpart H establishes rules governing the appeal by an institution or third-party servicer of a final audit determination or a final program review determination.

Proposed Regulations: The Department proposes to expand the scope to include the issuance of such determinations by the Department.

Reasons: The proposed expansion of scope for this subpart to include the issuance of final audit determinations and final program review determinations is a conforming change to the proposed changes in § 668.113, which would provide that the Secretary will rely on an accrediting agency's or State approval agency's requirements in resolving findings related to distance education or the establishment of credit hours.

§ 668.113 Request for Review

Statute: Section 487(b) of the HEA provides that an institution that has received written notice of a final audit determination or a program review determination may seek a review of the determination by the Secretary.

Current Regulations: Section 668.113 establishes the requirements for an institution or a third-party servicer to submit a written request for review of a final audit determination or a final program review determination. The regulations establish that an institution or servicer must file its request for review no later than 45 days from the date that the determination was received, must attach a copy of the determination to its request, and must state its position together with the pertinent facts and reasons supporting that position. The regulations also provide in paragraph (d)(1) that if an institution's violation results from an administrative, accounting, or recordkeeping error that was not part of a pattern of error and there is no evidence of fraud or misconduct related to the error, the Secretary permits the institution to correct the error. Paragraph (d)(2) states that an institution corrects an error described in paragraph (d)(1) with regard to liability if the correction eliminates the basis for the liability.

Proposed Regulations: The Department proposes to add a new paragraph that explains that if a final audit determination or final program review determination includes liabilities resulting from the institution's classification of a course or program as distance education, or the institution's assignment of credit hours, the Secretary would rely on the requirements of the institution's accrediting agency or State approval agency regarding qualifications for instruction and whether the work associated with the institution's credit hours is consistent with commonly accepted practice in higher education.

Reasons: The Department proposes these changes in order to conform with changes to the definitions of ''distance education'' and ''credit hour'' under § 600.2, both of which rely upon the judgment and requirements of an institution's accrediting agency or State approval agency. To the extent that a final audit determination or a final program review determination addresses these topics, we believe such determinations should specifically reference the agency's requirements.

§ 668.164 Disbursing Funds

Statute: Section 487(c)(1)(B) of the HEA provides that the Secretary ''shall prescribe such regulations as may be necessary to provide for'' reasonable standards of financial responsibility, and appropriate institutional administrative capability to administer the title IV, HEA programs, in matters not governed by specific program provisions, ''including any matter the Secretary deems necessary to the sound administration of the financial aid programs.''

Current Regulations: Section 668.164 establishes requirements for the disbursement of funds under the title IV, HEA programs. Current § 668.164(i) provides that the earliest an institution may disburse title IV, HEA funds to an eligible student or parent is—

- For a student enrolled in a credit-hour program offered in terms that are substantially equal in length, 10 days before the first day of classes; or
- For a student enrolled in a non-term program or a term-based program in which the terms are not substantially equal in length, the later of 10 days before the first day of classes in a payment period or the date the student completed the previous payment period for which he or she received title IV, HEA funds.

Proposed Regulations: The Department proposes to exclude subscription-based programs from the current provisions for early disbursements under § 668.164(i)(1)(i) and (ii) and establish requirements that will apply specifically to subscription-based programs in new paragraph (i)(1)(iii). The proposed regulations would establish that if a student is enrolled in a subscription-based program, the earliest that an institution may make a disbursement to that student is the later of 10 days before the first day of classes in the payment period or the date that the student completed the cumulative number of credit hours associated with the student's enrollment status in all prior terms attended under the definition of a subscription-based program in § 668.2.

Reasons: We are proposing these changes to conform with the establishment of the proposed disbursement methodology for subscription-based programs that is provided under § 668.2. The proposed regulations would establish the specific timing requirements for disbursement in a subscription-based programs. The requirements would be similar to

requirements for programs with terms that are substantially equal, except that an institution would not be permitted to disburse funds to a student in a subscription-based program until the student has completed the appropriate number of credit hours (or the equivalent) in accordance with the requirements in the definition of ''subscription-based program.''

§ 668.171 General

Statute: Section 498(c) of the HEA grants the Secretary the authority to determine whether an institution is financially responsible.

Current Regulations: If the Secretary determines that an institution is not financially responsible under the standards and provisions of § 668.171 or under an alternative standard in § 668.175, or the institution does not submit a financial or compliance audit by the date permitted and in the manner required under § 668.23, the Secretary may initiate an action under subpart G of part 668 to fine the institution, or to limit, suspend, or terminate the institution's participation in the title IV, HEA programs or for an institution that is provisionally certified, take an action against the institution under the procedures established in § 668.13(d).

Proposed Regulations: The Department proposes to add § 668.171(e)(3), which would allow the Secretary to deny the institution's application for certification or recertification to participate in the title IV, HEA programs if the Secretary determines that an institution is not financially responsible under the standards and provisions of this section or under an alternative standard in § 668.175, or the institution does not submit its financial and compliance audits by the date permitted and in the manner required under § 668.23.

Reasons: The Department proposes to codify current practice into regulation. The addition of § 668.171(e)(3) represents no substantive change and will have no impact on current practice.

§ 668.174 Past Performance

Statute: Section 498(c) of the HEA grants the authority to determine whether an institution is financially responsible to the Secretary.

Current Regulations: Section 668.174 governs the past performance of an institution and provides that an institution is not financially responsible if a person who exercises substantial control over the institution, or any member of that person's family, (1) owes a liability for a violation of a title IV, HEA program requirement that is not being repaid; or (2) exercises or exercised control over another institution with an outstanding liability that is not being repaid.

In such cases, the Secretary may nonetheless determine that an institution is financially responsible if the institution notifies the Secretary that the person who exercises substantial control over the institution has repaid a portion of the liability that equals or exceeds the greater of (1) the total percentage of the ownership interest held by that person and/or any member of that person's family (including when represented by a voting trust, power of attorney, proxy, or similar agreement; or (2) 25 percent, if the person or any member of the person's family is or was a member of the board of directors, chief executive officer, or other executive officer of the institution that owes the liability. Additionally, the Secretary may determine an institution is financially responsible if the owner's liability is currently being repaid in accordance with a written agreement with the Secretary. Lastly, the Secretary may find that the institution is financially responsible if the institution demonstrates why the person who exercises substantial control over the institution does not or did not exercise substantial control over the institution that owes the liability.

The current regulations also define the term ''ownership interest'' as a share of the legal or beneficial ownership or control of, or a right to share in the proceeds of, the operation of an institution, an institution's parent corporation, a third-party servicer, or a third-party servicer's parent corporation. The definition also indicates that a person is considered to exercise substantial control over an institution or third-party servicer if the person directly or indirectly holds at least a 25 percent ownership interest in the institution or servicer, holds at least a 25 percent ownership interest in the institution or servicer, represents at least a 25 percent ownership in the institution or servicer, or is a member of the board of directors, a general partner, the chief executive officer, or other executive officer as designated by institution, or an entity that holds at least a 25 percent ownership interest in the institution.

Proposed Regulations: The Department proposes to add either the term ''or entity'' or the term ''or entities'' after the references to ''person'' or ''persons'' in § 668.174(b), (b)(1)(ii), (b)(2)(i), (b)(2)(ii), (b)(2)(ii)(A), (b)(2)(ii)(B), (b)(2)(iii)(A), (b)(2)(iii)(B), and (c)(3). We also propose to revise ''substantial control'' in § 668.174(b)(1)(i) and (b)(1)(i)(A) to ''substantial ownership or control.''

The Department proposes to add § 668.174(b)(1)(ii)(B), which would state that an institution is not considered financially responsible if a person or entity who exercises substantial ownership or control over the institution, or any member or members of that person's family, alone or together exercised substantial ownership or control over another institution that closed without a viable teach-out plan or agreement approved by the institution's accrediting agency and faithfully executed by the institution.

Reasons: The Department proposes to add ''or entity'' or ''or entities'' to follow the words ''person'' or ''persons'' in various provisions because substantial ownership or control of an institution is sometimes vested in an entity as well as an individual. We believe that this addition would allow the Department to consider more structures of substantial ownership or control when determining the past performance of an institution in assessing its financial responsibility.

The Department proposes to add ''substantial ownership or control'' to conform with the proposed language change in § 668.15.

The Department proposes to add § 668.174(b)(1)(i)(B) because we believe the Secretary should consider whether a person or entity affiliated with an institution has overseen the precipitous closure of another institution. We want to encourage all institutions to have a viable teach-out plan if the institution closes. We believe this will prevent an institution from being substantially owned or controlled by persons or entities that would cause the institution to be financially irresponsible and close without providing to students a plan to finish their education in place or at another institution.

§ 668.175 Alternative Standards and Requirements

Statute: Section 498(c) of the HEA grants authority to the Secretary to determine whether an institution is financially responsible.

Current Regulations: A participating institution that is not financially responsible solely because the Secretary determines that its composite score is less than 1.5 may participate in the title IV, HEA programs as a financially-responsible institution for no more than three consecutive years, beginning with the year in which the Secretary determines that the institution qualifies under this alternative as long as the institution meets the two conditions in § 668.175(d), as long as its composite score is in the range from 1.0 to 1.4,

which is known as the zone alternative. Institutions that are qualified under the zone alternative must provide information regarding certain oversight and financial events to the Secretary, under § 668.175(d)(2)(ii). Under § 668.175(d)(3)(i), institutions can submit this information to the Secretary by certified mail or electronic or facsimile transmission.

Proposed Regulations: The Department proposes to delete the reference to facsimile transmission from § 668.175(d)(3)(i).

Reasons: Facsimile transmission is an outdated method of correspondence that is encompassed by the broader term ''electronic transmission.'' The deletion of the words ''facsimile transmission'' represents no substantive change and will have no impact on current practice.

Executive Orders 12866, 13563, and 13771

Regulatory Impact Analysis

Under Executive Order 12866, the Office of Management and Budget (OMB) determines whether this regulatory action is ''significant'' and, therefore, subject to the requirements of the Executive order and subject to review by 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.

OMB has determined that this proposed rule is an economically significant action and would have an annual effect on the economy of more than $100 million. This regulation would enable institutions to harness the power of innovation to expand postsecondary options, leverage advances in technology to improve student learning, and allow students to progress by demonstrating competencies rather than seat time. According to the Department's FY 2020 Budget Summary, Federal Direct Loans and Pell Grants accounted for almost $124 billion in new aid available in 2018. Given this scale of Federal student aid amounts disbursed yearly, the addition of even small percentage changes could result in transfers between the Federal government and students of more than $100 million on an annualized basis.

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as a ''major rule,'' as defined by 5 U.S.C. 804(2).

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 rule is considered an E.O. 13771 deregulatory action. We believe the effect of this regulation would be to remove barriers for development of distance and direct assessment programs and their participation in title IV, HEA funding, reduce the Department's role in approving programs, and promote innovation in higher education. We believe this regulatory action would be, in sum, deregulatory.

As required by Executive Order 13563, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action, and we are issuing these proposed regulations only on a reasoned determination that their benefits would justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that the regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action would not unduly interfere with State, local, or Tribal governments in the exercise of their governmental functions.

In accordance with the Executive orders, the Department has assessed, both quantitatively and qualitatively, the potential costs and benefits of this regulatory action.

In this regulatory impact analysis, we discuss the need for regulatory action, the potential costs and benefits, net budget impacts, and regulatory alternatives we considered.

Elsewhere in this section, under *Paperwork Reduction Act of 1995,* we identify and explain burdens specifically associated with information collection requirements.

Need for Regulatory Action

The emphasis in the proposed regulations is on clarifying the distinctions between distance education and correspondence courses, affirming the permissibility of team teaching models, improving worker mobility by accommodating differences in licensure requirements across State lines, simplifying conversions between clock and credit hours to enable students to meet licensure requirements while also earning credits more likely to transfer to other institutions, establishing regulations regarding subscription-based programs so that institutions can confidently implement programs that measure competencies rather than seat time, and reducing barriers that limit the number of direct assessment programs available to students.

These proposed changes would benefit institutions by enabling them to employ innovative methods and models without undue risk of inadvertently violating title IV requirements. These options would benefit students by expanding the number of postsecondary education opportunities available to them, including those who may have been poorly served by more traditional ''seat-time'' instructional models. By providing a larger variety of postsecondary options and strategies such as blended learning, adaptive learning, and competency-based education, students will be much more likely to persist in and complete their programs and institutions will be much more equipped to drive student success.[21] [22] Proposed regulations would define or clarify terms such as ''correspondence course,'' ''distance education,'' and ''regular and substantive interaction,'' and would streamline the current regulations to reduce the complexity of performing clock-to-credit hour conversions, disbursing aid to students enrolled in subscription-based programs, and ensuring that programs align with program length restrictions, while improving worker mobility across State lines. In some instances, the proposed definitions would clarify terms used in, but not defined by, the HEA. In other cases, the proposed regulations would

[21] *www2.deloitte.com/us/en/insights/industry/public-sector/improving-student-success-in-higher-education.html.*

[22] *www.texaspolicy.com/new-study-less-expensive-competency-based-education-programs-just-as-good-as-traditional-programs/.*

codify program administration requirements that had previously been communicated only through sub-regulatory guidance, to give institutions the certainty they need to expand the postsecondary education options that they make available to students.

For instance, while CBE programs using direct assessment have been permitted by statute since 2006, most institutions continue to evaluate progress in CBE programs based on measures of time (or time equivalency) rather than a student's demonstration of competency. This is largely due to uncertainties regarding how to disburse and calculate return-to-title IV for students enrolled in programs that measure competencies rather than time.

As a result, the potential benefits of CBE programs, such as accelerated learning and completion as well as providing better assurances to employers that graduates are prepared for workplace demands, were mitigated because programs still were required to adhere to time-based title IV disbursement methodologies.[23] These regulations would provide needed certainty to institutions about how to disburse aid to students enrolled in CBE programs. The regulations would also eliminate a significant legal obstacle to the adoption of direct assessment CBE programs by permitting title IV-eligible programs to be offered partly through direct assessment and partly using credit or clock hours. Eliminating this restriction would make it easier for institutions to experiment with direct assessment without having to immediately establish and implement a program offered entirely through direct assessment.

The proposed regulations acknowledge that subscription-based programs are permissible and would provide instructions to institutions about how to disburse aid and evaluate satisfactory academic progress for students enrolled in these programs. These regulations would also reduce the steps involved in gaining approval for direct assessment programs, which would reduce the burden associated with administering these programs and reduce the risk that an institution could invest resources in designing a program that the Department denies or unnecessarily delays. Institutions that better understand the rules for administering Federal student aid in circumstances that depart from traditional delivery models are more likely to invest in developing those models, and administering them properly, thus avoiding improper payments and improving the student experience.

The proposed regulations also acknowledge that, given the cost of developing sophisticated technology-driven instructional tools or building specialized facilities on college campuses, a rational approach may be to rely on a third-party provider with a much broader reach than an individual institution or on industry partners who have other incentives to maintain state-of-the-art facilities and equipment. Until institutions fully understand what is permissible in the development and implementation of innovative delivery models, institutional leaders will remain largely risk averse, and solutions that would otherwise help large numbers of students will not be made available to them.

Finally, the proposed regulations would change the return of title IV funds and satisfactory academic progress provisions to reduce administrative burden and increase flexibility for many postsecondary institutions offering innovative programs. Reducing the amount of burden and expense associated with the administration of the title IV, HEA programs for unique or non-traditional programs would also encourage institutions to offer programs that do not fit into the traditional mold and improve the available offerings for students.

The Department believes this proposed regulatory action would have an annual effect on the economy of more than $100 million. If students have more postsecondary options to select from and if more students persist to completion, the number of students who enroll for the full duration of a program may increase. For example, although extremely limited in availability now, if there were fewer barriers to starting a direct assessment program, there could be an increase in the number available, and perhaps adult learners would find this to be a more satisfying way to learn, or the only way they can juggle the demands of work, school, and family.

While a limited number of experienced institutions with established direct assessment programs may increase their program offerings, it is difficult to predict whether larger numbers of students will be attracted to higher education, in general, or if the current number of students would be distributed differently across the landscape of available programs. Direct assessment programs may be considerably more attractive to busy adult learners who would get credit for what they know from prior work or life experience.[24]

The demand for distance education programs has visibly increased in recent years. In 2003–04, 15.6 percent of undergraduate students took at least one distance education class and only 4.9 percent of students were exclusively in distance education while by 2015–16, 43 percent of undergraduate students took at least one distance education class and approximately 11 percent were in exclusively distance programs.[25] In many cases, more students are taking at least one online class while enrolled in a traditional ground-based program. Correspondingly, there has also been significant growth in the number of students who are enrolled in exclusively online programs.[26] We have also seen significant redistribution of online enrollments as some large non-profit and public institutions have increased their market share, while at the same time some proprietary schools that once dominated distance education delivery are suffering sizeable enrollment losses and even closures. Overall, growth in the number of students enrolled exclusively online has been moderate, increasing 22 percent between 2013 and 2018. The number of students taking at least one online class has increased 28 percent between 2013 and 2018.[27] [28] [29]

While current providers of CBE and direct assessment learning do so through distance learning modalities, it is possible that, as regulatory requirements become clearer, those institutions that primarily provide ground-based education will also develop and implement CBE and direct assessment programs. On the other hand, programs that lead to licensure may be slower to introduce CBE or

[23] *www2.deloitte.com/us/en/insights/industry/public-sector/improving-student-success-in-higher-education.html.*

[24] *onlinelibrary.wiley.com/doi/full/10.1002/cbe2.1008.*

[25] U.S. Department of Education, National Center for Education Statistics, Digest of Education Statistics 2018, Table 311.22. Number and percentage of undergraduate students enrolled in distance education or online classes and degree programs, by selected characteristics: Selected years, 2003–04 through 2015–16. Available at *nces.ed.gov/programs/digest/d18/tables/dt18_311.22.asp.*

[26] *www.insidehighered.com/digital-learning/article/2019/12/11/more-students-study-online-rate-growth-slowed-2018.*

[27] *nces.ed.gov/programs/digest/d18/tables/dt18_311.15.asp.*

[28] *nces.ed.gov/programs/digest/d14/tables/dt14_311.15.asp.*

[29] *U.S. Department of Education, National Center for Education Statistics, IPEDS, Spring 2019, Fall Enrollment component (provisional data)., Number and percentage distribution of students enrolled at Title IV institutions, by control of institution, student level, level of institution, distance education status of student, and distance education status of institution: United States, fall 2018.*

direct assessment models since licensing boards tend to resist change.[30]

As can be seen in Table 1 below, which is based on data collected by the National Center for Education Statistics (NCES), while the percentage of students who are enrolled exclusively in online programs has increased slightly between 2013 and 2018, the largest growth has been in the percentage of students who take at least one, but not all, of their classes online. The number of students engaged in online learning grew between 2013 and 2018 from approximately 5.5 million to 6.9 million. This suggests that learning modalities will change as innovation creates a broader range of options, but, based on current trends, an increase in the percentage of students who enroll in online classes will not likely result in overall increases in postsecondary enrollments. College enrollments are most dependent upon economic cycles, so changes in delivery models may be less important than macroeconomic conditions in determining total enrollments.

TABLE 1

All institutions	Total students (#)	No-distance education courses (%)	At least one distance course, not all (%)	All-distance education courses (%)
2018	20,008,434	65.3	18.4	16.3
2017	19,765,598	66.3	18.0	15.7
2015	19,977,270	70.2	15.4	14.4
2013	20,375,789	72.9	14.1	13.1
4-year (total):				
2018	13,901,011	64.3	18.0	17.6
2017	13,823,640	65.8	17.3	16.9
2015	13,486,342	69.7	14.4	15.9
2013	13,407,050	73.0	12.2	14.8
2-year (total):				
2018	6,107,423	67.6	19.2	13.2
2017	5,941,958	67.5	19.5	13.0
2015	6,490,928	71.2	17.6	11.2
2013	6,968,739	72.7	17.6	9.8
Public:				
2018	14,639,681	66.1	21.5	12.3
2017	14,560,155	67.8	20.8	11.4
2015	14,568,103	72.0	18.0	10.0
2013	14,745,558	74.6	16.7	8.7
Private Non-Profit:				
2018	4,147,604	69.7	10.1	20.2
2017	4,106,477	71.3	9.5	19.2
2015	4,063,372	75.0	8.5	16.5
2013	3,974,004	80.0	6.9	13.1
Private For-Profit:				
2018	1,221,149	41.0	8.6	50.4
2017	1,098,966	29.0	11.1	59.9
2015	1,345,795	35.9	8.6	55.5
2013	1,656,227	40.7	7.6	51.7

Growth in the number and percentage of online learners was especially strong among private not-for-profit institutions, where students who took all courses through distance education increased over 54 percent, from 13.1 to 20.2 percentage points. At 2-year institutions, the percentage of students taking all courses online increased from 9.8 to 13.2 percentage points, almost a 35-percent jump from 2013 to 2018. However, total enrollments at 2-year institutions during that same time period decreased by over 850,000 students.

While the percentage of students enrolled exclusively in distance learning is highest among proprietary institutions (60 percent), relatively few students are enrolled at these institutions (only approximately 1 million of the nearly 20 million enrolled in postsecondary education in 2017 were enrolled at proprietary institutions). There have been sizable decreases in total enrollments at proprietary institutions between 2013 and 2017, and in 2017 only 659,379 students were enrolled exclusively online at proprietary institutions as compared to 821,296 students who were enrolled exclusively online at private non-profit institutions and 1.6 million who were enrolled exclusively in online programs at public institutions. These data suggest that increases in enrollments among exclusively online courses do not necessarily result in increased number of total postsecondary enrollments.

The CBE marketplace overall has also seen significant attention from within the postsecondary education community and general public, but the direct assessment component of CBE has not, potentially because of the length of time it takes for the Department to review applications for direct assessment programs, and because several audits by the Department's Office of Inspector General in the past decade have been sharply critical of the oversight of direct assessment by the Department and accrediting agencies.[31] [32] [33] The Department also believes that another recent report by the Department's

[30] *ij.org/wp-content/themes/ijorg/images/ltw2/License_to_Work_2nd_Edition.pdf.*

[31] *www2.ed.gov/about/offices/list/oig/auditreports/fy2014/a05n0004.pdf.*

[32] *www2.ed.gov/about/offices/list/oig/auditreports/fy2015/a05o0010.pdf.*

[33] *www2.ed.gov/about/offices/list/oig/auditreports/fy2016/a05p0013.pdf.*

Inspector General, which questioned the validity of the team teaching model employed by one institution (and permitted by the Department's sub-regulatory guidance), had a chilling effect on other institutions that were considering the development of CBE programs. Audit determinations requiring the return of hundreds of millions of dollars in title IV funds pose an existential threat to most institutions, including public institutions, even if such determinations are ultimately reversed.[34]

The Department's data does not break out information about competency-based education students to the same extent as it does for distance education students, but a number of surveys and articles provide some background on existing programs. According to the 2018 National Survey of Postsecondary Competency-Based Education (NSPCBE), co-authored by American Institutes of Research (AIR) and Eduventures, a majority of respondents believe that CBE will experience strong growth although they also perceive that a number of barriers to implementation remain.[35] The survey was sent to over 3,000 institutions including primarily 2- and 4-year institutions listed in the Integrated Postsecondary Education Data System (IPEDS). About 69 percent of respondents were 4-year institutions and 31 percent were 2-year institutions. A total of 501 institutions replied to the survey, representing a survey response rate of 16 percent. It is possible that the survey may suffer from selection bias if the institutions that completed the survey were more likely to be those institutions considering adding CBE programs, which would mean that the survey results could not be accurately projected to the full postsecondary system.

Four-hundred-thirty of the 501 respondents reported being interested in, or in the process of, implementing CBE programs, while 71 indicated no interest. Some 57 institutions stated that they were currently offering at least one CBE program, with these institutions, in aggregate, offering a total of 512 CBE programs. The largest portion of programs (427 of 512) was at the undergraduate level with 85 at the graduate level. The highest concentration of CBE programs was in the fields of nursing and computer science. Given the requirement for nursing students to participate in clinical rotations, it is likely that CBE programs in nursing were designed to target students who are already registered nurses (with an associate degree) and now wish to complete a bachelor's degree.

Over 50 percent of institutions reported CBE undergraduate enrollments of no more than 50 students per program while only a small number of institutions (approximately 4 percent) enrolled more than 1,000 undergraduate students in CBE programs at their institution. Thus, assuming these findings are characteristic of the overall CBE landscape, it appears that most institutions are still in the early stages of implementing CBE programs with only a handful of institutions operating large-scale programs.

Similar results were described in the 2019 survey that had 602 respondents with 54 percent from public institutions, 42 percent from private, nonprofit institutions and 4 percent were from proprietary institutions.[36] Of the 588 programs offered by 64 institutions, 84 percent were undergraduate and 16 percent were graduate programs. The majority of existing programs remain small, with 53 percent with enrollment under 50 students.[37] As in the 2018 survey, popular fields for competency-based programs include nursing, computer and information sciences, and business administration.[38] Seventy-seven percent of responding institutions with competency-based programs reported that they are eligible for federal financial aid. Of those, 75 percent report they maintain that eligibility by using a course structure to map to credit hours.[39]

One of the three top barriers to implementing CBE programs, as cited by over 50 percent of the responding institutions, was ''Federal student aid regulations.'' The other two key barriers to entry included the need to change business processes and the high costs associated with start-up. While the survey results point to a guarded optimism on the growth of CBE programs, this optimism is tempered by a perception that the regulatory climate needs to be flexible and conducive to expansion of CBE programs; however, the report suggests that it is crucial to preserve consumer protections.

The Department agrees with this theme, as we note in the executive summary that ''the purpose of these distance education and innovation regulations is to reduce barriers to innovation in the way institutions deliver educational materials and opportunities to students, and assess their knowledge and understanding, while providing reasonable safeguards to limit the risks to students and taxpayers.''

Therefore, this NPRM sends a signal to the higher education community that the Department is committed to reducing regulatory burden to make way for responsible innovations, such as CBE programs and direct assessment programs. Further, the proposed regulations would enable institutions to develop new title IV disbursement models, such as subscription-based programs, to align the delivery of aid with programs that allow students to complete as many classes as possible during a given period of time, but to also pace themselves appropriately based on other demands and learning needs.

While technology has transformed the way almost every industry in America does business, it has not fundamentally transformed the way we educate students, monitor their progress, or diagnose when and what kind of additional support services a student needs. We are educating postsecondary students today in a very similar manner to methods and practices used a hundred years ago. Nonetheless, there have been some early innovators who have made advances despite the Department's lagging in this area. In that regard, this NPRM represents the Department's effort to catch up with innovations that are already taking place at forward-looking institutions. We seek to promote continuing innovation, both in distance learning and ground-based education. The proposed regulations would update our definitions of ''distance education'' and ''correspondence courses'' to acknowledge that as a result of CBE and direct assessment, many students enrolled in distance education progress at their own pace, which is a characteristic that in the past was determinant of a correspondence course. With the introduction of adaptive learning and other technologies, a student enrolled in distance education is likely to be learning at his or her own pace, although that learner continues to have regular and substantive interactions with the instructor(s). The proposed regulations acknowledge that adaptive learning can play an important role in a student's educational

[34] *www2.ed.gov/documents/press-releases/20190111-wgu-audit.pdf.*

[35] *www.air.org/sites/default/files/National-Survey-of-Postsec-CBE-2018-AIR-Eduventures-Jan-2019.pdf.*

[36] American Institutes for Research, State of the Field—Findings from the 2019 National Survey of Postsecondary Competency-Based Education, available at *www.air.org/sites/default/files/National-Survey-of-Postsecondary-CBE-Lumina-October-2019-rev.pdf.*

[37] *Id.,* p. 25.

[38] *Id.,* p. 26.

[39] *Id.,* p. 31.

experience and can facilitate regular and substantive interaction between students and instructors by providing students with continuous feedback regarding their learning. The Department appreciates the considerable effort of negotiators to recommend and agree to regulatory changes that promote and enable flexibility, while at the same time ensuring the preservation of student protections and the responsible distribution of title IV, HEA assistance.

It is the combination of changes addressed in these proposed regulations that cumulatively would have sufficient impact on the economy to warrant classifying this regulation as economically significant. Specifically, while there could be increases in the number of students seeking title IV, HEA assistance, or the number of students who persist to completion, these increased Federal expenditures could result in the preparation of a more capable workforce and a better-educated citizenry. As more adults are required to obtain additional postsecondary courses or credentials throughout their professional lifetime, the availability of more efficient learning opportunities, such as CBE and direct assessment learning, will enable more adults to evolve in their careers.

Costs, Benefits, and Transfers

The Department anticipates that the proposed regulations would affect students, IHEs, accrediting agencies, and the Federal government. State government may also be impacted in some instances. Table 2 refers to key changes described in the identified preamble sections and summarizes potential impacts.

TABLE 2—SUMMARY OF KEY CHANGES

Change	Affected parties	Impacts
Reg Section 600.2—Definitions		
Create definition for ''academic engagement''	Students/Institutions/Federal Government.	Clarifies and expands the types of activities that verify student enrollment for the purpose of performing return to title IV funds calculations while standardizing the Department's definition of ''academic engagement'' for use elsewhere in the regulations. Prevents improper payment of title IV funds to students who are not legitimately engaged in postsecondary learning.
Defines ''clock hour'' for distance education	Students/Institutions/Federal Government/Accrediting Agencies.	Codifies current policy allowing institutions to record clock hours earned through distance education but requires such hours to be taught through synchronous instruction by the instructor. Clock hours may be earned through distance education only when permitted by licensing boards or other regulatory entities that require enrollment to be measured in clock hours. Regulatory clarity may encourage greater use of distance education to provide the didactic portion of occupationally focused programs, thus expanding access to students who are working, raising families, or live far from campus.
Modifies definitions of ''correspondence course'' and ''distance education'' to clarify that it is permissible to employ a team approach to instruction and clarifies that the requirements for regular interaction are met if the institution provides opportunities for interaction, even if each student does not take advantage of each opportunity. Removes self-pacing from definition of ''correspondence course'' as it is not a necessary characteristic for such courses.	Students/Institutions/Federal Government/Accrediting Agencies.	Benefits students by encouraging the development of programs taught by instructional teams consisting of experts in the various elements of high-quality instruction, as opposed to a more traditional model that relies on a single faculty member to meet all of the student's learning needs. Benefits students and institutions by potentially reducing some of the costs of instruction. Reduces the need for institutions to require students to engage in less substantive work solely for the purpose of documenting that regular and substantive interaction took place in order to document that a course is offered using distance education and is not a correspondence course.
Refines definition of ''credit hour'' to reflect current sub-regulatory guidance in DCL GEN–11–06 that references a variety of delivery methods.	Students/Institutions/Federal Government.	Maintains time-based standard to ensure consistency among institutions regarding the awarding of academic credit, while also creating the necessary flexibility to take into account that many new educational delivery models are not based on seat time. Codifies flexibility provided in sub-regulatory guidance under the Department's Dear Colleague Letter GEN–11–06.
Amends definition of ''distance education'' by removing references to specific kinds of electronic media used in providing instruction, relegating the determination of instructor qualifications to accrediting agencies, including the use of interactive technologies to meet the requirements for ''substantive interaction,'' and establishing standards for ''regular interaction'' that include predictable opportunities for interaction and monitoring of student engagement.	Students/Institutions/Federal Government/Accrediting Agency.	Updates regulations to remove references to outdated forms of electronic media and to ensure that new forms of electronic media will be covered by the regulations in the future. Acknowledges that the use of interactive learning technologies can facilitate regular and substantive interaction between students and instructors. Benefits institutions by more clearly explaining regulatory compliance requirements for educational innovations, thus reducing risk and potential financial penalties for those institutions pursuing educational innovation. Benefits students by expanding learning opportunities and flexibilities, including personalized learning, without unnecessary bureaucratic hurdles for the purpose of meeting title IV requirements for regular participation. Benefits the Federal government by ensuring that students are receiving high-quality education when using Federal student aid to pay for that education. Benefits students by ensuring that online learning includes meaningful interactions with qualified instructors who can monitor and improve student learning.
Clarifies definitions of ''incarcerated student'' and ''juvenile justice facilities''.	Students/Institutions/Federal Government.	Reflects current practice and sub-regulatory guidance and clarifies that individuals in certain correctional facilities may be eligible for Pell grants, but limits the use of Pell grants to appropriate instructional expenses.
Amends definition of ''nonprofit institution'' to delete reference to 501(c)(3) tax status.	Institutions	Redundant language removed; no impact anticipated.
Reg Section 600.7—Conditions of Institutional Eligibility		
Establishes that a student is not considered to be ''enrolled in correspondence courses'' until at least 50 percent of the student's classes are correspondence courses.	Students/Institutions	Impact minimal based on the small number of correspondence courses operating in the country. Potential benefit to institutions and students is that enrollment in a single or small number of correspondence courses does not cause a student to be counted against the institution for eligibility purposes. Provides greater flexibilities for students who are managing multiple life demands or for whom travel to the campus is difficult or for whom technology access is limited, by allowing them to participate in a small number of correspondence courses without putting title IV participation for the institution at risk.

TABLE 2—SUMMARY OF KEY CHANGES—Continued

Change	Affected parties	Impacts
Reg Section 600.10—Date, Extent, Duration, and Consequences of Eligibility		
Limits Secretary's approval of direct assessment programs at the same academic levels to the first such program at an institution.	Students/Institutions/Federal Government.	Acknowledges that the Department's role in approving direct assessment programs is limited to ensuring the integrity of the title IV, HEA programs, and assumes that if an institution can disburse aid properly to students in one program at a given academic level, it is likely to be able to do so for additional programs. Ensures that an institution that creates a first new direct assessment program at a new academic level is reviewed by the Department to ensure appropriate administration of title IV funds. Encourages institutions that have demonstrated the ability to design and operate a direct assessment program to expand that model of instruction and enables institutions to more quickly respond to student and workforce needs. Reduces a potential barrier or reduces time required to establish a direct assessment program. A consequence of eliminating the requirement that the Secretary approve each new direct assessment program at the same academic level is that it may lead to the rapid expansion a direct assessment programs without the guardrail of the Department's review.
Reg Section 600.20—Notice and application procedures for establishing, reestablishing, maintaining, or expanding institutional eligibility and certification		
Requires the Secretary to provide timely review of new program applications and enables institutions to start advertising programs early enough to enroll a full cohort of students.	Students/Institutions/Federal Government.	Benefits institutions and students by allowing faster development of new programs, especially those responsive to workforce development needs. Reflects role of accreditors in assessing program quality and Department's intent to rely on accreditor's assessment except in rare circumstances related to the Department's statutory and regulatory requirements or specific requirements of the institution's PPA. Protects an institution from Department's failure to act on an application for new program approval and reduces the likelihood that delays on the Department's part will require an institution to navigate the State and accreditor approval process a second time.
Reg Section 600.21—Updating Application Information		
Adds reporting requirements for (1) the addition of second and subsequent direct assessment programs at the same academic level; and (2) written arrangements with ineligible institutions or organizations to provide 25 percent or more of an eligible program.	Institutions/Federal Government.	With the elimination of the requirement for the Department to approve subsequent programs, this allows the Department to monitor the growth and development of direct assessment programs and written arrangements. Also allows cross-checking with accreditors to be sure program or arrangement has approval.
Reg Section 600.52 and 600.54 (related to Foreign Institutions)		
Amended to permit written arrangements with an eligible institution in the United States to provide no more than 25 percent of a student's program.	Students/Institutions/Federal Government.	Benefits students by allowing them to take Federal student loans to enroll at certain foreign institutions but retain the ability to take a limited number of courses in the U.S., such as during summer breaks. Also enables title IV-participating students enrolled at foreign institutions to pursue qualifying internships or externships in the United States.
Amended to permit written arrangements between a foreign institution and an ineligible entity for no more than 25 percent of a student's program; provided that the ineligible entity satisfies definition of ''foreign institution''.	Students/Foreign Institutions/Federal Government.	Allows students at eligible foreign institutions to take courses at other approved foreign institutions in that country, thus benefiting from the same opportunities as their international peers enrolled at foreign schools. Broadens educational opportunities available to U.S. students at foreign institutions while maintaining reasonably equivalent quality. However, while the regulations require the ineligible institution to meet the requirements of the foreign country in which it is located, these arrangements would not be overseen by a recognized accrediting agency or the Department, outside of the regulatory requirements, which may make it difficult to ensure academic quality of the coursework offered by the ineligible foreign institution.
Reg Section 668.2—Definitions		
Eliminates definition of Academic Competitiveness Grant (ACG).	None	ACG program is no longer authorized by HEA. Removing definition has no impact on students or institutions.
Amends ''full-time student'' to define requirements for subscription-based programs and to prevent an institution offering such a program from including repeated courses for which a student has already received a passing grade in a student's enrollment status.	Students/Institutions/Federal Government.	Provides clarity for institutions regarding subscription-based models and how they can be structured in order to permit students to receive title IV, HEA assistance.
Defines ''subscription-based program'' for title IV disbursement purposes as standard or non-standard term direct assessment program for which an institution charges a student for a term with the expectation that the student completes a specified number of credit hours within the term. Clarifies that no specific timeframe applies for the terms and that students must complete a cumulative number of credit hours (or the equivalent) during or following the term before receiving another disbursement of title IV funds.	Students/Institutions/Federal Government.	Benefits all parties by clarifying how title IV aid disbursements work for subscription-based programs. Provides flexibility for students to take advantage of self-pacing inherent in this program model while limiting potential for abuse by requiring completion before subsequent disbursements of aid. Some protection for students with possibility of one single subscription period for catch-up work before loss of title IV eligibility. Clarity provided by definition may increase the establishment of direct assessment programs, to the benefit of the institutions that offer them, and as options for students, including the non-traditional students that have taken advantage of existing CBE programs. Provides an opportunity for students who fall behind in a subscription-based program to catch up and get back on track.

TABLE 2—SUMMARY OF KEY CHANGES—Continued

Change	Affected parties	Impacts
Requires institutions to establish a single enrollment status that applies to a student throughout his or her enrollment in a subscription-based program, with the student able to change their enrollment status once in an academic year.	Students/Institutions/Federal Government.	Provides consistency for students regarding expectations for completion of coursework in a subscription-based program. Offers clarity to institutions regarding requirements for structuring such programs in order to ensure access to Federal aid. Improves program integrity by limiting options for students to avoid completion requirements through changes in enrollment status.
Explains method for determining number of credit hours (or the equivalent) that must be completed before subsequent disbursements of title IV aid.	Students/Institutions/Federal Government.	Benefits institutions by clarifying how to match disbursements to pace of each student's progress. Benefits the Federal government by establishing a clear completion standard for students to meet before they receive subsequent disbursements of Federal aid. Benefits students by allowing for an additional term to ''catch-up'' on coursework before losing title IV eligibility.
Modifies definition of ''third party servicer'' to use ''originating loans'' instead of ''certifying loan applications''.	None	Reflects current practices and terminology. No impact anticipated on any party.
Reg Section 668.3—Academic Year		
Revises definition of ''week of instructional time'' as it pertains to an institution's ''academic year.'' One part of the definition would cover traditional post-secondary programs and remain unchanged and the other would cover programs using asynchronous coursework through distance education or correspondence courses. For these courses, defines it as a week in which the institution ''makes available the instructional material, other resources, and instructor support necessary for academic engagement and completion of course objectives''.	Students/Institutions/Federal Government.	Benefits institutions by clarifying requirements for building instructional calendars in programs offered asynchronously through distance education and may spur additional innovation given better understanding of compliance thresholds. Benefits students and the Federal government by ensuring that institutions make appropriate instructional materials and support available during instructional periods in exchange for Federal student aid.
Reg Section 668.5—Written Arrangements to Provide Educational Programs		
Clarifies that institutions using written arrangements may align or modify their curriculum to meet requirements of industry advisory boards or other industry-recognized credentialing bodies rather than going through a mandatory, and typically lengthy, shared governance decision-making process.	Institutions/Faculty/Students/Accrediting Agencies.	Enables institutions to keep pace with changing needs of employers and protects non-accredited providers from having their educational programs or technologies manipulated by others. This is important since providers through written arrangements must prove the efficacy of their programs, so outsiders should not be allowed to modify or change the program in a way that could influence those results. Ensures that students are better prepared for entry to the workforce in certain occupations. Could create tension with faculty and reduce their influence over certain aspects of the curriculum but could require proper oversight by partnering institutions and accreditors to reduce risk of harm to students.
Clarifies calculation of percentage of program that could be provided by an ineligible institution.	Students/Institutions/Accreditors/Ineligible Entities involved in Written Arrangements.	Ensures that degree-granting institutions retain academic control of a program and maintain the responsibility for delivering at least half of an academic program. Setting out a clear methodology makes clear when and how written arrangements may be used but ensures that colleges and universities are not simply outsourcing instructional responsibilities to non-accredited providers. Benefits institutions by improving speed with which accrediting agencies review and approve such arrangements. While the accrediting agency can deny the request for a written arrangement, increasing the speed for review and expanding the options for staff that can review these arrangements could make for a less robust or rigorous review. Benefits students and institutions by allowing institutions to engage other providers, such as unions and apprenticeship providers, who may have specialized facilities and uniquely trained employees who can serve as teachers and mentors. Benefits institutions by allowing them to offer educational opportunities or technologies that are developed by outside providers who may be better situated to invest in new technologies due to their opportunities to deliver them to a larger population of students than are typically at a single institution.
Clarifies that written arrangements are not necessary for certain other interactions with outside entities. Specifically, the limitations in § 668.5 do not apply to the transfer of credits, use of prior learning assessment or other non-traditional methods of providing academic credit, or the internship or externship portion of a program.	Institutions/Students	Offers clarity for institutions to ensure that use of written arrangements does not result in fewer credits being accepted through transfer or awarded through prior learning assessment. Benefits students by reducing costs and time to completion for those who bring pre-existing knowledge and skills to the classroom.
Removes 50 percent limitation on written arrangements between two or more eligible institutions under joint ownership.	Institutions	Allows greater opportunities for institutions to share administrative or instructional resources when under shared ownership.
Ineligible entities must demonstrate experience in delivery and assessment of the program or portion the ineligible entity delivers and that the programs have been successful in meeting stated learning objectives.	Institutions	Allows institutions to use third parties to deliver portions of programs, to integrate advanced technologies, enable student access to specialized facilities and experts, expand the number of learning options available to students and potentially increase the number of students an institution can responsibly serve. While written arrangements may reduce the cost of delivering certain kinds of instruction, constructing specialized facilities, or developing new technologies, the written arrangement will have associated costs that could reduce revenue. Students could have access to newer technologies or higher quality instruction than could be provided by the institution, but there are risks that the outside provider could be of lower quality and have less of a vested interest in the student's success.

TABLE 2—SUMMARY OF KEY CHANGES—Continued

Change	Affected parties	Impacts
Reg Section 668.8—Eligible Programs		
Eliminates consideration of ''out-of-class'' hours for purposes of performing clock-to-credit conversions for non-degree programs that are subject to those requirements.	Institutions	Aligns the Department's requirements with those of most licensing boards and simplifies the conversion process. Enables students to meet licensure requirements in programs that are title IV eligible and helps institutions by allowing them to comply with the reasonable length requirements while also allowing credit hour to clock hour conversions. May result in additional title IV funds expenditures for programs currently lacking any out-of-class components.
Reg Section 668.10—Direct Assessment Programs		
Revises definition of ''direct assessment'' and eliminates separate definitions of key terms for direct assessment programs, referring instead to requirements elsewhere in regulations.	Institutions	Simplifies and clarifies requirements related to direct assessment programs.
Eliminates certain prohibitions on types of coursework that can be offered through direct assessment, including remedial coursework, and enables ''hybrid'' programs to provide students options to take some direct assessment courses and some traditional or distance learning courses.	Students/Institutions/Federal Government.	Allows institutions to provide students with more options so that learners can select the learning modality that best meets their needs. Allows students to take some traditional courses even if some of their other courses are direct assessment courses. Recognizes that co-remediation is a promising practice, and direct assessment classes may increase the number of students who can participate in co-remediation programs while taking other classes.
Codifies current policy by adding prohibition on paying title IV, HEA funds for credit earned solely through prior learning assessment.	Students/Institutions/Federal Government.	Benefits students and taxpayers by discouraging institutions from charging excessive fees for conducting prior learning assessment and ensures that taxpayer dollars are not being used to pay institutions for instruction that they are not providing.
Reg Section 668.13—Certification Procedures		
Automatic renewal of an institution's certification if the Secretary does not make a decision on an application for recertification submitted no later than 90 calendar days before its PPA expires within 12 months.	Institutions	Benefits institutions by setting a time limit for the uncertainty of month-to-month eligibility. With the option of provisional recertification, the Department retains sufficient control over recertification process but cannot use certification delays to prevent institutions from starting new programs or making other necessary changes.
Reg Section 668.14—Program Participation Agreement		
Clarifies requirements related to making data available to prospective students about the most recent employment statistics, graduation statistics, or other information to substantiate the truthfulness of its advertising that uses job placement rates to attract students.	Institutions	Benefits institutions by reducing the amount of information that must be disclosed to students in order to enable institutions to include graduation rates or employment statistics in their marketing materials. Benefits students by improving the accuracy and truthfulness of published outcomes data, and by making an appropriate amount of information available to students without overwhelming them with extraneous data. Maintains the requirement for institutions to make available any information needed to substantiate the truthfulness of the institution's advertisements about job placement or graduation rates.
Eliminates requirements to provide the source of such statistics, associated timeframes, and methodology.		Considered redundant to requirement to provide data and other information to substantiate truth in the institution's advertising.
Aligns program length to occupational requirements. Limits program length to 150 percent of minimum program length for the State in which the institution is located or 100 percent of the minimum program hours for licensure in an adjoining State.	Students/institutions	Allows institutions to create programs that meet professional licensure requirements in multiple States, thus expanding the potential pool of students served and the number of job opportunities available to graduates. Students benefit by increased occupational mobility and, in some cases, being able to go to school in a lower cost State but work upon graduation in a different State where wages are higher. Conversely, if an institution increases program length, a student may have to pay more to meet requirements of a State in which the student does not plan to work.
Requires updates to teach-out plans after specified negative events.	Students/Institutions/Accrediting Agencies.	Allows accrediting agencies to gather more information from institutions that will be helpful to triad partners in assisting students find transfer and teach-out opportunities, and retain access to their academic records, when a school closure occurs. Requires institutions to update teach-out plans in instances where risk of closure increases.
Reg Section 668.15—Factors of Financial Responsibility		
Changes section title to emphasize changes in ownership or control.	Institutions/Federal Government.	Codifies current practice requiring factors of financial responsibility to be addressed when there is a change in ownership or control of an institution.
Reg Section 668.22—Treatment of Title IV Funds When a Student Withdraws		
Adds several exceptions to determination a student has withdrawn, including early completion of requirements for graduation, completion of module(s) containing 50 percent or more of the days in the payment period, or completion of coursework equal to or greater than the institution's requirements for a half-time student.	Students/Institutions	Benefits institutions by not requiring them to return title IV funds simply because a student is a faster learner. Benefits students by allowing them to complete courses at a quicker pace and still retain full title IV eligibility. Could improve completion rates and reduce time to completion if students are not required to participate in busy work if they finish the legitimate work required by the course more quickly than other students.

TABLE 2—SUMMARY OF KEY CHANGES—Continued

Change	Affected parties	Impacts
Applies 45-day time limit on delaying withdrawal for students who cease attendance to standard term programs. Eliminates references to modules for nonterm programs and revises timeframes for allowing students to provide written confirmation of intent to return without beginning an approved leave of absence.	Students/Institutions	Improves consistency of regulations as they apply to programs with different types of academic calendars and addresses concerns about long periods of non-attendance by students. Ensures that institutions perform return of title IV calculations when students cease attendance for long periods of time without beginning an approved leave of absence.
Clarifies requirements for determining the number of days in the payment period or period of enrollment for a student who is enrolled in a program offered using modules. Requires an institution to include all the days in modules that included coursework used to determine the student's eligibility for title IV, HEA assistance.	Institutions/Federal Government.	Simplifies and clarifies requirements for establishing the denominator of the return of title IV funds calculation when a student is enrolled in a program that uses modules. May result in a greater amount of title IV funds being returned for a limited number of students who enroll in numerous modules during a payment period or period of enrollment but fail to attend those modules.
Eliminates references to programs under which financial aid is no longer disbursed. Adds Iraq and Afghanistan Service Grants to types of aid subject to the return of title IV funds calculation and clarifies order for application of returned funds.		No impact anticipated for technical changes incorporating current policy.
Reg Section 668.28—Non-title IV Revenue (90/10)		
Removes references to net present value when including institutional loans in the 90/10 calculation.		No impact anticipated for technical changes.
Reg Section 668.34—Satisfactory Academic Progress		
Eliminates pace requirements for satisfactory academic progress for subscription-based programs.	Students/Institutions/Federal Government.	Reduces burden on institutions for making pace-based title IV calculations for students in subscription-based programs. Improves flexibility for students by allowing them to determine the pace of their learning without certain limits.
Allows maximum timeframe for undergraduate programs measured in credit hours to be expressed in calendar time in addition to current credit hour measurement. Limited to 150 percent of published length of program.	Students/Institutions/Federal Government.	Increases flexibility for institutions and students and provides new options for monitoring student progress when traditional semester-based time constraints conflict with a student's work or life responsibilities. However, sets outer limit for use of aid to ensure that students are progressing through their program and using Federal student aid funds efficiently.
Reg Section 668.111—Scope and Purpose and 668.113—Request for Review		
Indicates that, for final audit or program review determinations related to classification of a program as distance education or the assignment of credit hours, the Secretary will rely on institution's accrediting agency or State agency requirements.	Institutions/Federal Government.	Conforms with changes to definitions of ''distance education'' and ''credit hour'' and provides regulatory clarity that accreditors are the triad member given the responsibility of monitoring program quality and establishing standards for academic quality, faculty credentials, and effective distance learning.
Reg Section 668.164—Disbursing Funds		
Establishes disbursement requirements specific to subscription-based programs. Sets the later of 10 days before the first day of classes in the payment period or the date the student completed the cumulative number of credit hours associated with student's enrollment status in all prior terms attended.	Students/Institutions/Federal Government.	Conforming change with disbursement pattern for subscription-based programs in § 668.2 to enforce requirement that no disbursements are made until the student has completed the appropriate credit hours.
Reg Section 668.171—General		
Allows the Secretary to determine an institution is not financially responsible if the institution does not submit its financial and compliance audits by the date permitted and manner required under § 668.23.	Institutions/Federal Government.	Codifies current practice; no impact expected.
Reg Section 668.174—Past Performance		
Adds the term ''entity'' or ''entities'' to various provisions as ownership may be vested in an entity or an individual.	Institutions/Federal Government.	Allows the Department to consider more ownership structures when evaluating past performance.
Clarifies that institution is not financially responsible if a person who exercises substantial ownership or control over the institution also exercised substantial ownership or control over another institution that closed without a viable teach-out plan or agreement approved by the institution's accrediting agency and faithfully executed by the institution.	Institutions/Federal Government.	Allows the Department to consider whether a person or entity affiliated with an institution has overseen the precipitous closure of another institution with the goal of preventing an institution from being substantially owned or controlled by persons or entities that would cause the institution to be financially irresponsible and close without providing to students a plan to finish their education in place or at another institution.
Reg Section 668.175—Alternative Standards and Requirements		
Eliminates reference to fax transmission	None	Change to recognize technological advancements. No impact.

A key change that would result from this regulation is greater certainty among institutions about how to implement innovative programs without running afoul of title IV disbursement requirements. Institutions are not

inherently opposed to regulations, but instead crave information that will enable them to be sure they are complying with regulations that are otherwise difficult to interpret. The new proposed definitions would ensure a shared understanding of the various kinds of programs an institution can provide and the rules for disbursing title IV aid to students enrolled in those programs. Greater clarity in our regulations would reduce the likelihood that student and taxpayer dollars will be wasted or that institutions will face undeserved negative program review findings and financial liabilities that could have devastating consequences to the institution and its students.

Students

Students will benefit from the expanded program options available when institutions understand the ground rules for offering new kinds of programs and when they don't fear surprises at a program review. Despite being permitted by the HEA for decades, there are relatively few competency-based programs available to students, and even fewer direct assessment programs. Yet these types of programs may be very appealing to adult learners who bring considerable knowledge and skills to their programs. Expansion of subscription-based programs provides students with the scheduling flexibility they may need if managing responsibilities from school, work, and family. A clearer framework for administering title IV aid to students enrolled in competency-based programs on a subscription basis may increase institutions' willingness to develop new programs.

The proposed regulations eliminate the financial penalties that students and institutions would otherwise face when a student progresses quickly through a course and completes it early. Students, especially non-traditional students, could benefit from the flexible pacing and different model for assessing progress offered by this type of program. The emphasis on flexibility, workforce development, and innovative educational approaches could be beneficial to students and the national economy.

According to U.S Census data,[40] for the civilian non-institutionalized population, there were approximately 44 million adults between the ages of 25 and 49 with high school or some college as their highest educational level in 2018. In addition to students outside that age range and those with a degree who may want to pursue competency-based graduate certificates or degrees to enhance their careers, even a small percentage of that group represents a sizeable potential market for expansion of competency-based or other distance education programs. While a variety of factors may explain individual education attainment, to the extent that traditional programs were not suitable for some students' academic and employment goals, competency-based programs may provide an appealing option. However, evaluating the quality of new programs may be challenging, and it could be difficult to determine how much a student should learn to be awarded a certain amount of credit, as opposed to more traditional delivery models that award aid and mark progress by the number of hours during which a student is scheduled to sit in a seat (many institutions do not take attendance, and therefore do not monitor how much time an individual student actually sits in a seat). As with all programs, students would need to carefully consider if specific competency-based or distance education programs are appropriate for their objectives and learning. Distance learning, subscription-based programs, and other self-paced options require a higher degree of academic discipline on the part of students, which may pose challenges to students who are already burdened by work and family responsibilities.[41] For those who are so motivated, they could complete their program more quickly. For those who struggle to stay engaged, innovative learning models emphasizing coach or mentor support may improve retention and completion in online programs where students with poor self-directed learning skills might otherwise fail.[42] [43]

Another potential benefit for students in competency-based programs could be reduced costs to obtain a postsecondary credential. Western Governors University (WGU), for example, is known for its success in adopting this instructional approach, although it still disburses aid using a time-based model. In its 2018 annual report, WGU states that the average time to a bachelor's degree completion among its students is 2.5 years, which could generate substantial savings to students and taxpayers. An analysis done by Robert Kelchen [44] based on 14 cost structures at 13 institutions for credits earned through portfolio or prior learning assessment found that significant savings could be generated, but they vary substantially among colleges. Potential savings for 3 credits varied from $127 to $1,270.[45] The fee structure, amount of credits allowed to be obtained through these methods, the availability of federal aid, and the ability of students to pass those assessments with limited attempts all contribute to determining whether a competency-based approach would generate savings for a given student. The other pricing model, one that is supported by the proposed regulations, is subscription based pricing in which the potential savings relate to the number of credits a student completes during a subscription period and student's eligibility for financial aid in their specific program. Kelchen calculates the number of credits needed in a subscription period for students who receive a full Pell Grant and non-aided students to break even with traditional pricing models at 5 institutions that offer a subscription pricing option. These range from 6 credits for a non-aided student to 27 credits for a student in a bachelor's degree program who receives a full Pell Grant.[46] The subscription periods and prices vary by institution and pricing policies may have been updated since the time of this analysis, but that idea that subscription pricing may result in cost savings for students depending upon the speed of their progress is still valid.[47]

While more difficult to quantify, the Department also expects students would find benefits in programs they can complete more quickly in terms of reduced opportunity costs, which include wages lost when the student is in school rather than in the job for

[40] U.S. Census Bureau, Table 1. Educational Attainment of the Population 18 Years and Over, by Age, Sex, Race, and Hispanic Origin: 2018. Available at *www.census.gov/data/tables/2018/demo/education-attainment/cps-detailed-tables.html.* Last accessed November 29, 2019.

[41] California Community College Chancellor's Office, 2017 Distance Education Report, 2017, *http://californiacommunitycolleges.cccco.edu/Portals/0/Reports/2017-DE-Report-Final-ADA.pdf.*

[42] *www.texaspolicy.com/new-study-less-expensive-competency-based-education-programs-just-as-good-as-traditional-programs/.*

[43] Xu, D. and Xu, Y. March 2019. The Promises and Limits of Online Higher Education: Understanding How Distance Education Affects Access, Cost, and Quality. American Enterprise Institute.

[44] Robert Kelchen, The Landscape of Competency-Based Education—Enrollments, Demographics, and Affordability, January 2015. Center for Higher Education Reform, American Enterprise Institute AEI Series on Competency-Based Higher Education. Available at *www.aei.org/wp-content/uploads/2015/04/Competency-based-education-landscape-Kelchen-2015.pdf.*

[45] Id, p. 11, Table 4 Cost Structures of Portfolio and Prior Learning Assessment Programs.

[46] Id, p.14. Table 5 Costs of Subscription-Based CBE Programs Compared to Other Online Providers.

[47] Western Governors University, *WGU 2018 Annual Report,* p. 17. Available at *www.wgu.edu/content/dam/western-governors/documents/annual-report/annual-report-2018.pdf.*

which the student is preparing. Also, since student retention declines as time to degree completion expands, programs that enable students to finish more quickly are likely to increase credential completion.

Of course, it could be the unique attributes of WGU, or the students attracted to the institution, that contribute to these results, and it is not yet known if the results would be replicated by other institutions that adopt the WGU model. A number of factors, including a given student's anticipated pace of learning, likelihood of completion, desired employment outcomes, personal motivation, and the range of options available to them will influence the return the student enjoys on their educational investment.

Students would also benefit from the proposed changes to the definition of a week of instruction. Under the proposed regulations, institutions would be less likely to assign less substantive work to students (such as posting a blog or responding to a chat) simply to meet title IV requirements. Where these activities are substantive, they would likely continue to take place, but in many instances, these activities have been integrated into courses simply to provide evidence of ''regular and substantive'' interaction. Students who may otherwise be successful in distance learning can become frustrated if they are not allowed to move at their own pace because of requirements to post blogs, participate in chats, or answer questions that do not actually enhance learning.

The Department provides additional detail related to burden estimates in the *Paperwork Reduction Act* section of this NPRM and none of the burden is assigned to students in that analysis.

Institutions

Institutions should benefit from the proposed regulatory clarifications, especially those institutions that seek to expand competency-based and direct assessment learning options but are uncertain as to the Department's requirements for disbursing aid to students enrolled in those programs. A significant barrier to entry for institutions seeking to provide direct assessment programs is a lack of clarity regarding what the Department expects of these programs in order to approve them, and the slowness with which the Department has made decisions on applications submitted by institutions. Only a handful of institutions, as of 2019, have been approved by the Department to offer direct assessment programs. This indicates that either there is a lack of interest in offering direct assessment programs, or institutions are hesitant to invest in their development because approval requirements are too burdensome or uncertainties too great about what the Department and accreditors require. The proposed regulations would reduce burden and provide clarity to encourage more institutions to experiment with direct assessment programs. Under the proposed rule, the Department would be required to approve the first direct assessment program offered by an institution at a given credential level, but after that, only the accreditor would be required to review the program to ensure academic quality. Some institutions may aggressively seek approval for more direct assessment programs, while others may take a wait-and-see attitude until other institutions have forged new ground.

In the short term, it is likely that institutions already approved to offer at least one direct assessment program would expand offerings since their experience well positions them to do so. According to the Department's data, there are only six institutions that have established direct assessment programs. Although these institutions may expand the number of direct assessment programs available, the Department anticipates that these programs would mostly attract students away from more traditional distance learning programs, but may not add significantly to the total number of students enrolled in postsecondary education. Students looking for a flexible postsecondary program can find many advantages through distance education already but may gravitate to direct assessment programs because of added advantages, including in pacing and format. The Department's assumptions about potential student growth related to the proposed regulations are described in the Net Budget Impact section of this analysis and we welcome comments about the number and source of future enrollees in such programs.

However, over time, additional institutions may develop new direct assessment programs, especially if early adopters create demand among students for this new form of education. The Department projects that if new institutions engage in direct assessment, and those already approved to offer direct assessment programs launch new programs, there could be shifting of students from other programs to self-paced direct assessment programs. It is also possible that students not interested in current pedagogical models will find direct assessment programs to be attractive and will decide to enroll in a postsecondary program. This could increase the number of students who would qualify for Pell Grants or take Federal Direct Loans. While increased interest in direct assessment could result in higher title IV participation, it is possible that students enrolled in direct assessment programs would finish their programs more quickly, therefore reducing the amount of financial aid a student uses to complete his or her program.

Changes to the limitations on the ability of clock hour programs to offer didactic instruction through distance learning may enable more individuals to enroll in these programs. In turn, this could increase the number of individuals qualified for State licensure or certification, and thus gainful employment, in licensed occupations. There are very few clock-hour programs that use distance learning to provide portions of the program since there are few State or professional licensing boards that permit distance learning for clock-hour programs. However, for clock-hour programs permitted to incorporate distance learning, it is possible that more students could be served or that more students would persist to completion.

The proposed regulations would more clearly define what constitutes a reasonable length for clock-hour programs and allow institutions to meet the licensure requirements of surrounding States, thus enabling greater student and workforce mobility. There are only a few States that have licensure requirements that are significantly longer than other States, but if programs in surrounding States increase their clock hours to meet those requirements, there could be small increases in cost and utilization of title IV, HEA assistance. On the other hand, if programs can be structured to ensure that students can work if they cross State lines, there could be cost savings since, under the status quo, a student who moves from one State to another may be required to start their program over in order to meet the clock-hour requirements since shorter-term ''completer programs'' are not typically approved by those States. Therefore, this regulation could reduce the cost of education for students who move from one State to the next and could increase worker mobility in fields that employ large numbers of workers, such as cosmetology and massage therapy.[48] [49]

Institutions would also benefit from simplifications to the formula for clock-

[48] *www.bls.gov/ooh/personal-care-and-service/barbers-hairstylists-and-cosmetologists.htm.*

[49] *www.bls.gov/ooh/healthcare/massage-therapists.htm.*

to-credit hour conversions. The proposed regulations would eliminate the need for institutions to consider the number of homework hours associated with each credit hour in programs that are subject to the conversion. This change would reduce administrative burden while allowing institutions to offer programs in credit hours that are more likely to transfer to other schools than clock hours, but still meet the clock-hour requirements of licensing boards by calculating clock-hour equivalencies.

As discussed further in the *Paperwork Reduction Act of 1995* section of this preamble, the proposed regulations are expected to result in a net reduction in burden. In estimating costs and savings associated with these changes in burden, we assume that these activities are conducted by postsecondary administrators, which earn an average wage of $53.47.[50] Throughout, to estimate the total costs and savings associated with these changes, we multiply wage rates by two to account for overhead and benefits. The elimination of the Net Present Value calculation related to the 90/10 rule is estimated to save −2,808 hours, which would generate cost savings of approximately $300,000 annually. The proposed regulations also impose burden related to reporting subsequent direct assessment programs, reporting about written arrangements, and demonstrating that ineligible institutions have the experience in the delivery and assessment of the program or portion thereof it is contracted to provide. Together, these provisions are estimated to impose 138 hours of burden annually for a cost of $15,000 using the same hourly rate of $53.47 multiplied by two for overhead and benefits. Together, the estimated net reduction in burden is −2,670 hours and $−285,000.

Accrediting Agencies

The proposed regulations recognize the primary role that accrediting agencies play in evaluating the quality of new programs and approving institutions to offer them. Although the Department's review of direct assessment programs focuses on an institution's technical ability to calculate and disburse title IV aid to students enrolled in these programs, accreditors have always had—and will continue to have—the responsibility of ensuring that these programs are rigorous and of high quality. In conjunction with the recently published Accreditation and State Authorization Regulations, one or more existing or new accrediting agencies may step forward to become a leader in the field for assessing and approving direct assessment programs, which could lead to more rapid expansion of direct assessment programs. Accrediting agencies will continue to play an important role in approving written arrangements covering between 25 and 50 percent of a program; however, changes already published in the accreditation regulations to allow these approvals to take place at the staff level, and requirements for accrediting agencies to approve or deny them within 90 days, could encourage more institutions to consider entering into written arrangements.

Accrediting agencies play an important role in evaluating the quality of academic programs, including distance education programs, and will continue to play that role. These regulations do not create new responsibilities in this regard; however, until accrediting agencies have more experience in reviewing and approving competency-based and direct assessment programs, the approval process could be somewhat more burdensome. Some agencies may also need to develop new standards to facilitate the evaluation of these programs, but many already have such standards in place. The Department welcomes information from accrediting agencies on existing standards and experience with evaluating such programs and any costs they anticipate from the proposed regulations. If growth in competency-based programs is more significant than anticipated, there could be an increase in accrediting agency workload, but it is possible that demand for approval of traditional programs would decline as interest shifts to competency-based or direct assessment programs.

The Department provides additional detail related to burden estimates in the *Paperwork Reduction Act* section of this NPRM and does not estimate any additional burden to accrediting agencies from the proposed regulations.

Federal Government

In the proposed regulations, the Federal government is reducing some of the complexity of administering Federal student aid and calculating return-to-title IV obligations. These regulations also reaffirm that it is accreditors—and not the Department—who are authorized by the HEA to establish and evaluate compliance with education quality standards, including when innovative delivery models challenge the status quo. The proposed regulations require the Secretary to provide a timely review of new program applications and limit the Secretary's approval of direct assessment programs at the same academic level to the first such program at an institution, both provisions designed to support the expansion of innovative educational programs.

Net Budget Impact

We estimate that these proposed regulations would have a net Federal budget impact for Federal student loan cohorts between 2020–2029, of $[-237] million in outlays in the primary estimate scenario and an increase in Pell Grant outlays of $1,021 million over 10 years, for a total net impact of $784 million. A cohort reflects all loans originated in a given fiscal year. Consistent with the requirements of the Credit Reform Act of 1990, budget cost estimates for the student loan programs reflect the estimated net present value of all future non-administrative Federal costs associated with a cohort of loans. The Net Budget Impact is compared to a modified version of the 2020 President's Budget baseline (PB2021) that adjusts for the recent publication of the final Borrower Defense, Gainful Employment, and Accreditation and State Authorization rules.

The Department emphasizes that its estimates of transformations in higher education delivery that could occur as a result of these proposed regulations are uncertain. Similarly, the Department is constrained in its budget estimates by the limited data available to it. We estimate how institutions and students would respond to the regulatory changes, and we present alternative scenarios to capture the potential range of impacts on Federal student aid transfers. Similarly, we do not attempt to estimate effects based on evidence cited in this NPRM that students enrolled in similar programs have persisted longer, completed at higher rates, and finished in a shorter period of time with less debt. While increased enrollment and persistence could result in increased transfers to students in the form of Federal student aid grants and loans, it could also produce graduates better prepared to succeed in the workplace and encourage robust economic growth. The Administration's emphasis on workforce development may encourage more institutions to implement competency-based educational programs, which could improve employment outcomes and loan repayment performance.

There is anecdotal evidence that competency-based education programs may have strong loan repayment performance. Looking again to WGU, an

[50] *www.bls.gov/oes/current/oes119033.htm.*

institution that has been an early adopter of competency-based learning, we note that its three-year cohort default rates of 4.6 percent for 2014, 4.1 percent for 2015, and 4.2 percent for 2016 [51] are below the national average of 10.1 percent overall in 2016 (6.6 percent for private, 9.6 percent for public, and 15.2 percent for proprietary institutions).[52] Comparatively, Capella University, another leader in competency-based education, had a cohort default rate of 6.5 percent in 2015 and 6.8 percent in 2016.[53] Factors that could lead to lower defaults among institutions employing innovative learning models—and in particular when those models are used to provide graduate education—may be that they would attract older students who are employed and are seeking specific credentials for advancement or a career change. These individuals may be more likely to have resources (including those provided by current employers) to reduce the need to borrow and to repay any loans they need to take. On the other hand, the non-traditional students that may be the primary market for competency-based learning or direct assessment may have employment and family obligations that could make them less likely to complete their programs, potentially increasing their default risk.

An additional complicating factor in developing these estimates are the related regulatory changes on which the committee reached consensus in this negotiated rulemaking that we proposed in separate notices of proposed rulemaking. The budget impacts estimated here are in addition to the potential increases attributed to the accreditation changes promulgated in the final rule published November 1, 2019 that are reflected in the PB 2021 baseline.[54]

The main budget impacts estimated from these final regulations come from changes in loan volumes and Pell Grants disbursed to students if these new delivery models were to attract an increased number of students who receive title IV, HEA funds. The Department believes that much of the growth in this area will come from future students that shift from more traditional ground-based or distance learning programs to those offered using competency-based learning or direct assessment methods. In developing the primary estimate, the Department does not estimate the types of programs and institutions students who choose competency based education may come from or the potential cost differential between those programs, as further discussed after Table 4. Instead, we assume that the growth associated with programs that are developed or expanded in part because the proposed regulations make it easier to administer title IV aid to such programs comes from students who would not otherwise have borrowed to attend a different type of program and apply an average level of borrowing to each estimated enrollee. The Department believes that many of the students who enroll in competency based education will do so as a substitute for a different type of program for which they likely would receive some form of title IV aid, but there will be some small increase in enrollment from students who either not have pursued postsecondary education or who would not have received title IV aid for their program. Additionally, the alternate budget scenarios consider the possibility that the implementation of new pedagogical and delivery models could result in more or less new students being interested in pursuing a postsecondary credential. Expansion of subscription-based programs, provisions in these regulations that would encourage innovation, the growth of workforce development programs, and the new methods of delivery may appeal, in particular, to non-traditional students. Tables 3.A to 3.E illustrate the changes in title IV grant and loan volume developed for use in estimating the net budget impact of these proposed regulations for the primary scenario, with discussion about underlying assumptions following the tables.

In order to have a common basis for the Pell Grant and loan assumptions and to facilitate comment, we started the estimate with an assumption about the number of additional programs that would be established because of the combined effect of the proposed regulations.

TABLE 3.A—ASSUMPTIONS ABOUT CUMULATIVE NUMBER OF ADDITIONAL PROGRAMS BY SIZE OF PROGRAM

Size of program	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
25	12	36	80	150	225	275	325	350	415	435
75	5	15	35	55	90	105	128	135	160	180
150	3	12	26	40	68	75	90	113	120	128
350	3	10	20	28	40	52	60	70	78	84
750	3	8	14	20	30	38	48	56	65	70
1,500	0	3	5	9	12	16	20	24	26	30

As seen in Table 3.A, we expect the current trends of distance education programs capturing an increasing share of students to continue, and perhaps to accelerate as institutions and accreditors become more experienced in establishing or evaluating these programs. We also expect more institutions to engage in competency-based learning and direct assessment, which may or may not be delivered online. The initial distribution of programs by enrollment size uses information from the 2018 AIR survey and the 2019 survey; [55] however, we acknowledge that the results of that survey may be biased in that we expect the small proportion of institutions interested in starting CBE or direct assessment programs were more likely to respond. Nonetheless, these are the best data available to us, and we projected the results of that survey onto the postsecondary system as a whole. We assumed, based on the 2018 and 2019 survey data, that the majority of programs will be small, but assumed that over time larger programs would evolve.

[51] U.S. Department of Education, Official Cohort Default Rates for Schools, PEPS300.xls available at *www2.ed.gov/offices/OSFAP/defaultmanagement/cdr.html.*

[52] U.S. Department of Education, Comparison of FY 2016 Official National Cohort Default Rates to Prior Two Official Cohort Default Rates available at *www2.ed.gov/offices/OSFAP/defaultmanagement/schooltyperates.pdf.* Accessed February 21, 2020.

[53] U.S. Department of Education, Official Cohort Default Rates for Schools, PEPS300.xls available at *www2.ed.gov/offices/OSFAP/defaultmanagement/cdr.html.*

[54] 84 FR 58834.

[55] American Institutes for Research, State of the Field—Findings from the 2019 National Survey of Postsecondary Competency-Based Education, available at *www.air.org/sites/default/files/National-Survey-of-Postsecondary-CBE-Lumina-October-2019-rev.pdf.*

In addition, as institutions become more comfortable with using written agreements to access facilities and experts that private sector organizations and unions make available, there could be growth in career and technical education programs that are currently limited due to the high cost of constructing facilities, procuring equipment and hiring faculty qualified to teach in those programs.[56] As more hospitals and health care facilities require nurses to have bachelor's degrees, we expect to see continued growth of RN to BSN programs, which can be delivered using CBE or direct assessment because students in these programs are typically required to be working in the field, thus negating the need for the institution to provide clinical placements.

Other factors that support the increase in programs are recent regulatory developments with respect to accreditation and no requirement for approval of new delivery methods as a substantive change. The provisions requiring the Secretary to provide a timely review of new program applications and to limit the Secretary's review to the first competency-based education program at a given academic level could also accelerate the process of establishing programs.

We then had to develop an assumption for how many of the additional programs would be undergraduate or graduate programs for the purposes of determining how many would potentially serve Pell recipients and subsidized loan borrowers. Of the 512 programs described in the 2018 survey, approximately 17 percent were identified as graduate programs and of the 588 programs described in the 2019 survey, 16 percent were graduate programs. However, competency-based programs could be a good fit for working adults wanting a self-paced program to earn a graduate credential, so we assumed that that the distribution of undergraduate versus graduate programs would change over time, especially among smaller programs, as shown in Table 3.B.

TABLE 3.B—UNDERGRADUATE SHARE OF CUMULATIVE ADDITIONAL PROGRAMS

Size of program	2021 (%)	2022 (%)	2023 (%)	2024 (%)	2025 (%)	2026 (%)	2027 (%)	2028 (%)	2029 (%)	2030 (%)
25	83	78	70	65	60	55	50	50	45	45
75	83	78	70	65	60	60	60	60	60	60
150	83	78	70	65	60	60	60	60	60	60
350	83	80	75	75	75	70	70	70	70	70
750	83	80	80	80	75	75	75	75	75	75
1,500	83	83	80	80	78	78	75	75	75	75

This resulted in an assumed number of additional undergraduate and graduate students who may receive Pell Grants or take loans.

TABLE 3.C—NUMBER OF ADDITIONAL UNDERGRADUATE STUDENTS

Size of program	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
25	257	702	1,400	2,438	3,375	3,781	4,063	4,375	4,669	4,894
75	280	878	1,838	2,681	4,050	4,725	5,738	6,075	7,200	8,100
150	374	1,404	2,730	3,900	6,075	6,750	8,100	10,125	10,800	11,520
350	813	2,744	5,250	7,350	10,500	12,740	14,700	17,150	19,110	20,580
750	1,743	4,800	8,400	12,000	16,875	21,375	27,000	31,500	36,563	39,375
1,500	.....	3,735	6,000	10,800	14,040	18,720	22,500	27,000	29,250	33,750
Total	3,467	14,263	25,618	39,169	54,915	68,091	82,100	96,225	107,591	118,219

TABLE 3.D—NUMBER OF ADDITIONAL GRADUATE STUDENTS

Size of program	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
25	50	200	600	1,310	2,250	3,090	4,060	4,380	5,710	5,980
75	60	250	790	1,440	2,700	3,150	3,830	4,050	4,800	5,400
150	80	400	1,170	2,100	4,050	4,500	5,400	6,750	7,200	7,680
350	170	690	1,750	2,450	3,500	5,460	6,300	7,350	8,190	8,820
750	360	1,200	2,100	3,000	5,630	7,130	9,000	10,500	12,190	13,130
1,500	.....	770	1,500	2,700	3,960	5,280	7,500	9,000	9,750	11,250
Total	720	3,510	7,910	13,000	22,090	28,610	36,090	42,030	47,840	52,260

The next assumption involved the percent of those additional students who would receive Pell Grants and would take out different types of loans. For existing programs, the percent of undergraduates with Pell Grants is approximately 39 percent overall,[57] but this varies significantly by institution and program type. One motivating factor

[56] Shulock, N., Lewis, J., & Tan, C. (2013). Workforce Investments: State Strategies to Preserve Higher-Cost Career Education Programs in Community and Technical Colleges. California State University: Sacramento. Institute for Higher Education Leadership & Policy.

[57] U.S. Department of Education, The FY 2021 Justification of Appropriations Estimates to Congress Vol. II: Student Financial Assistance, p. p11. Available at *www2.ed.gov/about/overview/budget/budget21/justifications/p-sfa.pdf.*

for competency-based programs is to expand opportunities for non-traditional students, who typically qualify for Pell grants at higher rates; in the 2018–19 award year 54 of dependent applicants had a Pell eligible EFC, while 85 of independent applicants met that threshold. However, independent applicants are often ineligible for Pell at relatively moderate incomes— in AY 2018–19 88 percent of the eligible independent applicants with dependents had family incomes under $50,000 and 96 percent of the eligible independent applicants without dependents had family incomes under $25,000. If programs attract more students from lower income brackets, Pell Grant costs will increase. On the other hand, CBE and distance learning programs, including direct assessment programs, may be more attractive to working adults, who may be less likely to qualify for Pell grants given their earnings. Evidence is mixed from existing programs, both because the data does not always distinguish students in CBE programs from those in traditional programs at the institution and the percentage of students receiving Pell Grants does vary among institutions with at least some CBE programs. In 2017–18 IPEDS student financial assistance data, the percent of undergraduates receiving a Pell Grant at some institutions known for at least some competency based education programs was 30 percent for Western Governor's University, 33 percent for Sinclair Community College, 35 percent for Northern Arizona University, 43 percent for Capella University, 45 percent for the University of Wisconsin Flex program, and and47 percent for Southern New Hampshire University. Nonetheless, we assumed that the percentage of students who may be eligible for Pell Grants increases to 50 percent, resulting in the estimated number of additional Pell recipients shown in Table 3.E.

TABLE 3.E—ESTIMATED ADDITIONAL PELL RECIPIENTS

Size of program	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
25	129	351	700	1,219	1,688	1,891	2,031	2,188	2,334	2,447
75	140	439	919	1,341	2,025	2,363	2,869	3,038	3,600	4,050
150	187	702	1,365	1,950	3,038	3,375	4,050	5,063	5,400	5,760
350	407	1,372	2,625	3,675	5,250	6,370	7,350	8,575	9,555	10,290
750	872	2,400	4,200	6,000	8,438	10,688	13,500	15,750	18,281	19,688
1,500	.....	1,868	3,000	5,400	7,020	9,360	11,250	13,500	14,625	16,875
Total	1,734	7,131	12,809	19,584	27,458	34,046	41,050	48,113	53,796	59,109

We also assumed a distribution of Pell recipients based on expected growth in programs by type and control of institutions, as shown in Table 3.F. However, the share of programs reflected in Table 3.F does not necessarily reflect the share of students at each type of institution.

TABLE 3.F—ASSUMED DISTRIBUTION OF NEW PROGRAMS BY INSTITUTIONAL CATEGORY

	Share of programs (percent)
4-year public	22
2-year public	30
4 year private	15
2 year private	8
Proprietary	25

We welcome comments about the Pell Grant assumptions presented in Tables 3.A through 3.F as we recognize that competency-based and direct assessment programs, in particular, are a relatively new and developing part of the postsecondary market and it is not clear what institutions will pursue opportunities in this area or how the size and scope of programs offered will develop. Estimated program costs for Pell Grants range from $30.1 billion in AY 2021–22 to $36.1 billion in AY 2030–31, with a 10-year total estimate of $329.0 billion. On average, the FY 2021 President's Budget projects a baseline increase in Pell Grant recipients from 2021 to 2030 of approximately 150,000 annually. The increase in Pell Grant recipients estimated due to these proposed regulations ranges from about 6 percent in 2022 to approximately 41 percent by 2030 of the projected annual increase that would otherwise occur. The additional 59,109 recipients estimated for 2030 would account for under 1 percent of all estimated 8.25 million Pell recipients in 2030–31 and result in an increase in program costs of approximately $1,337 million, a 0.4 percent increase in estimated 10-year Pell Grant program costs of $329.0 billion.

For the loan programs, we used the estimated split between graduate and undergraduate programs to develop additional volume estimates by loan type and student loan model risk-group. Table 3.G presents the assumed borrowing rate by loan type of the additional students.

TABLE 3.G—ESTIMATED BORROWING RATES BY LOAN TYPE

	2021 (%)	2022 (%)	2023 (%)	2024 (%)	2025 (%)	2026 (%)	2027 (%)	2028 (%)	2029 (%)	2030 (%)
Subsidized	45	45	45	45	45	45	45	45	45	45
Unsubsidized	55	55	55	55	55	55	55	55	55	55
Parent PLUS	10	10	10	10	10	10	10	10	10	10
Grad Unsubsidized	35	35	35	35	35	35	35	35	35	35
Grad PLUS	25	25	25	25	25	25	25	25	25	25

We then used estimated average loans by loan type as projected for the PB2020 estimates to estimate a total increase in volume by loan type, as shown in Tables 3.H and 3.I.

TABLE 3.H—ESTIMATED AVERAGE AMOUNTS PER BORROWER BY LOAN TYPE

Average loan	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
Subsidized	4,240	4,240	4,240	4,250	4,250	4,260	4,260	4,270	4,280	4,290
Unsubsidized	4,630	4,660	4,700	4,720	4,760	4,780	4,820	4,830	4,860	4,880
PLUS	18,550	18,880	19,290	19,620	19,920	20,440	20,780	21,070	21,460	21,860
Grad Unsubsidized	20,660	20,910	21,120	21,230	21,330	21,590	21,810	22,080	22,290	22,500
Grad PLUS	25,990	26,760	27,510	28,130	28,640	29,330	30,100	30,870	31,760	32,660

TABLE 3.I—ESTIMATED ADDITIONAL LOAN VOLUME BY LOAN TYPE

Additional Loan Volume	2021	2022	2023	2024	2025
Subsidized	6,615,656	27,212,850	48,878,190	74,910,234	105,024,938
Unsubsidized	8,829,543	36,554,788	66,221,238	101,682,075	143,767,470
Parent PLUS	6,431,888	26,927,600	49,416,158	76,849,088	109,390,680
Grad Unsubsidized	5,206,320	25,687,935	58,470,720	96,596,500	164,912,895
Grad PLUS	4,678,200	23,481,900	54,401,025	91,422,500	158,164,400
Additional Loan Volume	**2026**	**2027**	**2028**	**2029**	**2030**
Subsidized	130,530,926	157,385,700	184,896,338	207,220,748	228,221,297
Unsubsidized	179,011,896	217,647,100	255,621,713	287,591,411	317,299,125
Parent PLUS	139,178,515	170,603,800	202,746,075	230,890,823	258,426,188
Grad Unsubsidized	216,191,465	275,493,015	324,807,840	373,223,760	411,547,500
Grad PLUS	209,782,825	271,577,250	324,366,525	379,849,600	426,702,900

Clearly, the large average borrowing amounts of graduate students contribute significantly to the loan volume estimates, so a different mix of programs or a different borrowing level would affect the estimated impact of the proposed regulations, so we adjust this factor in the alternate scenarios to identify a range of possible impacts.

As subsidy rates differ by risk group and loan type, the Department assumed a distribution of the undergraduate loans as shown in Table 3–J. This distribution is based on the PB2021 distribution of loan volume by risk group, but reduces the share in the 4-year Junior/Senior risk group by 10–15 percentage points and the 4-year Freshman/Sophomore risk group by approximately 5 percentage points and increases the share in the 2-year risk groups. All graduate loans are in the graduate risk group.

TABLE 3–J—ASSUMED DISTRIBUTION OF ADDITIONAL LOAN VOLUMES BY RISK GROUP

	Subsidized (%)	Unsubsidized (%)	Parent PLUS (%)
2-year Proprietary	18	15	10
2-year Not-for-Profit	20	15	10
4-year Freshman/Sophomore	32	35	42
4-year Junior/Senior	30	35	38

The resulting additional loan volumes are generated by simple multiplication of the estimated additional undergraduate students by the percent borrowing and average amount per borrower by loan type, and then by the distribution by risk group. The same process occurred for graduate students. We welcome comments on, and data related to, the assumed mix of undergraduate and graduate programs, the expected size of additional programs, the borrowing levels by loan type, and the distribution of borrowing by risk group. Any comments received will be considered in the development of estimates for the final regulations.

As seen from the approximately $100 billion total annual loan volume, even small changes would result in a significant amount of additional loan transfers. We update loan volume estimates regularly; for PB2021 the total non-consolidated loan volume estimates between FY2021 and FY2030 range from $94 billion to $107 billion. The assumed changes in loan volume would result in a small savings that represents the net impact of offsetting subsidy changes by loan type and risk group due to positive subsidy rates for Subsidized and Unsubsidized Stafford loans and negative subsidy rates for PLUS Loans. Given the higher loan amounts associated with PLUS loans and loans to graduate students, the negative subsidy rates that range from −20.57 in 2021 to −16.70 in 2028 generate significant savings ($−356 mn in outlays) to offset the increased costs in other loan types. In Alternate 2, the higher non-consolidated loan volume eventually results in higher consolidated loan volume, that, combined with the other positive subsidy categories results in a net cost in that scenario.

We do not assume any changes in subsidy rates from the potential creation of new programs or the other changes reflected in the proposed regulations. We are uncertain to what extent and in what direction the performance of programs that expand or develop under the proposed regulations will shift relative to current programs. As indicated previously, several institutions known for competency-based programs have default performance that is as good as or better than national averages, but it is not clear that most programs that will be created in the future will achieve that result. Depending on how programs are

configured, the market demand for them, and their quality, key subsidy components such as defaults, prepayments, and repayment plan choice may vary and affect the cost estimates.

Table 4 summarizes the Pell and loan effects for the Main, Alt1, and Alt2 scenarios over a 10-year period. Each column reflects a scenario showing estimated changes to Pell Grants and Direct Loans under those conditions. Therefore, the overall amounts reflect the sum of outlay changes occurring under each scenario for Pell Grants and Direct Loans when combined.

TABLE 4—ESTIMATED NET IMPACT OF PELL GRANT AND LOAN CHANGES—2021–2030 OUTLAYS

[$mns]

	Main	Alt 1	Alt 2
Pell Grants	1,110	446	1,741
Loans	−45	−20	106
Overall	1,065	426	1,847

The cost estimates presented above do not attempt to account for several factors that could ultimately result in a different net budget impact than the primary estimate presented in Table 4, including potential cost differences among programs and relative repayment performance. As discussed previously, one potential benefit of competency based programs is reduced costs for students relative to other programs. If a large share of students would have attended a different program or completed faster, their Pell Grant or borrowing may be lower than assumed in the PB2021 baseline. However, without more significant evidence, we are not estimating any savings from that possibility. Other provisions that we do not include in the budget estimate because of limited information on the potential significance include the treatment of out-of-class hours and the reasonable length provisions related to clock hour programs.

As discussed previously, the uncertainty around several factors affected by the proposed changes led the Department to develop some alternative scenarios for the potential impacts. The extent to which institutions invest in making direct assessment programs work and try to enroll additional students as opposed to converting some portion of existing enrollments to this type of program is unclear. In the AIR survey about competency-based education, approximately 40 percent of the 501 institutional respondents indicated CBE is in their institutions' strategic plans in a ''minor way'' and 16 percent in a ''major way''.[58] It is also unclear if the size and type of existing CBE programs is representative of future CBE programs, especially direct assessment programs.

In order to capture the effect of changing some of the key assumptions associated with the primary budget estimate, the Department developed the Alternate Scenarios presented in Table 5. Alternate 1 is a low impact scenario that reduces the number of additional programs and students and lowers the average amount borrowed and the percentage of students eligible for Pell Grants. Alternate 2, the high impact scenario, increases programs and student growth, the percentage of Pell recipients, and amounts borrowed.

TABLE 5—ALTERNATE SCENARIOS

	Alternate 1—low impact	Alternate 2—high impact
Program Growth	Eliminate half the programs per cell for 3 smallest categories and one-third of programs in 3 largest size categories.	+20 programs per cell for 3 smallest categories; +5 programs per cell for 3 largest size categories through 2025 and +10 per cell for 2026 to 2029.
Undergraduate Program Share	+15 percent	−15 percent.
Percent of Pell Recipients	30 percent	75 percent.
Distribution of Pell Recipients by Institutional Category.	4–yr Public 10%	4–yr Public 30%.
	4–yr Private 5%	4–yr Private 24%.
	2–yr Public 38%	2–yr Public 20%.
	2–yr Private 10%	2–yr Private 5%.
	Proprietary 37%	Proprietary 21%.
Borrowing Rates	Subsidized −10%	Subsidized +5%.
	Unsubsidized −15%	Unsubsidized +10%.
	Plus −5%	Plus +5%.
	Grad Unsub −15%	Grad Unsub +10%.
	Grad Plus −15%	Grad Plus +10%.
Average Loan Amount	Decrease 20 percent	Increase 10 percent.
Distribution by Risk Group (Subsidized and Unsubsidized).	2–yr Prop −10%	2–yr Prop +15%.
	2–yr NFP −5%	2–yr NFP +10%.
	4–yr FRSO +10%	4–yr FRSO −15%.
	4–yr JRSR +5%	4–yr JRSR −10%.
	GRAD No change.	GRAD No change.

[58] *www.air.org/sites/default/files/National-Survey-of-Postsec-CBE-2018-AIR-Eduventures-Jan-2019.pdf.*

TABLE 5—ALTERNATE SCENARIOS—Continued

	Alternate 1—low impact	Alternate 2—high impact
Distribution by Risk Group (PLUS)	2–yr Prop −6% 2–yr NFP −3% 4–yr FRSO +6% 4–yr JRSR +3% GRAD No change.	2–yr Prop +12%. 2–yr NFP +8%. 4–yr FRSO −12%. 4–yr JRSR −8%. GRAD No change.

Accounting Statement

As required by OMB Circular A–4 (available at *www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf*), in the following table we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of these final regulations. This table provides our best estimate of the changes in annual monetized transfers as a result of these final regulations. Expenditures are classified as transfers from the Federal Government to affected student loan borrowers and Pell Grant recipients.

TABLE 6—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES

[In millions]

Category	Benefits	
Clarification of terms and processes related to establishing programs and administering title IV aid to encourage development of new programs	Not Quantified	
Net Reduction in Paperwork Burden on Institutions, primarily due to elimination of Net Present Value calculation related to the 90/10 rule	7%	3%
	$−0.12	$−0.12
	Not Quantified	
Category	Costs	
Category	Transfers	
Increased transfers of Pell Grants	7% $95.8	3% $104.3
Increased transfers of loans to students in additional programs established, in part, due to the proposed regulations	$−5.7	$−5.1

Alternatives Considered

A number of proposals were considered on various sections of the proposed regulations as the negotiated rulemaking committee moved toward consensus. Some key alternatives that were considered are summarized in Table 76.

TABLE 76—KEY ALTERNATIVES CONSIDERED

Topic	Alternative proposal	Reasons rejected
Definition of Credit Hour	Eliminate time-based requirements	Retain definition for some consistency across higher education.
Subscription-based programs.	Disbursement based on attempted programs, not completed ones. Include a competency in student's enrollment status more than once if it overlapped more than one subscription period.	Concern for potential abuse leading to paying title IV aid for same course twice.
Written Arrangement	No limitation on percentage of program that could be provided by written arrangement with ineligible entity.	Goal was to facilitate partnerships with organizations using trade experts in workplace environment. Committee found sufficient flexibility with existing limit and changes would call into question whether the eligible institution was really offering the program.
Program Length	Allow limiting program length to 100 percent of the requirements in any State and then 100 percent required for licensure in an adjoining State.	Concern that changes would encourage institutions to add hours beyond what is necessary for student to become employed.

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 regulations

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? (A ''section'' is preceded by the symbol ''§ '' and a numbered heading; for example, § 668.43.)
- 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 Analysis

Description of the Reasons That Action by the Agency Is Being Considered

The Department is regulating to reflect development in postsecondary education delivery models, including those facilitated by technology and those that are based on the demonstration of competencies rather than seat time, to help institutions understand regulatory requirements for such programs and to facilitate further innovations in such areas. The proposed regulations provide or clarify definitions of terms such as correspondence course, distance education, subscription-based program, and clock hour, where the HEA provides no definition.

The proposed regulations send a signal to the higher education community that the Department is committed to supporting educational innovations such as subscription-based and direct assessment programs as well as new technology-driven delivery mechanisms, such as adaptive learning. The proposed regulations also seek to clarify definitions used to differentiate between distance education and correspondence courses, while at the same time preserving student protections and title IV financial aid distribution.

Succinct Statement of the Objectives of, and Legal Basis for, the Regulations

The Secretary proposes to amend the Institutional Eligibility regulations issued under the HEA, related to distance education and innovation in 34 CFR part 600. In addition, the Secretary proposes to amend the Student Assistance General Provisions regulations issued under the HEA in 34 CFR part 668. The proposed changes to part 600 are authorized by 20 U.S.C. 1001, 1002, 1003, 1088, 1091, 1094, 1099b, and 1099c, while the proposed changes to part 668 are authorized by 20 U.S.C. 1001–1003, 1070a, 1070g, 1085, 1087b, 1087d, 1087e, 1088, 1091, 1092, 1094, 1099c, 1099c–1, 1221e–3, and 3474.

Through the proposed regulations, we attempt to remove barriers that institutions face when trying to create and implement new and innovative ways of providing education to students, and also provide sufficient flexibility to ensure that future innovations we cannot yet anticipate have an opportunity to move forward.

The proposed regulations are also designed to protect students and taxpayers from unreasonable risks. Inadequate consumer information could result in students enrolling in programs that will not help them meet their goals. In addition, institutions adopting innovative methods of educating students may expend taxpayer funds in ways that were not contemplated by Congress or the Department, resulting in greater risk to the taxpayers of waste, fraud, and abuse and to the institution of undeserved negative program review findings. These proposed regulations attempt to limit risks to students and taxpayers resulting from innovation by delegating various oversight functions to the bodies best suited to conduct that oversight—States and accreditors. This delegation of authority through the higher education regulatory triad entrusts oversight of most consumer protections to States, assurance of academic quality to accrediting agencies, and protection of taxpayer funds to the Department.

Description of and, Where Feasible, an Estimate of the Number of Small Entities to which the Regulations Will Apply

Of the entities that the final regulations will affect, we consider many institutions to be small. The Department recently proposed a size classification based on enrollment using IPEDS data that established the percentage of institutions in various sectors considered to be small entities, as shown in Table 8. We described this size classification in the NPRM published in the **Federal Register** on July 31, 2018 for the proposed borrower defense rule (83 FR 37242, 37302). The Department discussed the proposed standard with the Chief Counsel for Advocacy of the Small Business Administration, and while no change has been finalized, the Department continues to believe this approach better reflects a common basis for determining size categories that is linked to the provision of educational services.

TABLE 8—SMALL ENTITIES UNDER ENROLLMENT BASED DEFINITION

Level	Type	Small	Total	Percent
2-year	Public	342	1,240	28
2-year	Private	219	259	85
2-year	Proprietary	2,147	2,463	87
4-year	Public	64	759	8
4-year	Private	799	1,672	48
4-year	Proprietary	425	558	76
Total		3,996	6,951	57

The proposed regulations would provide needed clarity around title IV eligibility for distance education, correspondence courses, subscription-based programs and direct assessment programs. They would also provide greater clarity regarding how the Department determines whether or not a program is of reasonable length. The effect on small entities would vary by the extent they currently participate in such programs or that they choose to do

so going forward. Introducing competency-based programs in areas with strong demand could be an opportunity for some small entities to maintain or expand their business. On the other hand, small entities could be vulnerable to competition from other institutions, large or small, that are capturing an increasing share of the postsecondary market with distance or competency-based programs. Developing and implementing new programs and delivery models, and especially those that require sophisticated technology, may be impractical for small institutions that cannot distribute the cost among a population of sufficient size to result in favorable return-on-investment. We expect that the development of the first direct assessment program at an institution would be a multi-stage and multi-year process involving choosing the subject areas appropriate for this model, developing competencies, modifying course materials and teaching approaches, reaching out to potential future employers to build acceptance of the credential, and getting approval from accreditors and the Department, and recruiting students. The Department does not have a detailed understanding of the costs and timeframe involved with establishing these programs, especially for small entities and we welcome such information. Small institutions may be more inclined to rely on consortia arrangements with other, larger institutions, to make distance learning and competency-based education available to their students. The proposed regulations would remove many barriers to innovation that currently restrain institutions, including small ones, and may accelerate innovations, but these innovations were likely to take place in postsecondary education anyway given the call for new, more efficient delivery models for the growing population of non-traditional students and the likelihood that adults will be engaged in postsecondary education throughout their lifetime.

The Secretary invites comments from small entities as to whether they believe the proposed changes would have a significant economic impact on them and, if so, requests evidence to support that belief.

Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Regulations, Including an Estimate of the Classes of Small Entities that Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

The Department provides additional detail related to burden estimates in the *Paperwork Reduction Act* section of this NPRM. Overall, the Department estimates $127,371 in reduced paperwork burden associated with the elimination of the net present value calculation related to the 90/10 rule. This affects proprietary institutions, of which approximately 85 percent are considered small according to Table 8 (2,572/3,021), so most of that reduction ($127,371*85 percent = $108,265) will go to small entities. There are also some small increases in burden related to reporting about direct assessment programs, reporting about written arrangements, and demonstrating an ineligible institution's competence to perform its contracted duties under a written arrangement. Overall, these provisions are expected to increase burden on small entities by approximately 79 hours, a small increase for those small institutions that choose to participate in direct assessment programs or written arrangements.

Identification, to the Extent Practicable, of All Relevant Federal Regulations That May Duplicate, Overlap, or Conflict With the Proposed Regulations

The proposed regulations are unlikely to conflict with or duplicate existing Federal regulations.

Alternatives Considered

As described above, the Department participated in negotiated rulemaking when developing the proposed regulations and considered a number of options for some of the provisions. These included: (1) Eliminating time-based requirements for credit hours; (2) no limitation on the percentage of a program that could be offered through written arrangement with an ineligible entity; (3) allowing limiting program length to 100 percent of the requirements in any State and then 100 percent required for licensure in an adjoining State, (4) disbursing funds in subscription-based programs based on attempted competencies, not completed ones; and (5) including a competency that overlaps subscription periods in a student's enrollment status more than once. No alternatives were aimed specifically at small entities.

Paperwork Reduction Act of 1995

As part of its continuing effort to reduce paperwork and respondent burden, the Department provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps ensure that: The public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

Parts 600 and 668 contains information collection requirements. Under the PRA the Department has submitted a copy of these sections to OMB for its review.

A Federal agency may not conduct or sponsor a collection of information unless OMB approves the collection under the PRA and the corresponding information collection instrument displays a currently valid OMB control number.

Notwithstanding any other provision of law, no person is required to comply with, or is subject to penalty for failure to comply with, a collection of information if the collection instrument does not display a currently valid OMB control number.

In the final regulations we will display the control numbers assigned by OMB to any collection requirements proposed in this NPRM and adopted in the final regulations.

Section 600.21—Updating application information

Requirements: The proposed regulations in § 600.21 would require the institution to only report the addition of a second or subsequent direct assessment program without the review and approval of the Department when it previously has such approval. The proposed regulations would also require an institution to report the establishment of a written arrangement between the eligible institution and an ineligible institution or organization in which the ineligible institution or organization would provide more than 25 percent of a program.

Burden Calculation: We believe that the calculation would impose burden on institutions. We estimate that 36 institutions will need to report such activities. We anticipate that an institution will require an average of .5 hours (30 minutes) to report such

activities for a total estimated burden of 18 hours under OMB Control Number 1845–NEW.

We estimate that there will be 12 proprietary institutions that be required to report this information for 9 burden hours (12 institutions × .5 hours = 6 hours). We estimate that there are 11 private institutions that be required to report this information for 5 burden hours (11 institutions × .5 hours = 5 hours). We estimate that there are 13 public institutions that be required to report this information for 7 burden hours (13 institutions × .5 hours = 7 hours).

600.21—UPDATING APPLICATION INFORMATION—1845–NEW1

Institution type	Respondents	Responses	Time factor (hours)	Burden hours	Cost $106.94
Proprietary	12	12	.5	6	$642
Private	11	11	.5	5	538
Public	13	13	.5	7	749
Total	36	36		18	1,929

Section 668.5—Written arrangements to provide education programs

Requirements: The proposed regulations in § 668.5 would require the institution to demonstrate how the ineligible institution has the experience in the delivery and assessment of the program or portions thereof that the ineligible institution would be contracted to deliver under the terms of the written arrangement.

Burden Calculation: We believe that the calculation would impose recordkeeping burden on institutions. We estimate that 24 institutions will need to document such information. We anticipate that an institution will require an average of 5 hours to document such activities for a total estimated burden of 120 hours under OMB Control Number 1845–NEW2.

We estimate that there are 8 proprietary institutions that be required to document this information for 40 burden hours (8 institutions × 5 hours = 40 hours). We estimate that there are 8 private institutions that be required to document this information for 40 burden hours (8 institutions × 5 hours = 40 hours). We estimate that there are 8 public institutions that be required to report this information for 40 burden hours (8 institutions × 5 hours = 40 hours).

SECTION 668.5—WRITTEN ARRANGEMENTS TO PROVIDE EDUCATION PROGRAMS.—1845–NEW2

Institution type	Respondents	Responses	Time factor (hours)	Burden hours	Cost $106.94
Proprietary	8	8	5	40	$4,278
Private	8	8	5	40	4,278
Public	8	8	5	40	4,278
Total	24	24		120	12,834

Section 668.28—Non-title IV revenue (90/10).

Requirements: The proposed regulations in § 668.28 would remove the Net Present Value calculation currently in the regulations.

Burden Calculation: We believe that the proposed regulatory language change would remove burden from the institution. Based on the explanation provided in the preamble, the regulations in 668.28(b) no longer applies to the calculation of the treatment of revenue. Therefore, the current burden applied under OMB Control Number 1845–0096 would be eliminated. Upon the effective date of these regulation, the currently assessed 2,808 burden hours would be discontinued.

SECTION 668.28—NON-TITLE IV REVENUE (90/10).—1845–0096

Institution type	Respondents	Responses	Time factor (hours)	Burden hours	Cost savings $106.94/hour
Proprietary	−936	−936	2	−1,872	$200.192
Proprietary	−936	−936	1	−936	100,096
Total	−1,872	−1,872		−2,808	300,288

The estimated cost to institutions is $53.47 per hour based on the 2018 mean hourly information from the Bureau of Labor Statistics Occupational Employment Statistics for Postsecondary Education Administrators [59] × 2 to account for benefits and expenses for a total per hour cost of $106.94.

[59] *www.bls.gov/oes/current/oes119033.htm.*

Regulatory section	Information collection	OMB Control Number and estimated burden (change in burden)	Estimated costs $106.94/hour
§ 600.21 Updating application information.	The proposed regulations in § 600.21 would require the institution to only report the addition of a second or subsequent direct assessment program without the review and approval of the Department when it previously been awarded such approval. The proposed regulations would also require an institution to report the establishment of a written arrangement between the eligible institution and an ineligible institution or organization in which the ineligible institution or organization would provide more than 25 percent of a program.	1845–NEW1 ..... 18 hours	$1,929
§ 668.5—Written arrangements to provide education programs.	The proposed regulations in § 668.5 would require the institution to demonstrate how the ineligible institution has the experience in the delivery and assessment of the program or portions thereof that the ineligible institution would be contracted to deliver under the terms of the written arrangement.	1845–NEW2 ..... 120 hours	12,834
§ 668.28 Non-title IV revenue (90/10).	The proposed regulations in § 668.28 would remove the Net Present Value calculation currently in the regulations.	−2,808	($300,288)

Collection of Information

The total burden hours and change in the burden hours associated with each OMB control number affected by the proposed regulations follows:

OMB control number	Total proposed burden hours	Proposed change in burden hours
1845–NEW1	+18	+18
1845–NEW2	+120	+120
1845–0096	−2,808	−2,808
Total	−2,670	−2,670

Intergovernmental Review

These regulations are not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

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.

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. The proposed regulations in 600 and 668 may have federalism implications. We encourage State and local elected officials to review and provide comments on these proposed regulations.

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List of Subjects

34 CFR Part 600

Colleges and universities, grant programs-education, loan programs-education, reporting and recordkeeping requirements, student aid, vocational education.

34 CFR Part 668

Administrative practice and procedure, colleges and universities, consumer protection, grant programs—education, loan programs—education, reporting and recordkeeping requirements, student aid, vocational education.

Betsy DeVos,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary proposes to amend parts 600 and 668, of title 34 of the Code of Federal Regulations as follows:

PART 600—INSTITUTIONAL ELIGIBILTY UNDER THE HIGHER EDUCATION ACT OF 1965, AS AMENDED

■ 1. The authority citation for part 600 continues to read as follows:

Authority: 20 U.S.C. 1001, 1002, 1003, 1088, 1091, 1094, 1099b, and 1099c, unless otherwise noted.

■ 2. Section 600.2 is amended by:
■ a. Adding, in alphabetical order, a definition for ''academic engagement''.
■ b. Revising the definitions of ''clock hour'', ''correspondence course'', ''credit hour'', ''distance education'', and ''incarcerated student'', and ''nonprofit institution''.
■ c. Adding, in alphabetical order, a definition for ''juvenile justice facility''.

The additions and revisions read as follows:

§ 600.2 Definitions.

* * * * *

Academic engagement: Active participation by a student in an instructional activity related to the student's course of study that—

(1) Is defined by the institution in accordance with any applicable requirements of its State or accrediting agency;

(2) Includes, but is not limited to—

(i) Attending a synchronous class, lecture, recitation, or field or laboratory activity, physically or online, where there is an opportunity for interaction between the instructor and students;

(ii) Submitting an academic assignment;

(iii) Taking an assessment or an exam;

(iv) Participating in an interactive tutorial, webinar, or other interactive computer-assisted instruction;

(v) Participating in a study group, group project, or an online discussion that is assigned by the institution; or

(vi) Interacting with an instructor about academic matters; and

(3) Does not include, for example—

(i) Living in institutional housing;

(ii) Participating in the institution's meal plan;

(iii) Logging into an online class or tutorial without any further participation; or

(iv) Participating in academic counseling or advisement.

* * * * *

Clock hour: (1) A period of time consisting of—

(i) A 50- to 60-minute class, lecture, or recitation in a 60-minute period;

(ii) A 50- to 60-minute faculty-supervised laboratory, shop training, or internship in a 60-minute period;

(iii) Sixty minutes of preparation in a correspondence course; or

(iv) In distance education, 50 to 60 minutes in a 60-minute period of attendance in a synchronous class, lecture, or recitation where there is opportunity for direct interaction between the instructor and students.

(2) A clock hour in a distance education program does not meet the requirements of this definition if it does not meet all accrediting agency and State requirements or exceeds an agency's restrictions on the number of clock hours in a program that may be offered through distance education.

(3) An institution must be capable of monitoring a student's attendance in 50 out of 60 minutes for each clock hour under this definition.

* * * * *

Correspondence course: (1) A course provided by an institution under which the institution provides instructional materials, by mail or electronic transmission, including examinations on the materials, to students who are separated from the instructors. Interaction between instructors and students in a correspondence course is limited, is not regular and substantive, and is primarily initiated by the student.

(2) If a course is part correspondence and part residential training, the Secretary considers the course to be a correspondence course.

(3) A correspondence course is not distance education.

Credit hour: Except as provided in 34 CFR 668.8(k) and (l), a credit hour is an amount of student work defined by an institution, as approved by the institution's accrediting agency or State approval agency, that is consistent with commonly accepted practice in postsecondary education and that—

(1) Reasonably approximates not less than—

(i) One hour of classroom or direct faculty instruction and a minimum of two hours of out-of-class student work each week for approximately fifteen weeks for one semester or trimester hour of credit, or ten to twelve weeks for one quarter hour of credit, or the equivalent amount of work over a different period of time; or

(ii) At least an equivalent amount of work as required in paragraph (1)(i) of this definition for other academic activities as established by the institution, including laboratory work, internships, practica, studio work, and other academic work leading to the award of credit hours; and

(2) Permits an institution, in determining the amount of work associated with a credit hour, to take into account a variety of delivery methods, measurements of student work, academic calendars, disciplines, and degree levels.

* * * * *

Distance education: (1) Education that uses one or more of the technologies listed in paragraphs (2)(i) through (iv) of this definition to deliver instruction to students who are separated from the instructor or instructors and to support regular and substantive interaction between the students and the instructor or instructors, either synchronously or asynchronously.

(2) The technologies that may be used to offer distance education include—

(i) The internet;

(ii) One-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devices;

(iii) Audio conference; or

(iv) Other media used in a course in conjunction with any of the technologies listed in paragraph (2)(i) through (iii) of this definition.

(3) For purposes of this definition, an instructor is an individual responsible for delivering course content and who meets the qualifications for instruction established by an institution's accrediting agency.

(4) For purposes of this definition, substantive interaction is engaging students in teaching, learning, and assessment, consistent with the content under discussion, and also includes at least two of the following—

(i) Providing direct instruction;

(ii) Assessing or providing feedback on a student's coursework;

(iii) Providing information or responding to questions about the content of a course or competency;

(iv) Facilitating a group discussion regarding the content of a course or competency; or

(v) Other instructional activities approved by the institution's or program's accrediting agency.

(5) An institution ensures regular interaction between a student and an instructor or instructors by, prior to the student's completion of a course or competency—

(i) Providing the opportunity for substantive interactions with the student on a predictable and regular basis commensurate with the length of time and the amount of content in the course or competency; and

(ii) Monitoring the student's academic engagement and success and ensuring that an instructor is responsible for promptly and proactively engaging in substantive interaction with the student when needed on the basis of such monitoring, or upon request by the student.

* * * * *

Incarcerated student: A student who is serving a criminal sentence in a Federal, State, or local penitentiary, prison, jail, reformatory, work farm, juvenile justice facility, or other similar correctional institution. A student is not

considered incarcerated if that student is in a half-way house or home detention or is sentenced to serve only weekends. For purposes of Pell Grant eligibility under 34 CFR 668.32(c)(2)(ii), a student who is incarcerated in a juvenile justice facility, or in a local or county facility, is not considered to be incarcerated in a Federal or State penal institution, regardless of which governmental entity operates or has jurisdiction over the facility, including the Federal government or a State, but is considered incarcerated for the purposes of determining costs of attendance under section 472 of the HEA in determining eligibility for and the amount of the Pell Grant.

Juvenile justice facility: A public or private residential facility that is operated primarily for the care and rehabilitation of youth who, under State juvenile justice laws—

(1) Are accused of committing a delinquent act;

(2) Have been adjudicated delinquent; or

(3) Are determined to be in need of supervision.

Nonprofit institution: An institution that—

(1)(i) Is owned and operated by one of more nonprofit corporations or associations, no part of the net earnings of which benefits any private shareholder or individual;

(ii) Is legally authorized to operate as a nonprofit organization by each State in which it is physically located; and

(iii) Is determined by the U.S. Internal Revenue Service to be an organization to which contributions are tax-deductible in accordance with section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3); OR

(2) For a foreign institution—

(i) An institution that is owned and operated only by one or more nonprofit corporations or associations; and

(ii)(A) If a recognized tax authority of the institution's home country is recognized by the Secretary for purposes of making determinations of an institution's nonprofit status for title IV purposes, is determined by that tax authority to be a nonprofit educational institution; or

(B) If no recognized tax authority of the institution's home country is recognized by the Secretary for purposes of making determinations of an institution's nonprofit status for title IV purposes, the foreign institution demonstrates to the satisfaction of the Secretary that it is a nonprofit educational institution.

* * * * *

■ 3. Section 600.7 is amended by:

■ a. Redesignating paragraph (b)(2) as (b)(3).

■ b. Adding new paragraph (b)(2).

The addition reads as follows:

§ 600.7 Conditions of institutional eligibility.

* * * * *

(b) * * *

(2) *Calculating the number of correspondence students.* For purposes of paragraph (a)(1)(ii) of this section, a student is considered ''enrolled in correspondence courses'' if the student's enrollment in correspondence courses constituted more than 50 percent of the courses in which the student enrolled during an award year.

* * * * *

* * * * *

■ 4. Section 600.10 is amended by revising paragraph (c)(1)(iii) to read as follows:

§ 600.10 Date, extent, duration, and consequence of eligibility.

* * * * *

(c) * * *

(1) * * *

(iii) For a first direct assessment program under 34 CFR 668.10, or the first direct assessment program offered at each credential level, and for a comprehensive transition and postsecondary program under 34 CFR 668.232, obtain the Secretary's approval.

* * * * *

■ 5. Section 600.20 is amended by:

■ a. Adding a sentence to the end of paragraph (a)(1).

■ b. Removing the word ''wishes'' in paragraphs (b)(1) and (2) and adding in its place the word ''chooses.''

■ c. Redesignating paragraphs (b)(2)(i) through (iii) as paragraphs (b)(2)(i)(A) through (C).

■ d. Redesignating paragraph (b)(2) introductory text as paragraph (b)(2)(i) introductory text.

■ e. Adding a new paragraph (b)(2)(ii).

■ f. Removing paragraph (d)(1)(ii)(B) and redesignating paragraphs (d)(1)(ii)(C) through (F) as paragraphs (d)(1)(ii)(B) through (E).

■ g. Revising redesignated paragraph (d)(1)(1i)(C).

■ h. Removing redesignated paragraph (d)(1)(ii)(D) and redesignating paragraphs (d)(1)(ii)(E) and (F) as paragraphs (d)(1)(ii)(D) and (E).

■ i. Revising redesignated paragraph (d)(1)(ii)(E)(*1*).

The additions and revisions read as follows:

§ 600.20 Notice and application procedures for establishing, reestablishing, maintaining, or expanding institutional eligibility and certification.

(a)(1) * * * The Secretary must ensure prompt action is taken by the Department on any materially complete application required under this section.

* * * * *

(b) * * *

(2) * * *

(ii) The Secretary must ensure prompt action is taken by the Department on any materially complete application required under paragraph (b)(2)(i) of this section.

* * * * *

(d)(1) * * *

(ii) * * *

(C) If an additional educational program is required to be approved by the Secretary for title IV, HEA program purposes under paragraph (d)(1)(ii)(B) of this section, the Secretary may grant approval, or request further information prior to making a determination of whether to approve or deny the additional educational program.

* * * * *

(E)(*1*) If the Secretary denies an application from an institution to offer an additional educational program, the denial will be based on the factors described in paragraphs (d)(1)(ii)(D)(2), (3), and (4) of this section, and the Secretary will explain in the denial how the institution failed to demonstrate that the program is likely to lead to gainful employment in a recognized occupation.

* * * * *

■ 6. Amend § 600.21 by revising paragraph (a)(11) and adding paragraphs (a)(12) and (13) to read as follows:

§ 600.21 Updating application information.

(a) * * *

(11) For any program that is required to provide training that prepares a student for gainful employment in a recognized occupation—

(i) Establishing the eligibility or reestablishing the eligibility of the program;

(ii) Discontinuing the program's eligibility;

(iii) Ceasing to provide the program for at least 12 consecutive months;

(iv) Losing program eligibility under § 600.40; or

(v) Changing the program's name, CIP code or credential level.

(12) Its addition of a second or subsequent direct assessment program.

(13) Its establishment of a written arrangement for an ineligible institution or organization to provide more than 25

percent of a program pursuant to § 668.5(c).

* * * * *

■ 7. Section 600.52 is amended by revising the definition of ''foreign institution'' to read as follows:

§ 600.52 Definitions.

* * * * *

Foreign institution: (1) For the purposes of students who receive title IV aid, an institution that—

(i) Is not located in the United States;

(ii) Except as provided with respect to clinical training offered under § 600.55(h)(1), § 600.56(b), or § 600.57(a)(2)—

(A) Has no U.S. location;

(B) Has no written arrangements, within the meaning of § 668.5, with institutions or organizations located in the United States for those institutions or organizations to provide a portion of an eligible program, as defined under § 668.8, except for written arrangements for no more than 25 percent of the courses required by the program to be provided by eligible institutions located in the United States; and

(C) Does not permit students to complete an eligible program by enrolling in courses offered in the United States, except that it may permit students to complete up to 25 percent of the program by enrolling in the coursework, research, work, internship, externship, or special studies offered by an eligible institution in the United States;

(iii) Is legally authorized by the education ministry, council, or equivalent agency of the country in which the institution is located to provide an educational program beyond the secondary education level; and

(iv) Awards degrees, certificates, or other recognized educational credentials in accordance with § 600.54(e) that are officially recognized by the country in which the institution is located.

(2) Notwithstanding paragraph (1)(ii)(C) of this definition, independent research done by an individual student in the United States for not more than one academic year is permitted, if it is conducted during the dissertation phase of a doctoral program under the guidance of faculty, and the research is performed only in a facility in the United States.

(3) If the educational enterprise enrolls students both within the United States and outside the United States, and the number of students who would be eligible to receive title IV, HEA program funds attending locations outside the United States is at least twice the number of students enrolled within the United States, the locations outside the United States must apply to participate as one or more foreign institutions and must meet all requirements of paragraph (1) of this definition, and the other requirements of this part. For the purposes of this paragraph, an educational enterprise consists of two or more locations offering all or part of an educational program that are directly or indirectly under common ownership.

* * * * *

■ 8. Section 600.54 is amended by revising paragraph (c) to read as follows:

§ 600.54 Criteria for determining whether a foreign institution is eligible to apply to participate in the Direct Loan Program.

* * * * *

(c)(1) Notwithstanding § 668.5, written arrangements between an eligible foreign institution and an ineligible entity are limited to those under which—

(i) The ineligible entity is an institution that meets the requirements in paragraphs (1)(iii) and (iv) of the definition of ''foreign institution'' in § 600.52; and

(ii) The ineligible foreign institution provides 25 percent or less of the educational program.

(2) For the purpose of this paragraph (c), written arrangements do not include affiliation agreements for the provision of clinical training for foreign medical, veterinary, and nursing schools.

* * * * *

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

■ 9. The authority citation for part 668 continues to read as follows:

Authority: 20 U.S.C. 1001–1003, 1070a, 1070g, 1085, 1087b, 1087d, 1087e, 1088, 1091, 1092, 1094, 1099c, 1099c–1, 1221e–3, and 3474, unless otherwise noted.

■ 10. Section 668.1 is amended by revising paragraph (b) introductory text to read as follows:

§ 668.1 Scope.

* * * * *

(b) As used in this part, an ''institution,'' unless otherwise specified, includes—

* * * * *

■ 11. Section 668.2 is amended by:

■ a. Adding in alphabetical order in the list of definitions in paragraph (a) the words ''Direct assessment program'', ''Distance education'', ''Religious mission'', ''Teach-out'', ''Teach-out agreement'', and ''Teach-out plan''.

■ b. In paragraph (a):

■ i. Removing from the list of definitions the words ''Telecommunications course''; and

■ ii. Adding in alphabetical order in the list of definitions the words ''Title IV, HEA program''.

■ c. In paragraph (b):

■ i. Removing the definition of ''Academic Competitiveness Grant (ACG)'';

■ ii. Revising the definition of ''full-time student'';

■ iii. Adding in alphabetical order the definition of ''subscription-based program''; and

■ iv. In the definition of ''Third-party servicer'', in paragraph (1)(i)(D), removing the words ''Certifying loan applications'' and adding in their place the words ''Originating loans''.

The additions and revisions read as follows:

§ 668.2 General definitions.

* * * * *

(b) * * *

Full-time student: An enrolled student who is carrying a full-time academic workload, as determined by the institution, under a standard applicable to all students enrolled in a particular educational program. The student's workload may include any combination of courses, work, research, or special studies that the institution considers sufficient to classify the student as a full-time student. For a term-based program that is not subscription-based, the student's workload may include repeating any coursework previously taken in the program; however, the workload may not include more than one repetition of a previously passed course. For an undergraduate student, an institution's minimum standard must equal or exceed one of the following minimum requirements, based on the type of program:

(1) For a program that measures progress in credit hours and uses standard terms (semesters, trimesters, or quarters), 12 semester hours or 12 quarter hours per academic term.

(2) For a program that measures progress in credit hours and does not use terms, 24 semester hours or 36 quarter hours over the weeks of instructional time in the academic year, or the prorated equivalent if the program is less than one academic year.

(3) For a program that measures progress in credit hours and uses nonstandard-terms (terms other than semesters, trimesters, or quarters) the number of credits determined by—

(i) Dividing the number of weeks of instructional time in the term by the number of weeks of instructional time in the program's academic year; and

(ii) Multiplying the fraction determined under paragraph (3)(i) of

this definition by the number of credit hours in the program's academic year.

(4) For a program that measures progress in clock hours, 24 clock hours per week.

(5) A series of courses or seminars that equals 12 semester hours or 12 quarter hours in a maximum of 18 weeks.

(6) The work portion of a cooperative education program in which the amount of work performed is equivalent to the academic workload of a full-time student.

(7) For correspondence coursework—

(i) A full-time course load must be commensurate with the requirements listed in paragraphs (1) through (6) of this definition; and

(ii) At least one-half of the coursework must be made up of non-correspondence coursework that meets one-half of the institution's requirement for full-time students.

(8) For a subscription-based program, completion of a full-time course load commensurate with the requirements in paragraphs (1), (3), and (5) through (7) of this definition.

* * * * *

Subscription-based program: A standard or nonstandard-term direct assessment program in which the institution charges a student for each term on a subscription basis with the expectation that the student completes a specified number of credit hours during that term. Coursework in a subscription-based program is not required to begin or end within a specific timeframe in each term. Students in subscription-based programs must complete a cumulative number of credit hours (or the equivalent) during or following the end of each term before receiving subsequent disbursements of title IV, HEA program funds. An institution establishes an enrollment status (for example, full-time or half-time) that will apply to a student throughout the student's enrollment in the program, except that a student may change his or her enrollment status no more often than once per academic year. The number of credit hours (or the equivalent) a student must complete before receiving subsequent disbursements is calculated by—

(1) Determining for each term the number of credit hours (or the equivalent) associated with the institution's minimum standard for the student's enrollment status (for example, full-time, three-quarter time, or half-time) for that period commensurate with paragraph (8) in the definition of ''full-time student,'' adjusted for less than full-time students in light of the definitions of ''half-time student'' and ''three-quarter time student,'' and adjusted to at least one credit (or the equivalent) for a student who is enrolled less than half-time; and

(2) Adding together the number of credit hours (or the equivalent) determined under paragraph (1) for each term in which the student was enrolled in and attended that program, excluding the current and most recently attended terms.

* * * * *

■ 12. Section 668.3 is amended by revising paragraphs (b)(2) and (3) to read as follows:

§ 668.3 Academic year.

* * * * *

(b) * * *

(2) A week of instructional time is any week in which—

(i) At least one day of regularly scheduled instruction or examinations occurs, or, after the last scheduled day of classes for a term or payment period, at least one day of study for final examinations occurs; or

(ii)(A) In a program offered using asynchronous coursework through distance education or correspondence courses, the institution makes available the instructional materials, other resources, and instructor support necessary for academic engagement and completion of course objectives; and

(B) In a program using asynchronous coursework through distance education, the institution expects enrolled students to perform educational activities demonstrating academic engagement during the week.

(3) Instructional time does not include any scheduled breaks and activities not included in the definition of ''academic engagement'' in 34 CFR 600.2, or periods of orientation or counseling.

■ 13. Section 668.5 is amended by:

■ a. Revising paragraphs (a), (c), and (d)(1).

■ b. Adding paragraphs (f), (g) and (h).

The revisions and additions read as follows:

§ 668.5 Written arrangements to provide educational programs.

(a) *Written arrangements between eligible institutions.* (1) Except as provided in paragraph (a)(2) of this section, if an eligible institution enters into a written arrangement with another eligible institution, or with a consortium of eligible institutions, under which the other eligible institution or consortium provides part of the educational program to students enrolled in the first institution, the Secretary considers that educational program to be an eligible program if the educational program offered by the institution that grants the degree, certificate, or other recognized educational credential otherwise satisfies the requirements of § 668.8.

(2) If the written arrangement is between two or more eligible institutions that are owned or controlled by the same individual, partnership, or corporation, the Secretary considers the educational program to be an eligible program if the educational program offered by the institution that grants the degree, certificate, or other recognized educational credential otherwise satisfies the requirements of § 668.8.

* * * * *

(c) *Written arrangements between an eligible institution and an ineligible institution or organization.* Except as provided in paragraph (d) of this section, if an eligible institution enters into a written arrangement with an institution or organization that is not an eligible institution under which the ineligible institution or organization provides part of the educational program of students enrolled in the eligible institution, the Secretary considers that educational program to be an eligible program if—

(1) The ineligible institution or organization—

(i) Demonstrates experience in the delivery and assessment of the program or portion of the program they will be contracted to deliver under the provisions of the written arrangement and that the program has been effective in meeting the stated learning objectives; and

(ii) Has not—

(A) Had its eligibility to participate in the title IV, HEA programs terminated by the Secretary;

(B) Voluntarily withdrawn from participation in the title IV, HEA programs under a termination, show-cause, suspension, or similar type proceeding initiated by the institution's State licensing agency, accrediting agency, or guarantor, or by the Secretary;

(C) Had its certification to participate in the title IV, HEA programs revoked by the Secretary;

(D) Had its application for recertification to participate in the title IV, HEA programs denied by the Secretary; or

(E) Had its application for certification to participate in the title IV, HEA programs denied by the Secretary;

(2) The educational program offered by the institution that grants the degree, certificate, or other recognized educational credential otherwise satisfies the requirements of § 668.8; and

(3)(i) The ineligible institution or organization provides 25 percent or less

of the educational program, including in accordance with § 602.22(b)(4); or

(ii)(A) The ineligible institution or organization provides more than 25 percent but less than 50 percent of the educational program, in accordance with § 602.22(a)(1)(ii)(J);

(B) The eligible institution and the ineligible institution or organization are not owned or controlled by the same individual, partnership, or corporation; and

(C) The eligible institution's accrediting agency or, if the institution is a public postsecondary vocational educational institution, the State agency listed in the **Federal Register** in accordance with 34 CFR part 603 has specifically determined that the institution's arrangement meets the agency's standards for executing a written arrangement with an ineligible institution or organization.

(d) *Administration of title IV, HEA programs.* (1) If an institution enters into a written arrangement as described in paragraph (a), (b), or (c) of this section, or provides coursework as provided in paragraph (h)(2) of this section, except as provided in paragraph (d)(2) of this section, the institution at which the student is enrolled as a regular student must determine the student's eligibility for the title IV, HEA program funds, and must calculate and disburse those funds to that student.

* * * * *

(f) *Workforce responsiveness.* Nothing in this or any other section prohibits an institution utilizing written arrangements from aligning or modifying its curriculum or academic requirements in order to meet the recommendations or requirements of industry advisory boards that include employers who hire program graduates, widely recognized industry standards and organizations, or industry-recognized credentialing bodies, including making governance or decision-making changes as an alternative to allowing or requiring faculty control or approval or integrating industry-recognized credentials into existing degree programs.

(g) *Calculation of percentage of program.* When determining the percentage of the program that is provided by an ineligible institution or organization under paragraph (c) of this section, the institution divides the number of semester, trimester, or quarter credit hours, clock hours, or the equivalent that are provided by the ineligible organization or organizations by the total number of semester, trimester, or quarter credit hours, clock hours, or the equivalent required for completion of the program. A course is provided by an ineligible institution or organization if the organization with which the institution has a written arrangement has authority over the design, administration, or instruction in the course, including, but not limited to—

(1) Establishing the requirements for successful completion of the course;

(2) Delivering instruction in the course; or

(3) Assessing student learning.

(h) *Non-applicability to other interactions with outside entities.* Written arrangements are not necessary for, and the limitations in this section do not apply to—

(1) Acceptance by the institution of transfer credits or use of prior learning assessment or other non-traditional methods of providing academic credit; or

(2) The internship or externship portion of a program if the internship or externship is governed by accrediting agency standards that require the oversight and supervision of the institution, where the institution is responsible for the internship or externship and students are monitored by qualified institutional personnel.

* * * * *

■ 14. Section 668.8 is amended by revising paragraphs (e)(1)(iii), (k)(2), and (l) to read as follows:

§ 668.8 Eligible program.

* * * * *

(e) * * * (1) * * *

(iii) The institution can demonstrate reasonable program length, in accordance with 34 CFR 668.14(b)(26); and

* * * * *

(k) * * *

(2) Each course within the program is acceptable for full credit toward completion of an eligible program offered by the institution that provides an associate degree, bachelor's degree, professional degree, or equivalent degree as determined by the Secretary, provided that—

(i) The eligible program requires at least two academic years of study; and

(ii) The institution can demonstrate that at least one student was enrolled in the program during the current or most recently completed award year.

(l) *Formula.* For purposes of determining whether a program described in paragraph (h) of this section satisfies the requirements contained in paragraph (c)(3) or (d) of this section, and the number of credit hours in that educational program for the purposes of the title IV, HEA programs—

(1) A semester or trimester hour must include at least 30 clock hours of instruction; and

(2) A quarter hour must include at least 20 clock hours of instruction.

* * * * *

■ 15. Section 668.10 is revised to read as follows:

§ 668.10 Direct assessment programs.

(a)(1) A direct assessment program is a program that, in lieu of credit or clock hours as the measure of student learning, utilizes direct assessment of student learning, or recognizes the direct assessment of student learning by others. The assessment must be consistent with the accreditation of the institution or program utilizing the results of the assessment.

(2) Direct assessment of student learning means a measure of a student's knowledge, skills, and abilities designed to provide evidence of the student's proficiency in the relevant subject area.

(3) An institution must establish a methodology to reasonably equate each module in the direct assessment program to either credit hours or clock hours. This methodology must be consistent with the requirements of the institution's accrediting agency or State approval agency.

(4) All regulatory requirements in this chapter that refer to credit or clock hours as a measurement apply to direct assessment programs according to whether they use credit or clock hour equivalencies, respectively.

(5) A direct assessment program that is not consistent with the requirements of the institution's accrediting agency or State approval agency is not an eligible program as provided under § 668.8. In order for any direct assessment program to qualify as an eligible program, the accrediting agency must have—

(i) Evaluated the program based on the agency's accreditation standards and criteria, and included it in the institution's grant of accreditation or preaccreditation; and

(ii) Reviewed and approved the institution's claim of each direct assessment program's equivalence in terms of credit or clock hours.

(b)(1) An institution that wishes to offer a direct assessment program must apply to the Secretary to have its direct assessment program or programs determined to be eligible programs for title IV, HEA program purposes. Following the Secretary's initial approval of a direct assessment program, additional direct assessment programs at an equivalent or lower academic level may be determined to be

eligible without further approvals from the Secretary except as required by § 600.10(c)(1)(iii), § 600.20(c)(1), or § 600.21(a), as applicable, if such programs are consistent with the institution's accreditation or its State approval agency.

(2) The institution's direct assessment application must provide information satisfactory to the Secretary that includes—

(i) A description of the educational program, including the educational credential offered (degree level or certificate) and the field of study;

(ii) A description of how the direct assessment program is structured, including information about how and when the institution determines on an individual basis what each student enrolled in the program needs to learn and how the institution excludes from consideration of a student's eligibility for title IV, HEA program funds any credits or competencies earned on the basis of prior learning;

(iii) A description of how learning is assessed and how the institution assists students in gaining the knowledge needed to pass the assessments;

(iv) The number of semester, trimester, or quarter credit hours, or clock hours, that are equivalent to the amount of student learning being directly assessed for the certificate or degree;

(v) The methodology the institution uses to determine the number of credit or clock hours to which the program or programs are equivalent; and

(vi) Documentation from the institution's accrediting agency or State approval agency indicating that the agency has evaluated the institution's offering of direct assessment program(s) and has included the program(s) in the institution's grant of accreditation and approval documentation from the accrediting agency or State approval agency indicating agreement with the institutions methodology for determining the direct assessment program's equivalence in terms of credit or clock hours.

(vii) Notwithstanding paragraphs (a) and (b) of this section, no program offered by a foreign institution that involves direct assessment will be considered to be an eligible program under § 668.8.

(c) A direct assessment program may use learning resources (*e.g.,* courses or portions of courses) that are provided by entities other than the institution providing the direct assessment program without regard to the limitations on contracting for part of an educational program in § 668.5(c)(3).

(d) Title IV, HEA program funds may be used to support instruction provided, or overseen, by the institution, except for the portion of the program that the student is awarded based on prior learning.

(e) Unless an institution has received initial approval from the Secretary to offer direct assessment programs, and the institution's offering of direct assessment coursework is consistent with the institution's accreditation and State authorization, if applicable, title IV, HEA program funds may not be used for—

(1) The course of study described in § 668.32(a)(1)(ii) and (iii) and (a)(2)(i)(B), if offered using direct assessment; or

(2) Remedial coursework described in § 668.20, if offered using direct assessment.

(f) Student progress in a direct assessment program may be measured using a combination of—

(1) Credit hours and credit hour equivalencies; or

(2) Clock hours and clock hour equivalencies.

■ 16. Section 668.13 is amended by:

■ a. Redesignating paragraph (a)(1) as paragraph (a)(1)(i).

■ b. Adding paragraph (a)(1)(ii).

■ c. Adding paragraph (b)(3).

■ d. Removing the word ''or'' at the end of paragraph (c)(1)(i)(D).

■ e. Removing the period and adding in its place ''; or'', at the end of paragraph (c)(1)(i)(E).

■ f. Adding paragraph (c)(1)(i)(F).

■ g. Removing the word ''facsimile'' and adding in its place the word ''electronic'' in paragraphs (d)(3)(i) and (d)(3)(ii)(C).

■ h. Revising paragraph (d)(3)(iii).

■ i. Removing paragraph (d)(3)(iv).

■ j. Revising paragraph (d)(5).

The additions and revisions read as follows:

§ 668.13 Certification procedures.

(a) * * * (1)(i) * * *

(ii) On application from the institution, the Secretary certifies a location of an institution that meets the requirements of 34 CFR 668.13(a)(1)(i) as a branch if it satisfies the definition of ''branch'' in 34 CFR 600.2.

* * * * *

(b) * * *

(3) In the event that the Secretary does not make a determination to grant or deny certification within 12 months of the expiration of its current period of participation, the institution will automatically be granted renewal of certification, which may be provisional.

(c) * * * (1)(i) * * *

(F) The institution is a participating institution that has been provisionally recertified under the automatic recertification requirement in paragraph (b)(3) of this section.

* * * * *

(d) * * *

(3) * * *

(iii) Documents filed by electronic transmission must be transmitted to the Secretary in accordance with instructions provided by the Secretary in the notice of revocation.

* * * * *

(5) The mailing date of a notice of revocation or a request for reconsideration of a revocation is the date evidenced on the original receipt of mailing from the U.S. Postal Service or another service that provides delivery confirmation for that document.

* * * * *

■ 17. Section 668.14 is amended by revising paragraphs (b)(10), (26), and (31) to read as follows:

§ 668.14 Program participation agreement.

* * * * *

(b) * * *

(10) In the case of an institution that advertises job placement rates as a means of attracting students to enroll in the institution, the institution will make available to prospective students, at or before the time that those students apply for enrollment—

(i) The most recent available data concerning employment statistics, graduation statistics, and any other information necessary to substantiate the truthfulness of the advertisements; and

(ii) Relevant State licensing requirements of the State in which the institution is located for any job for which the course of instruction is designed to prepare such prospective students, as provided in 34 CFR 668.43(a)(5)(v);

* * * * *

(26) If an educational program offered by the institution is required to prepare a student for gainful employment in a recognized occupation, the institution must—

(i) Demonstrate a reasonable relationship between the length of the program and entry level requirements for the recognized occupation for which the program prepares the student. The Secretary considers the relationship to be reasonable if the number of clock hours provided in the program does not exceed the greater of—

(A) One hundred and fifty percent of the minimum number of clock hours required for training in the recognized occupation for which the program prepares the student, as established by the State in which the institution is

located, if the State has established such a requirement, or as established by any Federal agency; or

(B) The minimum number of clock hours required for training in the recognized occupation for which the program prepares the student as established in a State adjacent to the State in which the institution is located; and

(ii) Establish the need for the training for the student to obtain employment in the recognized occupation for which the program prepares the student.

* * * * *

(31) The institution will submit a teach-out plan to its accrediting agency in compliance with 34 CFR 602.24(c) and the standards of the institution's accrediting agency. The institution will update its teach-out plan upon the occurrence of any of the following events:

* * * * *

■ 18. Section 668.15 is amended by:

■ a. Revising the section heading; and

■ b. Adding the phrase ''after a change in ownership or control'' after the phrase ''any Title IV, HEA program'' in paragraph (a).

The revision reads as follows:

§ 668.15 Factors of financial responsibility for changes in ownership or control.

* * * * *

■ 19. Section 668.22 is amended by:

■ a. Removing the word ''or'' at the end of paragraph (a)(2)(i)(B).

■ b. Revising paragraph (a)(2)(i)(C).

■ c. Adding paragraph (a)(2)(i)(D).

■ d. Revising paragraph (a)(2)(ii).

■ e. Removing the word ''nonterm'' and adding in its place the word ''non-term'' in paragraph (a)(2)(iii)(B).

■ f. Revising paragraph (a)(3).

■ g. Removing the citation ''§ 668.164(g)'' at the end of paragraph (a)(5) and adding in its place the citation ''§ 668.164(i)''.

■ h. Revising paragraphs (a)(6)(ii), (d)(1)(vii), and (i).

■ i. Removing the citation ''§ 668.164(g)'' in paragraph (l)(1) and adding in its place the citation ''§ 668.164(j)''.

■ j. Removing the citation ''§ 668.164(g)(2)'' in paragraph (l)(4) and adding in its place the citation ''§ 668.164(j)(2)''.

■ k. Adding the phrase ''the program uses a standard term or nonstandard-term academic calendar, is not a subscription-based program, and'' after the word ''if'' in paragraph (l)(6).

■ l. Revising paragraph (l)(7).

■ m. Adding paragraph (l)(9).

The additions and revisions read as follows:

§ 668.22 Treatment of title IV funds when a student withdraws.

(a) * * *

(2)(i) * * *

(C) For a student in a standard or nonstandard-term program, excluding a subscription-based program, the student is not scheduled to begin another course within a payment period or period of enrollment for more than 45 calendar days after the end of the module the student ceased attending, unless the student is on approved leave of absence, as defined in paragraph (d) of this section; or

(D) For a student in a non-term program or a subscription-based program, the student is unable to resume attendance within a payment period or period of enrollment for more than 60 calendar days after ceasing attendance.

(ii)(A) Notwithstanding paragraph (a)(2)(i) of this section—

(*1*) A student who completes all the requirements for graduation from his or her program before completing the days or hours in the period that he or she was scheduled to complete is not considered to have withdrawn;

(*2*) In a program offered in modules, a student is not considered to have withdrawn if the student completes—

(*i*) One module that includes 50 percent or more of the number of days in the payment period;

(*ii*) A combination of modules that when combined contain 50 percent or more of the number of days in the payment period; or

(*iii*) Coursework equal to or greater than the coursework required for the institution's definition of a half-time student under 34 CFR 668.2 for the payment period;

(*3*) For a payment period or period of enrollment in which courses in the program are offered in modules—

(*i*) A student is not considered to have withdrawn if the institution obtains written confirmation, including electronic confirmation, from the student at the time that would have been a withdrawal of the date that he or she will attend a module that begins later in the same payment period or period of enrollment; and

(*ii*) For standard and nonstandard-term programs, excluding subscription-based programs, that module begins no later than 45 calendar days after the end of the module the student ceased attending;

(*4*) For a subscription-based program, a student is not considered to have withdrawn if the institution obtains written confirmation from the student at the time that would have been a withdrawal of the date that he or she will resume attendance, and that date occurs within the same payment period or period of enrollment and is no later than 60 calendar days after the student ceased attendance; and

(*5*) For a non-term program, a student is not considered to have withdrawn if the institution obtains written confirmation from the student at the time that would have been a withdrawal of the date that he or she will resume attendance, and that date is no later than 60 calendar days after the student ceased attendance.

(B) If an institution has obtained the written confirmation of future attendance in accordance with paragraph (a)(2)(ii)(A) of this section—

(*1*) A student may change the date of return that begins later in the same payment period or period of enrollment, provided that the student does so in writing prior to the return date that he or she had previously confirmed;

(*2*) For standard and nonstandard-term programs, excluding subscription-based programs the later module that he or she will attend begins no later than 45 calendar days after the end of the module the student ceased attending; and

(*3*) For non-term and subscription-based programs, the student's program permits the student to resume attendance no later than 60 calendar days after the student ceased attendance.

(C) If an institution obtains written confirmation of future attendance in accordance with paragraph (a)(2)(ii)(A) and, if applicable, (a)(2)(ii)(B) of this section, but the student does not return as scheduled—

(*1*) The student is considered to have withdrawn from the payment period or period of enrollment; and

(*2*) The student's withdrawal date and the total number of calendar days in the payment period or period of enrollment would be the withdrawal date and total number of calendar days that would have applied if the student had not provided written confirmation of a future date of attendance in accordance with paragraph (a)(2)(ii)(A) of this section.

* * * * *

(3) For purposes of this section, ''title IV grant or loan assistance'' includes only assistance from the Direct Loan, Federal Pell Grant, Iraq and Afghanistan Service Grant, TEACH Grant, and FSEOG programs, not including the non-Federal share of FSEOG awards if an institution meets its FSEOG matching share by the individual recipient method or the aggregate method.

* * * * *

(6) * * *

(ii)(A) If outstanding charges exist on the student's account, the institution may credit the student's account up to the amount of outstanding charges in accordance with § 668.164(c) with all or a portion of any—

(*1*) Grant funds that make up the post-withdrawal disbursement; and

(*2*) Loan funds that make up the post-withdrawal disbursement only after obtaining confirmation from the student or parent in the case of a parent PLUS loan, that they still wish to have the loan funds disbursed in accordance with paragraph (a)(6)(iii) of this section.

* * * * *

(d)(1) * * *

(vii) Except for a clock hour or non-term credit hour program, or a subscription-based program, upon the student's return from the leave of absence, the student is permitted to complete the coursework he or she began prior to the leave of absence; and

* * * * *

(i) *Order of return of title IV funds*—

(1) *Loans.* Unearned funds returned by the institution or the student, as appropriate, in accordance with paragraph (g) or (h) of this section respectively, must be credited to outstanding balances on title IV loans made to the student or on behalf of the student for the payment period or period of enrollment for which a return of funds is required. Those funds must be credited to outstanding balances for the payment period or period of enrollment for which a return of funds is required in the following order:

(i) Unsubsidized Federal Direct Stafford loans.

(ii) Subsidized Federal Direct Stafford loans.

(iii) Federal Direct PLUS received on behalf of the student.

(2) *Remaining funds.* If unearned funds remain to be returned after repayment of all outstanding loan amounts, the remaining excess must be credited to any amount awarded for the payment period or period of enrollment for which a return of funds is required in the following order:

(i) Federal Pell Grants.

(ii) Iraq and Afghanistan Service Grants.

(iii) FSEOG Program aid.

(iv) TEACH Grants.

* * * * *

(l) * * *

(7)(i) ''Academic attendance'' and ''attendance at an academically-related activity'' must include academic engagement as defined under 34 CFR 600.2.

(ii) A determination of ''academic attendance'' or ''attendance at an academically-related activity'' must be made by the institution; a student's certification of attendance that is not supported by institutional documentation is not acceptable.

* * * * *

(9) A student in a program offered in modules is scheduled to complete the days in a module if the student's coursework in that module was used to determine the amount of the student's eligibility for title IV, HEA funds for the payment period or period of enrollment.

* * * * *

§ 668.28 [Amended]

■ 20. Section 668.28 is amended by removing and reserving paragraph (b).

■ 21. Section 668.34 is amended by:

■ a. Revising paragraph (a)(5).

■ b. Adding the phrase ''or expressed in calendar time'' after the phrase ''credit hours'' in paragraph (1) in the definition for ''maximum timeframe'' in paragraph (b).

The revision reads as follows:

§ 668.34 Satisfactory academic progress.

(a) * * *

(1) * * *

(5) The policy specifies—

(i) For all programs, the maximum timeframe as defined in paragraph (b) of this section; and

(ii) For a credit hour program using standard or nonstandard terms that is not a subscription-based program, the pace, measured at each evaluation, at which a student must progress through his or her educational program to ensure that the student will complete the program within the maximum timeframe, calculated by either dividing the cumulative number of hours the student has successfully completed by the cumulative number of hours the student has attempted or by determining the number of hours that the student should have completed by the evaluation point in order to complete the program within the maximum timeframe. In making this calculation, the institution is not required to include remedial courses.

* * * * *

(b) * * *

Maximum timeframe. Maximum timeframe means—

(1) For an undergraduate program measured in credit hours, a period that is no longer than 150 percent of the published length of the educational program, as measured in credit hours, or expressed in calendar time;

* * * * *

§ 668.111 [Amended]

■ 22. Section 668.111 is amended by adding the phrase ''issuance by the Department of and'' after the phrase ''establishes rules governing the'' in the first sentence of paragraph (a).

■ 23. Section 668.113 is amended by:

■ a. Replacing the word ''shall'' with the word ''must'' in both instances it is used in paragraph (c) introductory language.

■ b. Redesignating paragraphs (d)(1) and (2) as paragraphs (d)(2) and (3).

■ c. Adding new paragraph (d)(1).

The addition reads as follows:

§ 668.113 Request for review.

* * * * *

(d)(1) If the final audit determination or final program review determination in paragraph (a) of this section results from the institution's classification of a course or program as distance education, or the institution's assignment of credit hours, the Secretary relies upon the requirements of the institution's accrediting agency or State approval agency regarding qualifications for instruction and whether the amount of work associated with the institution's credit hours is consistent with commonly accepted practice in postsecondary education, in applying the definitions of ''distance education'' and ''credit hour'' in 34 CFR 600.2.

* * * * *

■ 24. Section 668.164 is amended by:

■ a. Adding the phrase ''that is not a subscription-based program'' after the phrase ''equal in length'' in paragraphs (i)(1)(i) and (i)(1)(ii).

■ b. Removing the word ''or'' at the end of paragraph (i)(1)(i).

■ c. Removing the period and adding in its place the punctuation and the word ''; or'' in paragraph (i)(1)(ii)(B).

■ d. Adding paragraph (i)(1)(iii).

The addition reads as follows:

§ 668.164 Disbursing funds.

* * * * *

(i)(1) * * *

(iii) If the student is enrolled in a subscription-based program, the later of—

(A) Ten days before the first day of classes of a payment period; or

(B) The date the student completed the cumulative number of credit hours associated with the student's enrollment status in all prior terms that the student attended under the definition of a subscription-based program in 34 CFR 668.2.

* * * * *

■ 25. Section 668.171 is amended by:

■ a. Removing the word ''or'' at the end of paragraph (e)(1).

■ b. Removing the period and adding in its place the punctuation and the word ''; or'', in paragraph (e)(2).

■ c. Adding paragraph (e)(3).

The additions reads as follows:

§ 668.171 General.

* * * * *

(e) * * *

(3) Deny the institution's application for certification or recertification to participate in the title IV, HEA programs.

* * * * *

■ 26. Section 668.174 is amended by:

■ a. Revising paragraph (b)(1)(i) introductory text.

■ b. Adding the phrase ''ownership or'' after the word ''substantial'' in and removing the word ''or'' at the end of, paragraph (b)(1)(i)(A).

■ c. Redesignating paragraph (b)(1)(i)(B) as paragraph (b)(1)(i)(C).

■ d. Adding a new paragraph (b)(1)(i)(B).

■ e. Adding the word ''entity'' and a comma after the phrase ''That person,'' in paragraph (b)(1)(ii).

■ f. Adding the phrase ''or entity'' after the word ''person'' in paragraphs (b)(2)(i) and (ii).

■ g. Adding the word ''entity'' and a comma afterward after the phrase ''owes the liability by that'' in paragraph (b)(2)(ii)(A).

■ h. Adding the word ''entity'' and a comma afterward after the phrase ''owes the liability that the'' in paragraph (b)(2)(ii)(B).

■ i. Adding the phrase ''or entity'' after the phrase ''The person'' in paragraphs (b)(2)(iv)(A) and (B).

■ j. Adding the phrase ''or entity'' after both uses of the word ''person'' in paragraph (c)(3) introductory language.

The revisions and additions read as follows:

§ 668.174 Past performance.

* * * * *

(b) *Past performance of persons or entities affiliated with an institution.*

(1)(i) Except as provided in paragraph (b)(2) of this section, an institution is not financially responsible if a person or entity who exercises substantial ownership or control over the institution, as described under 34 CFR 600.31, or any member or members of that person's family alone or together—

(A) * * *

(B) Exercised substantial ownership or control over another institution that closed without a viable teach-out plan or agreement approved by the institution's accrediting agency and faithfully executed by the institution; or

* * * * *

§ 668.175 [Amended]

■ 27. Section 668.175 is amended by deleting the phrases ''or facsimile'' and ''or by facsimile transmission'' in paragraph (d)(3)(i).

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Part III

Department of the Treasury

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Parts 4, 5, 7, et al.

Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages; Final Rule

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Parts 4, 5, 7, and 19

[Docket No. TTB–2018–0007; T.D. TTB–158; Ref: Notice Nos. 176 and 176A]

RIN 1513–AB54

Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Final rule; Treasury decision.

SUMMARY: The Alcohol and Tobacco Tax and Trade Bureau (TTB) is amending certain of its regulations governing the labeling and advertising of wine, distilled spirits, and malt beverages to address comments it received in response to a notice of proposed rulemaking, Notice No. 176, published on November 26, 2018. In this document, TTB is finalizing certain liberalizing and clarifying changes that were proposed, and that could be implemented quickly and provide industry members greater flexibility. TTB is also identifying certain other proposals that will not be adopted, including the proposal to define an ''oak barrel'' for purposes of aging distilled spirits, the proposal to require that statements of composition for distilled spirits specialty products list components in ''intermediate'' products and list distilled spirits and wines used in distilled spirits specialty products in order of predominance, and the proposal to adopt new policies on the use of cross-commodity terms. TTB continues to consider the remaining issues raised by comments it received that are not addressed in this document. TTB plans to address those issues in subsequent rulemaking documents. The regulatory amendments in this document will not require industry members to make changes to alcohol beverage labels or advertisements and instead will afford them additional flexibility to make certain changes if they wish.

DATES: This final rule is effective May 4, 2020.

FOR FURTHER INFORMATION CONTACT: Christopher M. Thiemann or Kara T. Fontaine, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW, Box 12, Washington, DC 20005; phone 202–453–2265.

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I. Background

A. TTB's Statutory Authority

Sections 105(e) and 105(f) of the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. 205(e) and 205(f), set forth standards for the regulation of the labeling and advertising of wine, distilled spirits, and malt beverages (referred to elsewhere in this document as ''alcohol beverages'').

Chapter 51 of the Internal Revenue Code of 1986 (IRC), (26 U.S.C. 5001 *et seq.*), sets forth, among other things, certain provisions relating to the taxation of, and production, marking, and labeling requirements applicable to, distilled spirits, wine, and beer.

The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers the FAA Act and IRC pursuant to section 1111(d) of the Homeland Security Act of 2002, codified at 6 U.S.C. 531(d). The Secretary of the Treasury (the Secretary) has delegated to the TTB Administrator various functions and duties in the administration and enforcement of these laws through Treasury Department Order 120–01. For a more in-depth discussion of TTB's authority under the FAA Act and the IRC regarding labeling, see Notice No. 176.

B. Notice of Proposed Rulemaking on Modernization of the Labeling and Advertising Regulations for Alcohol Beverages

On November 26, 2018, TTB published in the **Federal Register** Notice No. 176 (83 FR 60562), ''Modernization of the Labeling and Advertising Regulations for Wine, Distilled Spirits, and Malt Beverages.'' The principal goals of that proposed rule were to:

- Make the regulations governing the labeling of alcohol beverages easier to understand and easier to navigate. This included clarifying requirements, as well as reorganizing the regulations in 27 CFR parts 4, 5, and 7 and consolidating TTB's alcohol beverage advertising regulations in a new part, 27 CFR part 14.
- Incorporate into the regulations TTB guidance documents and current TTB policy, as well as changes in labeling standards that have come about through statutory changes and international agreements.
- Provide notice and the opportunity to comment on potential new labeling policies and standards, and on certain internal policies that had developed through the day-to-day practical application of the regulations to the approximately 200,000 label applications that TTB receives each year.

The comment period for Notice No. 176 originally closed on March 26, 2019, but was reopened and extended at the request of commenters (see Notice No. 176A, 84 FR 9990). The extended comment period ended June 26, 2019. TTB received and posted 1,143 comments in response to Notice No. 176. Commenters included trade associations, consumer interest groups, foreign entities, a Federally-recognized tribe, State legislators and members of Congress, industry members and related companies, and members of the public.

TTB is also taking into consideration for purposes of this rulemaking earlier comments that were submitted to the Department of the Treasury in response to a Request for Information (RFI) published in the **Federal Register** (82 FR 27212) on June 14, 2017. The RFI invited members of the public to submit views and recommendations for Treasury Department regulations that could be eliminated, modified, or streamlined, in order to reduce burdens. The comment period for the RFI closed on October 31, 2017.

Eight comments on the FAA Act labeling regulations, which included 28 specific recommendations, were submitted in response to the RFI. For ease of reference, TTB has posted these comments in the docket for this rulemaking. TTB is considering all of the relevant recommendations submitted in response to the RFI either as comments to Notice No. 176 or as suggestions for separate agency action, as appropriate.

C. Scope of This Final Rule

The comments TTB received in response to Notice No. 176 provided thorough, substantive, and thoughtful information on a diverse array of issues. Determining the appropriate course of action on all those issues will require further consideration by the Bureau. However, there are some issues that TTB has decided to address now, while

it considers the remaining issues. In this final rule, TTB is amending certain regulations, identifying certain proposals it will not move forward with, and identifying certain other issues raised by commenters that TTB has determined are outside the scope of this rulemaking or otherwise require separate, further rulemaking.

1. Liberalizing and Clarifying Changes That Are Being Implemented in This Final Rule

The issues that TTB has decided to integrate into the regulations through this final rule were well supported by commenters, can be implemented relatively quickly, and would either give more flexibility to industry members or help industry members understand existing requirements, while not requiring any current labels or advertisements to be changed. Liberalizing measures that TTB is finalizing in this document include: Implementing an increase (to plus or minus 0.3 percentage points) in the tolerance applicable to the alcohol content statements on distilled spirits labels, removing the current prohibition against age statements on several classes and types of distilled spirits, removing outdated prohibitions against the use of the term ''strong'' and other indications of alcohol strength on malt beverage labels, and removing a limitation on the way distilled spirits producers may count the distillations when making optional ''multiple distillation'' claims on their labels. See Section VI below for a description of all of the changes, both liberalizing and clarifying, that TTB is incorporating into its regulations.

Although TTB received positive comments with regard to its proposed reorganization and recodification of 27 CFR parts 4, 5, and 7, and the establishment of a separate part 14 to address advertising, TTB is not incorporating those organizational changes in this document, but intends to incorporate them at a later date. At this stage, TTB is only addressing a small subset of the issues raised by commenters in response to Notice No. 176, and is therefore incorporating the amendments into its current regulatory organization. The reorganization will be incorporated at a later date, as more issues are resolved.

2. Proposed Changes That TTB Will Not Adopt

Some changes proposed in Notice No. 176 were opposed by commenters who provided substantive statements about the proposed policies requiring changes to existing labels, requiring industry members to incur substantial costs, or not having the intended result within the purpose of the FAA Act. As a result, TTB is not finalizing certain of the proposals in Notice No. 176. One such proposal is TTB's proposed definition of an ''oak barrel'' for purposes of aging distilled spirits. TTB received nearly 700 comments on this issue, almost all of which raised specific concerns in opposition to the proposed definition.

In addition to not adopting its proposed definition of an ''oak barrel,'' TTB has decided not to finalize:

- A proposed restriction on the use of certain types of cross-commodity terms (for example, imposing restrictions on the use of various types of distilled spirits terms, including homophones of distilled spirits classes on wine or malt beverage labels).
- Proposed changes to statements of composition for distilled spirits labels, including changes that would have required disclosure of components of intermediate products, required distilled spirits and wines used in a finished product to be listed in order of predominance, and removed the flexibility to use an abbreviated statement of composition for cocktails.
- A policy that would have limited ''age'' statements on distilled spirits labels to include only the time the product is aged in the first barrel, and not aging that occurs in subsequent barrels.
- A proposal that would have required that whisky that meets the standards for a specific type designation be labeled with that type designation.

These proposals are described more fully in Section II of this document.

TTB also is not finalizing its proposal to incorporate in its regulations the jurisdictional interaction between U.S. Food and Drug Administration (FDA) determinations that a product is ''adulterated'' and TTB's position that such products are ''mislabeled.'' Commenters appeared to misunderstand this proposal, and believed that TTB was proposing to take on a new role of interpreting FDA requirements. TTB is explaining its proposals and clarifying its position with regard to its policy position in this document, but is not moving forward with finalizing the proposed text.

3. Proposals That Will Be Considered for Further Rulemaking

TTB recognizes that industry members have an interest in regulatory certainty, particularly with regard to policies that may affect the labeling of their products. Some commenters have asked that TTB complete its rulemaking without multiple final rules. TTB has weighed the benefit of waiting until it has completed review of all of the issues raised by commenters in response to Notice No. 176 against the potential benefit of providing some more immediate flexibility in identified areas and certainty in others. TTB has decided to promulgate a final rule for a subset of the proposals in Notice No. 176. TTB plans to address the remaining proposals from Notice No. 176 in subsequent **Federal Register** publications, whether by finalizing other proposed changes from Notice No. 176, announcing that such changes will not be adopted, or initiating further rulemaking proceedings on certain issues to obtain the benefit of further public comment. The fact that TTB will address those issues in future rulemaking documents rather than in this final rule does not in any way indicate whether the proposed changes will or will not ultimately be adopted.

II. Discussion of Specific Comments Received and TTB Responses

For ease of navigation, TTB is setting forth the issues and comments it is addressing in this document in the following order: Issues affecting multiple commodities, wine-related issues, distilled spirits-related issues, and malt beverage-related issues. Within each part, the order reflects generally the order the sections appear in the regulations, which will aid readers in comparing the explanations in the preamble with the subsequent section setting forth the regulatory text. TTB is not adopting in this document the reorganization of labeling regulations proposed by Notice No.176, but may at a later date.

A. Issues Affecting Multiple Commodities

1. Incorporating a Definition of ''Certificate of Label Approval (COLA)''

In Notice No. 176, TTB proposed to add in parts 4, 5, and 7 a definition of ''Certificate of Label Approval.'' Under the proposal, the certificate of label approval is defined as a certificate issued on TTB Form 5100.31 that authorizes the bottling of wine, distilled spirits, and malt beverages, or the removal of bottled wine, distilled spirits, and malt beverages from customs custody for introduction into commerce, as long as the product bears labels identical to the labels appearing on the face of the certificate, or labels with changes authorized by TTB on the certificate or otherwise. The proposed definition was largely consistent with the definition included in existing § 13.11 and recognizes that TTB authorizes certain revisions to an

approved label without requiring the certificate holder to obtain a new COLA. These allowable changes are set forth in Section V of the COLA Form, ''Allowable Revisions to Approved Labels.'' However, the proposed definition also specifically recognizes that TTB may authorize revisions in other ways, such as through guidance issued on the TTB website.

TTB received two comments in response to the proposed definition of ''certificates of label approval.'' The National Association of Beverage Importers (NABI) supported the proposed definition but requested that TTB clarify what is meant by ''on the certificate or otherwise,'' specifically whether the scope of the phrase ''or otherwise'' includes an authorized ''use up'' of a label. The Distilled Spirits Council of the United States (DISCUS) also supported the proposed definition.

TTB Response

TTB is incorporating the definition of ''certificate of label approval'' as proposed into existing §§ 4.10, 5.11, and 7.10, with minor grammatical changes and clarifying language. With regard to the phrase ''changes authorized by TTB on the certificate or otherwise,'' TTB is intending to reference methods of authorizing allowable changes other than listing those allowable changes on the COLA form. For example, TTB may announce additional allowable changes through public guidance published on its website at *www.ttb.gov.* In this way, TTB is able to authorize additional allowable changes, and thereby provide more flexibility to industry members, more quickly while it is in the process of updating the listing of ''allowable revisions'' that appears as supplemental information along with the instructions for the approved form. Accordingly, TTB has added a parenthetical to the end of the definition to clarify that the phrase ''changes authorized by TTB on the certificate or otherwise'' includes a TTB authorization of allowable changes through the issuance of public guidance available on the TTB website at *www.ttb.gov.*

2. Compliance With Federal and State Requirements, Including FDA Requirements

In Notice No. 176, TTB proposed new regulatory text that specifically stated that compliance with the requirements in parts 4, 5, and 7 relating to the labeling and bottling of alcohol beverages does not relieve industry members from responsibility for complying with other applicable Federal and State requirements. Proposed §§ 4.3(d), 5.3(d), and 7.3(d) also set out for the first time in the regulations TTB's position that to be labeled in accordance with the regulations in these parts, the wine, distilled spirit, or malt beverage may not be adulterated within the meaning of the Federal Food, Drug, and Cosmetic Act.

The proposed language was intended to codify for the first time TTB's longstanding position on these issues, as reflected in current TTB label and formula forms, and recent and older public guidance documents. The proposed regulatory language was also consistent with the 1987 Memorandum of Understanding (MOU) between FDA and TTB's predecessor agency, ATF, which remains in effect between FDA and TTB. See 52 FR 45502. The MOU specifically refers to ATF's authority over ''voluntary recalls of alcoholic beverages that are adulterated under FDA law *or mislabeled under the FAA Act by reason of being adulterated.*'' [Emphasis added.]

The MOU thus reflects the longstanding position of TTB and its predecessors that if FDA has determined that an alcohol beverage product is adulterated, then the product is mislabeled within the meaning of the FAA Act, even if the bottler or importer of the product in question has obtained a COLA or formula approval from TTB. See Industry Circular 2010–8, dated November 23, 2010, entitled ''Alcohol Beverages Containing Added Caffeine.'' Subject to the jurisdictional requirements of the FAA Act, mislabeled distilled spirits, wines, and malt beverages, including such adulterated products, may not be sold or shipped, delivered for sale or shipment, or otherwise introduced or received in interstate or foreign commerce, or removed from customs custody for consumption, by a producer, importer, or wholesaler, or other industry member subject to 27 U.S.C. 205(e).

Furthermore, proposed §§ 4.9(b), 5.9(b), and 7.9(b) provided that it remains the responsibility of the industry member to ensure that any ingredient used in the production of alcohol beverages complies fully with all applicable FDA regulations pertaining to the safety of food ingredients and additives and that TTB may at any time request documentation to establish such compliance. In addition, proposed §§ 4.9(c), 5.9(c), and 7.9(c) provided that it remains the responsibility of the industry member to ensure that containers are made of suitable materials that comply with all applicable FDA health and safety regulations for the packaging of alcohol beverages for consumption and that TTB may at any time request documentation to establish such compliance.

Current regulations allow TTB to request information about the contents of a wine, distilled spirits product, or malt beverage through formula submissions or otherwise. See, for example, 27 CFR 4.38(h), 5.33(g), and 7.31(d), as well as the formula requirements in 27 parts 5, 19, 24, and 25. As part of its formula review, TTB may ask for substantiation that an ingredient complies with FDA ingredient safety rules. See Industry Circular 2019–1, dated April 25, 2019, entitled ''Hemp Ingredients in Alcohol Beverage Formulas.'' (''TTB also consults with FDA on ingredient safety issues where appropriate. In some cases, TTB may require formula applicants to obtain documentation from FDA indicating that the proposed use of an ingredient in an alcohol beverage would not violate the FD&C Act.'') See also Industry Circular 62–33, dated October 26, 1962, entitled ''Need for Review of Approved Formulas Covering Distilled Spirits Products,'' in which our predecessor agency, the Internal Revenue Service, advised industry members that ''they should be prepared to submit proof that all ingredients in their products are acceptable under the Federal Food and Drug regulations.''

TTB received a number of comments on these proposals. TTB received two comments opposing the proposed changes in §§ 4.3(d), 5.3(d), and 7.3(d), which appear to reflect an erroneous belief that the proposed language would result in TTB, rather than FDA, enforcing the substantive provisions of the FD&C Act and making decisions as to whether alcohol beverages are adulterated within the meaning of that Act. The Brewers Association and American Distilled Spirits Association both suggested that TTB eliminate this provision and leave adulteration determinations under the FD&C Act to FDA. Both comments urged TTB to follow the 1987 Memorandum of Understanding (MOU) between TTB's predecessor agency and FDA, which remains in effect between TTB and FDA.

TTB also received approximately 20 comments on the general issue of FDA and TTB roles in enforcing these requirements, stating that the proposed rule appears to indicate that TTB will attempt to interpret FDA policy. These comments similarly urge TTB to instead ''honor the TTB's longstanding Memorandum of Understanding with FDA in which TTB can freely refer matters to FDA where questions of ingredient safety, food contact material safety, or adulteration arise. The TTB

has expertise in many arenas, but these topics are the purview of the FDA.''

While a few commenters supported the proposals in §§ 4.9, 5.9 and 7.9 relating to compliance with other Federal requirements, many commenters opposed finalizing these proposals. For example, DISCUS commented that the regulations were unnecessary because ''industry members fully recognize that complying with TTB's Part 5 rules does not relieve them from compliance with other applicable federal and state requirements.'' The Beer Institute commented that language about compliance with FDA requirements created unnecessary confusion about which FDA requirements were being referenced, and recommended that the language be deleted.

Some commenters, including the Wine Institute, the American Distilled Spirits Association, the United States Association of Cider Makers, and Heaven Hill Brands, commented in opposition to the provisions authorizing the appropriate TTB officer to request documentation to establish compliance with applicable FDA regulations regarding the safety of ingredients and packaging materials. These comments made points similar to the following statement made by the United States Association of Cider Makers:

> USACM believes the provisions above would invite a diversion of TTB resources into a subject area with which TTB has little-to-no expertise and possesses no legal basis for asserting jurisdiction. Moreover, USACM believes it would be fundamentally unfair for TTB to request information on an ingredient's compliance with FD&C Act standards, subsequently approve the product, but later charge that the approval of that product did not signify compliance with FD&C Act standards. Such a position would violate basic notions of due process.

TTB Response

TTB wishes to clarify that the proposed regulatory text was not meant to indicate that TTB was proposing to change how enforcement responsibilities for ingredient safety, food contact material safety, or adulteration issues are allocated between FDA and TTB. See Memorandum of Understanding between the Food and Drug Administration (FDA) and the Bureau of Alcohol, Tobacco and Firearms (ATF), 52 FR 45502 (1987). The MOU was entered into by TTB's predecessor agency, ATF, and remains in effect between FDA and TTB. With regard to adulterated alcohol beverage products, the MOU provides as follows:

> ATF, as the agency with a system of specific statutory and regulatory controls over alcoholic beverages, will have primary responsibility for issuing recall notices and monitoring voluntary recalls of alcoholic beverages that are adulterated under FDA law *or mislabeled under the FAA Act by reason of being adulterated.* This agreement does not affect or otherwise attempt to restrict the seizure or other statutory and regulatory authorities of the respective agencies. [Emphasis added.]

Thus, the 1987 MOU specifically recognizes the position that adulterated alcohol beverages are mislabeled under the FAA Act. This position was reiterated in Industry Circular 2010–8, in which TTB advised that FDA's determination that certain alcohol beverages were adulterated under the FD&C Act ''would have consequences under the FAA Act, because of TTB's position that adulterated alcohol beverages are mislabeled within the meaning of the FAA Act.''

The proposed regulation was not meant to suggest that TTB would abandon its position that it defers to FDA on issues of ingredient safety, food contact material safety, and adulteration under the FD&C Act. TTB continues to work with FDA, within our respective authorities, on these issues, and will continue to rely upon FDA to make determinations about the safety of ingredients and whether the use of certain ingredients renders an alcohol beverage adulterated under the FD&C Act.

It is TTB's position that its review of labels and formulas does not relieve industry members from their responsibility to ensure compliance with applicable FDA regulations. See, for example, Industry Circular 2010–8, in which TTB reminded industry members as follows:

> * * * each producer and importer of alcohol beverages is responsible for ensuring that the ingredients in its products comply with the laws and regulations that FDA administers. TTB's approval of a COLA or formula does not imply or otherwise constitute a determination that the product complies with the [Federal Food, Drug, and Cosmetic Act], including a determination as to whether the product is adulterated because it contains an unapproved food additive.

The instructions on the forms for formula approval (TTB F 5100.51, TTB F 5110.38, and TTB F 5120.29) contain similar language. For example, TTB F 5100.51 states:

> This approval is granted under 27 CFR parts 4, 5, 7, 19, 24, 25, and 26 and does not in any way provide exemption from or waiver of the provisions of the Food and Drug Administration regulations relating to the use of food and color additives in food products.

Accordingly, the proposed regulations about requesting documentation with regard to ingredient safety issues did not represent a change from current policy.

TTB has decided not to move forward with the proposed amendments on this issue. The commenters generally supported TTB's current policy, but misunderstood the intent of the proposed revisions. After considering the comments and reexamining the issues, TTB has determined that the proposed clarification would not meet its intended purpose.

3. Alcohol Beverage Products That Do Not Meet the Definition of a Wine, Distilled Spirits, or Malt Beverage Under the FAA Act

In the proposed rule, TTB set forth regulations to clarify which alcohol beverage products meet the statutory definition of a wine or malt beverage under the FAA Act, and which do not. Products not meeting these definitions are not subject to the requirements of parts 4 or 7 of the TTB regulations and, instead, are subject to FDA labeling regulations (and may be subject to the labeling requirements of the IRC, which are codified in the TTB regulations at parts 24 and 25). For example, wine that is under 7 percent alcohol by volume does not fall under the jurisdiction of the FAA Act. Proposed §§ 4.5 and 4.6 related to wine products not subject to TTB labeling requirements, and proposed § 7.6 related to brewery products. Proposed § 7.6 also explicitly referred readers to the regulations in part 4 for saké and similar products that meet the definition of ''wine'' under the FAA Act (but that are ''beer'' under the Internal Revenue Code). TTB did not propose a similar section for distilled spirits because there are no distilled spirits products that would be subject to the FDA food labeling regulations rather than TTB regulations. Products that would otherwise meet the definition of wine except that they contain more than 24 percent alcohol by volume are considered to be distilled spirits; thus, they are subject to the distilled spirits labeling regulations in part 5 of the TTB regulations. These clarifications did not represent any change in TTB policy, and are based on statutory provisions.

TTB received no comments in response to proposed §§ 4.5 and 4.6. TTB also did not receive any comments in direct response to proposed § 7.6. However, the Confederated Tribes of the Chehalis Reservation did submit a comment requesting TTB to clarify that unmalted grains can be used to produce ''fermented beer products.''

TTB Response

TTB is finalizing the provisions of proposed §§ 4.5, 4.6, and 7.6, except

that §§ 4.5 and 4.6 are being incorporated into the existing regulations as §§ 4.6 and 4.7, respectively. In response to the comment from the Confederated Tribes of the Chehalis Reservation, TTB notes that the FAA Act allows malt beverages to be made from unmalted cereals in addition to malted barley and hops. However, pursuant to the statutory definition of a ''malt beverage'' found in 27 U.S.C. 211(a)(7), a beer made without any malted barley would not be considered a ''malt beverage'' and would not be subject to the labeling requirements of the FAA Act or part 7 of the TTB regulations. Such a product (other than saké and similar products) would generally be considered either a ''beer'' or a ''cereal beverage,'' depending on the alcohol content, and would be subject to the labeling requirements of the IRC, which are codified in the TTB regulations at part 25, and may also be subject to FDA labeling regulations. See TTB Ruling 2008–3, Classification of Brewed Products as ''Beer'' Under the Internal Revenue Code of 1986 and as ''Malt Beverages'' under the Federal Alcohol Administration Act, for more information.

4. Exportation in Bond and Labeling Requirements

The current regulations exempting products for export from the labeling regulations under the FAA Act are stated in an inconsistent manner. In existing §§ 4.80 and 7.60, wine and malt beverages ''exported in bond'' are exempted from the requirements of those respective parts. However, current § 5.1, which is entitled ''General,'' provides that part 5 ''does not apply to distilled spirits for export.'' In Notice No. 176, TTB proposed to clarify its position that these three provisions all mean the same thing—*i.e.,* that products exported in bond directly from a bonded wine premises, distilled spirits plant, or brewery, or from customs custody, are not subject to the FAA Act regulations under parts 4, 5, or 7 of the TTB regulations. However, if products that are removed for consumption or sale in the United States (which are subject to the FAA Act regulatory provisions in parts 4, 5, and 7) are subsequently exported after being removed for consumption or sale, they are not ''exported in bond,'' and are accordingly subject to the FAA Act provisions when the removal for consumption or sale occurs. This proposal was only a clarifying change to existing §§ 4.80 and 7.60. With regard to part 5, TTB sought comments on whether the proposed change to the current regulations in § 5.1 would be viewed as impacting existing practices, and if so, what the impact would be.

Six commenters responded to the proposals. Wine Institute supported the proposed amendment to part 4. NABI stated that the exemption for exported products should not be restricted to alcohol beverage products exported in bond.

DISCUS urged revision of the proposal, stating as follows:

> We urge the Bureau to revise this proposal to clarify that products may be sent to a different distribution center prior to exportation. Some industry members would be required to change their distribution processes if this proposal is adopted as some companies utilize an internal central distribution point in the United States to gather products prior to international shipment. To effectuate this change, we propose adding the words ''or between'' after the words ''directly from'' in the rule.

The Oregon Winegrowers Association, the Willamette Valley Wineries Association, and the Mexican Chamber of the Tequila Industry all suggested that, even though the regulations exempt exported products from COLA requirements, the regulations should still require any statement on the labels of exported products to be truthful, accurate, and not misleading.

TTB Response

TTB is not moving forward with its proposed changes in parts 4 and 7. Upon additional consideration, TTB believes that the current regulatory text is sufficiently clear that the FAA Act regulations do not apply to wine and malt beverages exported in bond. Instead, in this document, TTB is incorporating the existing text from parts 4 and 7 (at §§ 4.80 and 7.60) into part 5 (at § 5.1), to ensure consistency and promote clarity.

It is TTB's long-held position that products removed from industry member premises for consumption or sale in the United States must be labeled in accordance with the FAA Act. Accordingly, TTB disagrees with NABI's comment that exemption from label approval for exported products should not be restricted to products exported in bond.

To the extent that the DISCUS comment reflects a concern about the meaning of exportation ''directly'' from a distilled spirits plant, TTB's only intent was to clarify the current requirements, and not to create distinctions between various types of exportations without payment of tax. Accordingly, TTB is removing references to whether the products are exported ''directly'' from the bonded premises, to clarify that there is no intent to create distinctions based on the various types of exportations without payment of tax that are allowed under the IRC.

In response to the comments from the Oregon Winegrowers Association, the Willamette Valley Wineries Association, and the Mexican Chamber of the Tequila Industry that TTB regulations should require any statement on the labels of exported products to be truthful, accurate, and not misleading, TTB notes that the regulations implementing the FAA Act have always included some sort of exemption for exported products, and TTB knows of no basis to limit that exemption now.

5. Personalized Labels

In Notice No. 176, TTB proposed, at new §§ 4.29, 5.29, and 7.29, to set forth the process for importers and bottlers to make certain changes to approved labels in order to personalize the labels without having to resubmit the labels for TTB approval. Personalized labels are labels that contain a personal message, picture, or other artwork that is specific to the consumer who is purchasing the product. For example, a producer may offer custom labels to individuals or businesses that commemorate an event such as a wedding or grand opening.

The proposed regulations reflect current policy as set forth in TTB public guidance documents (see, for example, TTB G 2017–2 and TTB G 2011–5) and provide for a process whereby applicants submit a template as part of the application for label approval, with a description of the specific personalized information that may change. If the application complies with the regulations, TTB will issue the COLA with a qualification that will allow the certificate holder to add or change items on the personalized label such as salutations, names, graphics, artwork, congratulatory dates and names, or event dates, without applying for a new COLA. The proposed regulations provided examples of situations where personalized labels would be permitted.

WineAmerica, Beverly Brewery Consultants, the New York Farm Bureau, the Beer Institute, and DISCUS all explicitly supported the proposed regulations. DISCUS also requested that additional examples be provided in the regulation to specifically recognize that personalized labels may include ''elements such as bottle engravings, signatures, medallions, bottle bags, and barrel program information.'' The Wine Institute and the Mexican Chamber of the Tequila Industry did not specifically

express support or opposition for the proposal but did each make recommendations. The Wine Institute noted that TTB had not included a definition of ''personalized label'' in each of the proposed sections and provided suggested language to clarify the meaning of the term. The Wine Institute also suggested removing the examples of types of personalized labels from the proposed regulations, as they ''are better conveyed in written guidance.''

The Mexican Chamber of the Tequila Industry requested that TTB include a specific prohibition on information that is misleading.

TTB Response

After reviewing the comments, TTB is incorporating the proposed provisions into the existing regulations as new §§ 4.54, 5.57, and 7.43. In response to the Wine Institute's comment, TTB is including a definition of ''personalized label'' into each of the new sections. The definition is drawn from (and is an abbreviated version of) current TTB guidance on personalized labels (TTB G 2017–2, Personalized Labels, dated September 5, 2017), and reads in the new regulatory text as follows: ''A personalized label is an alcohol beverage label that meets the minimum mandatory label requirements and is customized for customers.'' With regard to Wine Institute's suggested clarifying language, TTB believes that the examples in the proposed regulations provided important context and served a clarifying purpose, and thus those examples remain in the final rule.

With regard to the comment from The Mexican Chamber of the Tequila Industry, TTB believes that it is not necessary to include a specific prohibition on misleading information on personalized labels, as the revised regulations provide that approval of an application for a personalized label does not authorize the addition of any information that discusses either the alcohol beverage or characteristics of the alcohol beverage, or that is inconsistent with or in violation of the regulations.

With regard to the DISCUS comment about including additional examples to cover bottle engravings, signatures, medallions, bottle bags, and barrel program information, TTB does not believe it is appropriate or helpful to include these examples. In some cases, the types of information that would be added through these examples may be covered by TTB's allowable revision policy, which is not specific to personalized labels; in other cases, they may be covered by the personalized label rules.

TTB notes that industry members may offer personalized labels without going through this process, by obtaining individual COLAs for each personalized label. Similarly, if the information to be added to a personalized label is already covered by an allowable revision to an approved label, the industry member may make changes to the approved label without obtaining TTB approval.

6. Country of Origin References

Current TTB regulations require a country of origin statement on labels of imported distilled spirits, but include no such requirement for imported wine or malt beverages. Nonetheless, U.S. Customs and Border Protection (CBP) regulations in 19 CFR parts 102 and 134 require a country of origin statement to appear on containers of all imported alcohol beverages, including alcohol beverages that are imported in bulk and then subjected to certain production activities or bottling in the United States if, pursuant to CBP regulations, the beverage is the product of a country other than the United States. In ATF Ruling 2001–2, TTB's predecessor agency clarified that the country of origin requirements under part 5 would be interpreted in a manner consistent with CBP's rules of origin, to avoid inconsistencies between CBP and ATF rules and confusion for the industries affected by those rules.

For part 5, TTB proposed replacing the existing requirements setting out how the country of origin statement must appear on a label with a cross-reference to existing CBP country of origin regulations; this cross-reference was also proposed for parts 4 and 7. This would have the effect of removing the substantive requirement from the TTB distilled spirits regulations in part 5 and having a consistent cross reference to the CBP regulations in parts 4, 5, and 7. TTB also proposed including information on requirements for alcohol beverages that are further processed in the United States after importation.

TTB received three comments in response to this proposal. NABI expressly supported the addition of a cross reference to the CBP's country of origin requirements, stating that country of origin marking requirements ''should be governed solely by CBP regulations rather than separate TTB regulations.'' An attorney also commented in favor of the general concept that TTB should defer to CBP with respect to country of origin marking requirements. DISCUS opposed the proposed amendment, and commented in favor of retaining the current country of origin requirement for distilled spirits.

TTB Response

TTB is proceeding with its proposal to remove the substantive requirement for country of origin labeling for distilled spirits. It has been the longstanding policy of TTB and its predecessor that this requirement should be interpreted in a manner that is consistent with the CBP requirements. As noted by NABI, which is the trade association representing importers, ''country of origin information should be governed solely by CBP regulations rather than separate TTB regulations.''

TTB is also incorporating a cross-reference to CBP regulations into existing §§ 4.35, 5.36, and 7.25 because the provisions are a clarifying change that alerts industry members of their obligation to comply with CBP requirements. TTB is simplifying the proposed language to instead simply refer readers to the CBP regulations for those requirements.

7. Misleading Representations as to Commodity

In Notice No. 176, TTB proposed to adopt a new prohibition on types of cross-commodity terms that TTB considered to be misleading (see proposed §§ 4.128, 5.128, and 7.128). TTB proposed this prohibition in response to the fact that more and more frequently TTB receives applications for approval of a label for one commodity bearing a term normally associated with a different commodity, including terms that are specific classes and types for other commodities. TTB was concerned that this had the potential to confuse consumers as to the identity of the product.

Some uses of cross-commodity terms are restricted under the current labeling regulations because they are considered misleading; for example, current regulations at 27 CFR 7.29(a)(7) prohibit a malt beverage label from containing information (a statement, representation, etc.) that tends to create a false or misleading impression that a malt beverage contains distilled spirits or is a distilled spirits product. The regulation includes certain types of labeling statements that would not be considered misleading.

The text of the proposed regulations would have also established a new prohibition on the use of the name of a class or type designation (or a homophone or coined word that simulated or imitated a class or type designation) for one commodity on the label of a different commodity, if the representation created a misleading impression about the identity of the product.

Consistent with past practice and/or current regulations, the proposed regulation clarified that the proposal would not prohibit various non-misleading labeling statements, including statements of alcohol content, the use of the same brand name for different commodities, the use of cocktail names for wines and malt beverages, or the use of truthful and non-misleading statements such as ''aged in whisky barrels'' for a malt beverage or wine.

TTB solicited comments on whether the proposed prohibition and the proposed exceptions to the prohibition would adequately prevent consumer deception and whether the proposed regulations would require changes to existing labels. TTB particularly solicited comments on whether the use of coined terms and homophones in brand names and elsewhere on the labels is misleading to consumers when those terms imply similarity to class and type designations to which a product is not entitled.

Eleven commenters responded to these proposed provisions. The New York Farm Bureau and WineAmerica expressed support for this proposal without offering further explanation. The Mexican Chamber of the Tequila Industry expressed support for more restrictive provisions that would prohibit any use of a term associated with one commodity from appearing on the label of another commodity.

Sazerac, DISCUS, the American Craft Spirits Association, and the American Distilled Spirits Association, however, expressed opposition to the proposal related to distilled spirits labels (proposed § 5.128), and the Beer Institute opposed the similar proposal related to malt beverage labels (proposed § 7.128). Wine Institute opposed the proposal related to wine labels (proposed § 4.128). Williams Compliance and Consulting opposed the proposal for all three commodities. The common theme among these comments is that the proposed regulations would not meet the intent of, or were unnecessary for, preventing consumer deception and would also inhibit future innovations. For instance, the American Distilled Spirits Association stated that TTB's general rules can address distilled spirits labeling that falsely or deceptively suggests that a distilled spirit is or contains a different commodity. Furthermore, Senator John Kennedy of Louisiana noted that the proposal ''may require the relabeling of certain products that are marketed using terms associated with different commodities.''

TTB Response

Based on the feedback provided by commenters regarding the ambiguity of the proposed text, TTB is not finalizing the proposal. Instead, TTB will continue to rely on its current regulations (in §§ 4.39(a)(1), 5.42(a)(1) and 7.29(a)(1)) to address specific circumstances where it finds that a representation on a label is misleading, and will not move forward with a blanket approach to cross-commodity terms that could unnecessarily restrict creativity in the use of truthful and non-misleading representations on labels.

8. Alternate Contact Information for Advertisements

Current regulations in §§ 4.62, 5.63, and 7.52 require advertisements to include the name and address (city and state) of the industry member responsible for the advertisement. TTB proposed to amend the regulations to allow alternative contact information for the permittee to be shown instead of the city and State. These new options included the advertiser's phone number, website, or email address.

TTB received two comments on this issue. Diageo and DISCUS both commented in support of the proposed liberalization of the mandatory information requirements for the responsible advertiser. However, both commenters also believe mandatory statements on advertisements are no longer necessary and should be removed from TTB's regulations.

TTB Response

TTB is adopting the proposed amendment to allow additional options for displaying contact information for responsible advertisers. This amendment will allow the advertiser to display its phone number, website, or email address rather than the city and State where it is located. TTB is incorporating these amendments into the existing regulations in §§ 4.62, 5.63, and 7.52. The comments concerning the elimination of mandatory statements on advertisements are outside the scope of this rulemaking. Accordingly, TTB will consider these comments as suggestions for future rulemaking.

B. Wine Issues

1. Citrus Wine

The standards of identity currently provide for two different classes of fruit wine—the standards of identity for citrus wine are found in § 4.21(d) and the standards of identity for fruit wine are found in § 4.21(e). The production standards for the ''citrus wine'' and ''fruit wine'' classes are the same in the part 4 standards of identity. Furthermore, the ways in which fruit wine and citrus wine may be designated are consistent.

In Notice No. 176, TTB proposed to eliminate the class ''citrus wine'' and include any wines made from citrus fruits in the existing fruit wine class. TTB proposed this regulatory change in part because distinguishing between citrus fruits and other fruits seemed to add an unnecessary complexity to the regulations and also in part because the Bureau does not receive many applications for COLAs for wines designated as ''citrus wine'' (as opposed to applications for COLAs for citrus wines derived wholly from one kind of citrus fruit, such as ''orange wine'' or ''grapefruit wine'' and designated as such on the label).

For these reasons and because citrus is a type of fruit, TTB proposed to eliminate the class of ''citrus wine'' and to include any wines made from citrus fruits in the fruit wine class. TTB solicited comments on whether this change (in proposed § 4.145) would require changes to existing labels.

TTB received one comment in response to this proposed change. WineAmerica supported the proposal without additional explanation.

TTB Response

The intent of the original proposal was to streamline the regulations. TTB sees no reason to continue to distinguish between citrus wine and fruit wine. TTB is eliminating the class designation ''citrus wine,'' and amending § 4.21(e) to include citrus wines in the fruit wine class. The final rule also adds language to clarify that wines previously designated as ''citrus wine'' or ''citrus fruit wine'' may continue to use that term on the label instead of ''fruit wine.'' Thus, labels will not have to be revised as a result of this amendment.

2. Vintage Dates for Wine Imported in Bulk

In proposed § 4.95, TTB proposed to remove a prohibition (that currently appears in § 4.27) that restricts the use of vintage dates on imported wine. Under current regulations, imported wine may bear a vintage date only if, among other things, it is imported in containers of 5 liters or less, or it is bottled in the United States from the original container that shows a vintage date. In the preamble to Notice No. 176, TTB noted that this liberalizing measure would allow the use of vintage dates on wine imported in bulk containers and bottled in the United States, as long as bottlers have the appropriate

documentation substantiating that the wine is entitled to be labeled with a vintage date. TTB received one comment on this issue from an industry representative supporting the proposal.

TTB Response

TTB is incorporating the proposal in existing § 4.27. TTB believes the amendment will provide additional labeling flexibility to bottlers who import vintage wine in bulk for bottling in the United States. As long as the bottler has the appropriate documentation substantiating that the wine is entitled to be labeled with a vintage date, it should not be disqualifying that the wine was imported in a bulk container that did not bear a vintage date.

3. Natural Wine

In Notice No. 176, TTB set out provisions that would update existing references to certain IRC provisions and provide that grape wine (including sparkling grape wine and carbonated grape wine), fruit wine, and citrus wine must meet the standards for ''natural wine'' under the IRC. The proposal would align the part 4 regulations with the current requirements (pertaining to sweetening, amelioration, and the addition of wine spirits for natural wine) in the IRC, which includes wine treating practices for imported wines acceptable to the United States under an international agreement or treaty. TTB did not receive any comments opposing the proposal or indicating that the proposed amendments would require changes to any existing labels.

TTB Response

TTB is incorporating the proposed provisions into current § 4.21. TTB had identified this proposal as potentially restrictive in Notice No. 176 out of an abundance of caution. TTB, however, did not receive comments indicating that the proposed amendments would require changes to any existing labels. TTB believes that the alignment of the regulations under the FAA Act and the IRC will facilitate compliance with the production standards specified under the IRC for ''natural wine.''

C. Distilled Spirits Issues

1. Definition of ''Distilled Spirits''

In Notice No. 176, TTB proposed to amend the existing definition of ''distilled spirits,'' as it currently appears in § 5.11, to reflect TTB's longstanding policy that products containing less than 0.5 percent alcohol by volume are not regulated as ''distilled spirits'' under the FAA Act. TTB did not receive any comments on this proposal.

TTB Response

TTB is adopting the proposed amendment by amending the definition of ''distilled spirits'' in existing § 5.11.

2. Definition of ''Oak Barrel''

In Notice No. 176, TTB proposed to incorporate into its regulations in part 5 a definition of an ''oak barrel'' as a ''cylindrical oak drum of approximately 50 gallons capacity used to age bulk spirits,'' and specifically sought comments ''on whether smaller barrels or non-cylindrical shaped barrels should be acceptable for storing distilled spirits where the standard of identity requires storage in oak barrels.''

TTB received almost 700 comments in opposition to the proposed definition, including comments from individuals, distillers, trade associations, and a United States Senator. These comments generally opposed the proposed size restriction, and many also opposed the proposed restriction on shape. Only a handful of individual comments supported the proposed definition. The trade associations that commented on this issue (such as DISCUS, the American Distillers Institute, the American Distilled Spirits Association, the American Craft Spirits Association, the American Single Malt Whiskey Commission, the Kentucky Distillers' Association, the Texas Whiskey Association, and the Missouri Craft Distillers Guild) all opposed the proposed definition.

Most of the commenters asserted that this proposal conflicted with innovative industry practices where oak containers of various sizes and/or shapes are used to develop and age bulk spirits. Several stated that the proposed definition would economically burden distillers who age bulk spirits in oak containers other than cylindrical oak drums of approximately fifty gallons capacity. Many commenters suggested the proposed definition would impose an undue burden on small distillers, who use small or square barrels due to limited storage space or for other reasons. The consensus was that the proposed definition would stifle innovation and did not adequately reflect industry practices or consumer expectations regarding the aging of whisky and other distilled spirits whose standards of identity require storage in oak barrels.

As discussed further under ''Regulatory Flexibility Act'' in Section III below, the Office of Advocacy for the Small Business Administration also commented on this issue, challenging the factual basis for TTB's certification that this proposal would not have a significant economic impact on a substantial number of small entities, and suggesting that the proposal be revised or that TTB publish a supplemental initial regulatory flexibility analysis (IRFA) to propose alternatives to the rule.

Finally, TTB received a few comments on oak barrels that went beyond the issues on which TTB specifically sought comment. For example, a few commenters supported regulatory amendments that would allow aging in barrels made of wood other than oak, and one comment supported the use of a metal container with oak staves.

TTB Response

After careful review of the comments received on this issue, TTB has determined that it will not move forward with the proposal to define an ''oak barrel'' as a ''cylindrical oak drum of approximately 50 gallons used to age bulk spirits'' or otherwise define the term in the regulations. After analysis of the comments, TTB has concluded that current industry practice and consumer expectations for aging whisky (and other spirits aged in oak barrels) do not support limiting the size and shape of the oak barrel in the manner proposed in Notice No. 176. Under the standard of identity for whisky in the TTB regulations at 27 CFR 5.22(b), among other things, a product labeled as whisky ''possesses the taste, aroma, and characteristics generally attributed to whisky,'' and is ''stored in oak containers.'' TTB's intent was to define oak containers within objective parameters that would be consistent with a product possessing the taste, aroma, and characteristics generally attributed to whisky, not to unnecessarily limit innovation. TTB believes the current regulatory text can be interpreted to allow different sizes and shapes of oak containers as long as the product meets the other criteria for the standard. In the absence of a regulatory definition for ''oak barrel'' or ''oak container,'' it will be TTB's policy that these terms include oak containers of varying shapes and sizes.

To the extent that a few commenters addressed other issues pertaining to the proposed definition, such as the acceptability of other types of wood and of metal containers with oak staves, TTB will consider these issues for future rulemaking efforts.

3. Certificates of Age and Origin

In Notice No. 176, TTB proposed to maintain without substantive change

the current requirements related to imported distilled spirits that must be covered by certificates as to the age and the origin of the spirits. TTB proposed an organizational change, to divide the existing paragraph on brandy, Cognac, and rum into one paragraph on brandy and Cognac and a separate paragraph for rum. That proposal would not result in any substantive change to the requirements for these three spirits, but would provide greater ease of readability.

TTB received eight comments on this proposal. Privateer Rum, a distiller, stated that it applauds and supports the proposal. Spirits Canada recommended changing the existing regulations by removing references to the Immature Spirits Act for Canadian whisky products. Spirits Canada also requested that TTB allow aging in barrels made from any species of tree, not just oak. The Tequila Regulatory Council (CRT), the Mexican Chamber of the Tequila Industry, and NABI each commented in support of the requirements, but also suggested an edit to the requirements for imported Tequila. These three commenters noted that the authority in Mexico for issuing certificates is delegated to a conformity assessment body, the CRT, rather than a person or government official. Additionally, Tequila exports from Mexico are not accompanied by a certificate of age and origin, but rather by a Certificate of Tequila Export. Consequently, the commenters asked TTB to amend the regulations for Tequila to take these facts into account. Finally, DISCUS and the Beverage Alcohol Coalition each requested that TTB no longer require certificates for whisky to indicate the type of barrel (new or reused) if the standard of identity for that whisky does not require the use of a new barrel. They also suggested that TTB retain the certificates indefinitely, instead of requiring the importer to retain the certificate for five years, as required currently by 27 CFR 5.52(f).

TTB Response

TTB is finalizing the proposed reorganization of the paragraph relating to brandy, Cognac, and rum to make the related provisions easier to read. In response to the comment from Spirits Canada, TTB is also removing references to the Immature Spirits Act for Canadian whisky, and also for Scotch and Irish whiskies. The current reference to compliance with the laws of the applicable foreign countries would cover any aging requirements of those foreign governments, and there is no need to specify the particular laws of those countries, which are subject to change. Finally, TTB is amending the paragraph on Tequila to incorporate the correct terminology relating to the certification process. These minor amendments are being incorporated into existing § 5.52.

With respect to the comments from DISCUS and the Beverage Alcohol Coalition that suggest that TTB should retain certificates instead of requiring importers to retain them for 5 years, TTB notes that current regulations do not require that importers submit the certificates to TTB or CBP on a routine basis. Rather, importers are only required to maintain such certificates in their own possession and make them available to TTB or CBP upon request; thus, were TTB to take the action suggested, it would create a new requirement that importers submit such certificates, which is beyond the scope and intent of Notice No. 176. With regard to the suggestion that certificates should not be required to indicate whether the barrels in which all types of whiskies were aged are new or reused, this suggestion also goes beyond the scope of Notice No. 176, but will be considered for future rulemaking.

4. Statements of Composition

Current regulations at § 5.35(a) provide that the class and type of distilled spirits must be stated on the label if defined in current § 5.22. Otherwise, the product must be designated in accordance with trade and consumer understanding or with a distinctive or fanciful name; in either case, the designation must be followed by a ''truthful and adequate statement of composition.'' The regulations do not provide general guidelines on what suffices as a truthful and adequate statement of composition. However, the regulations in § 5.35(b) provide that in the case of highballs, cocktails, and similar prepared specialties, a statement of the classes and types of distilled spirits used in the manufacture of the product is a sufficient statement of composition, when the designation adequately indicates to the consumer the general character of the product.

TTB proposed to set forth standards for what should be included in statements of composition, including incorporation of current TTB policies on how to identify distilled spirits, wines, flavors, coloring materials, and non-nutritive sweeteners that are added to a specialty product. The proposed rule also proposed three changes to the rules on statements of composition. The first required the listing of the separate components of an ''intermediate'' flavoring product; the second required that distilled spirits and wines used in the production of the finished product be listed in order of predominance; and the third required a full statement of composition for cocktails rather than the abbreviated statement provided for by current regulations.

As explained in more detail below, after evaluating the comments received on these issues, TTB has decided not to move forward on any of these proposals. For the sake of clarity, TTB will address the comments received on each of these three proposals separately, and then provide a single TTB response, as the issues are related. At this time, TTB is merely making a typographical correction in the heading of § 5.35(b).

i. Intermediates

In Notice No. 176, TTB proposed to treat components such as distilled spirits and wines that are blended together by a distilled spirits plant in an intermediate product and then added to a distilled spirits product the same as if the components of the intermediate had been added separately for purposes of determining the standard of identity of the finished product, such as a flavored distilled spirits product. (See proposed §§ 5.141 and 5.166.) Additionally, TTB proposed to change its policy with regard to statements of composition for specialty products to require the disclosure of the components of the intermediate product, including spirits, wines, and flavoring materials, as part of the statement of composition. In the case of distilled spirits specialty products, TTB currently treats intermediate products as ''natural flavoring materials'' when they are blended into a product, for the purpose of disclosure as part of a truthful and adequate statement of composition. TTB has seen changes in the alcohol beverage industry and in various formulas and put forward the proposed changes in the belief that treating intermediate products as natural flavoring materials does not provide adequate information to consumers, as required by the FAA Act.

TTB received seven comments in response to its proposal with regard to ''intermediate products.'' The comments, all in opposition to TTB's proposed policy, came from trade associations (DISCUS, the American Distilled Spirits Association, and the Kentucky Distillers Association), distillers (Diageo, Sazerac, and Heaven Hill Brands), and Senator John Kennedy. These comments urged TTB to retain its current policy of treating intermediate products as ''natural flavoring materials'' when they are blended into a product, for the purpose of both compliance with standards of

identity and disclosure as part of a truthful and adequate statement of composition.

Many commenters pointed to the proposal as a change in policy that would require changes in the labeling and formulation of several products. For example, Heaven Hill Brands commented that the proposal was ''a significant departure from existing labeling practices'' that will ''create consumer confusion, and will create the need to develop otherwise unnecessary reformulations and relabeling for numerous products.'' Diageo stated that many specialty products currently contain wine added via intermediates, and the ''proposed rule upsets decades of reliance by the industry in crafting products that use wine for blending purposes.''

Several commenters also suggested that requiring labeling disclosure of the specific components in the intermediate product would actually mislead consumers. For example, Sazerac commented that ''a requirement to disclose intermediate products in the statement of composition for a distilled spirits specialty product, particularly where the intermediates do not impart any characterizing flavor or qualities to the finished product, would be misleading to consumers.'' Diageo, DISCUS, the Kentucky Distillers' Association, and the American Distilled Spirits Association all raised similar objections. Some of the commenters perceived the proposal as a partial form of ingredient labeling, and suggested that until and unless TTB actually implemented ingredient labeling requirements, this type of partial disclosure requirement would mislead consumers.

ii. Order of Predominance

In new § 5.166(a)(1), TTB proposed to require distilled spirits and wines in the statement of composition to be listed in order of predominance, which was intended to provide consumers with more clear information about the composition of distilled spirits specialty products.

TTB received comments from Heaven Hill Brands and the American Distilled Spirits Association in favor of clarifying TTB's policies regarding statements of composition. However, these comments emphasized that TTB should clarify that it is not changing its longstanding administrative policies, on which the industry has relied. For example, Heaven Hill Brands requested that ''TTB not make significant changes in existing policy and interpretation that the spirits industry has relied upon for decades.'' DISCUS commented in opposition to any changes to the regulations on statements of composition, and included a suggested revision that reverted back to TTB's current regulations. Senator Kennedy also commented in opposition to the proposal.

iii. Cocktails

In Notice No. 176, TTB proposed to amend its policies with regard to the use of cocktail names in statements of composition on distilled spirits labels. Under current regulations at 27 CFR 5.35(b)(1), and in guidance issued by TTB's predecessor agency, the Bureau of Alcohol, Tobacco, and Firearms (see Compliance Matters 94–1, issued in 1994), distilled spirits cocktails with names recognized by consumers may be labeled with the cocktail name and an abbreviated, rather than a full, statement of composition. This abbreviated statement is a declaration of the spirits components of the cocktail, for example, ''Screwdriver made with vodka.'' In Notice No. 176, TTB proposed to require a full statement of composition in such instances because, over the years, TTB has seen an increase in the number of cocktails recognized in bartenders' recipe books as the industry continued to innovate. TTB was concerned about whether consumers are fully informed when a label has only a cocktail name and the component spirit(s) because of the vast array of cocktails. Accordingly, TTB proposed to require a full statement of composition on such specialty products, and those products could continue to be designated with the name of a cocktail.

TTB received several comments regarding its proposal. DISCUS, Sazerac, the Kentucky Distillers' Association, and the American Distilled Spirits Association opposed the proposal on the grounds that it would impose costs as a result of labeling and formulation changes without benefiting consumers, who might be confused by statements of composition that differed from what they were used to seeing on cocktail labels. Sazerac also stated that a full statement of composition would amount to an unnecessary labeling requirement for cocktails that are well recognized and understood by consumers.

Some of the commenters also addressed TTB's current policy of including a list of ''recognized cocktails'' in the Beverage Alcohol Manual for Distilled Spirits (Distilled Spirits BAM; TTB P 5110.7) for purposes of administering this provision. The American Distilled Spirits Association commented that the regulation ''should establish a framework for TTB to periodically publish, after seeking input from the industry and other sources, lists of cocktails it recognizes and the ingredients required for such cocktails.'' On the other hand, Sazerac commented that TTB should eliminate the list of recognized cocktails in the BAM, as the list is ''outdated and not particularly relevant to consumers.''

TTB Response

TTB is not finalizing its proposal to require statements of composition to include the elements of an intermediate. TTB is persuaded that the proposed changes could require changes in the labeling (or, alternatively, lead to reformulation) of many distilled spirits products, and that benefit to consumers would be speculative. In addition, a number of comments TTB received in response to Notice No. 176 proposed that TTB consider proposing ingredient labeling, which would obviate the need for the types of information TTB proposed to require. TTB agrees that ingredient labeling is worth consideration, and is reviewing such comments to determine next steps to obtain additional comment through further rulemaking.

TTB is also not moving forward with a reference to intermediates in the standard for flavored spirits and for standards of identity in general. Current policies and regulatory text regarding intermediates and statements of composition will remain in effect, which includes the longstanding policy that class 9 flavored spirits must derive all of their spirits content from the base spirit of the product, in contrast with those products that are labeled with statements of composition in lieu of a class or type. See, for example, T.D. ATF–37, 41 FR 48120, 48121 (1976) (''standards of identity for flavored products adopted in 1968 require them to contain a spirits base of 100 percent gin, rum, vodka, etc.''). Furthermore, the current regulations expressly provide that class 9 flavored spirits may not contain more than 2.5 percent wine by volume (15 percent for certain flavored brandy products) without label disclosure. See 27 CFR 5.22(i).

Additionally, TTB has decided it will not move forward with the order of predominance requirement for distilled spirits and wines included in the final product in the statement of composition and will retain current regulatory text. Current policy, which requires that the base distilled spirit is listed first (for example, ''vodka with red wine and natural flavors''), remains in effect.

Finally, based on the comments, TTB is not moving forward with the proposal to require a full statement of

composition for cocktails. We agree that consumers are used to seeing the abbreviated statement of composition on cocktail labels. We also agree that a full statement of composition is not necessary in cases where the cocktail name is well recognized and understood by consumers

Accordingly, the existing regulations and policies on abbreviated statements of composition for cocktails will continue in effect. TTB notes that in addition to the cocktails that are recognized in the Distilled Spirits BAM, TTB evaluates applications for label approval that include new cocktail names on a case-by-case basis to determine if the cocktails are recognized in bartender's guides or other publications that reflect a widespread consensus on the composition of a cocktail (such as trade magazines). This review will, in turn, determine whether the designation adequately indicates to the consumer the general character of the product. TTB will consider the comments on updating the list of recognized cocktails as suggestions for future action.

5. Use of Term ''Bottled in Bond''

In Notice No. 176, TTB proposed to maintain the rules for the use of the terms ''bottled in bond,'' ''bond,'' ''bonded,'' or ''aged in bond,'' or other phrases containing these or synonymous terms. The use of these terms was originally restricted to certain products under the Bottled in Bond Act of 1897 (29 Stat. 626), which was repealed in 1979 (see Distilled Spirits Tax Revision Act of 1979, Public Law 96–39, 93 Stat. 273, title VIII, subtitle A). The Bottled in Bond Act was intended to provide standards for certain spirits that would inform consumers that the spirits were not adulterated. Treasury Department officers monitored bonded distilled spirits plants.

TTB's predecessor agency, ATF, decided to maintain the labeling rules concerning ''bottled in bond'' and similar terms, because consumers continued to place value on these terms on labels. Imported spirits may use ''bottled in bond'' and similar terms on labels when, among other conditions, the imported spirits are produced under the same rules that would apply to domestic spirits.

One of the conditions for use of these terms is that the distilled spirits must be stored in wooden containers for at least four years. To maintain parity between whisky that is aged and vodka and gin, which do not undergo traditional aging, vodka and gin are required to be stored in wooden containers to use ''bond'' or similar terms, but the wood containers must be coated or lined with paraffin or another substance to prevent the vodka or gin from coming into contact with the wood. TTB specifically requested comment on whether TTB should maintain the ''bottled in bond'' standards, including those relating to gin and vodka.

TTB received 14 comments in response to the request for comment. The majority of the comments were in favor of maintaining ''bottled in bond'' as a term related to quality. Only two commenters recommended removing the term as confusing and irrelevant. Four of the supporting comments also responded directly to TTB's request for comments on whether TTB should maintain the requirement that vodka and gin be stored in lined wooden containers if they are labeled as ''bottled in bond.''

Roulaison Distilling Co., the American Distilling Institute, and DISCUS each supported retaining the bottled in bond standards and also recommended removing the related requirement concerning paraffin-lining of barrels for storing gin. The Kentucky Distillers' Association recommended the expansion of the term for gin, but recommended that TTB no longer allow for vodka to be bottled in bond.

TTB Response

Consistent with the comments, TTB is maintaining the regulatory standards for ''bottled in bond'' with an amendment to allow gin to be stored in either paraffin-lined or unlined barrels. This amendment is a conforming amendment to account for changes made in this final rule that would allow for the aging of gin. (See Section 8, Age Statements, below.) TTB is not changing the provisions allowing vodka to be labeled ''bottled in bond''.

6. Brand Labels

In Notice No. 176, TTB proposed to revise regulations relating to the placement of mandatory information on distilled spirits containers, in order to increase flexibility. Current § 5.32(a) requires that the following appear on the ''brand label'': The brand name, the class and type of the distilled spirits, the alcohol content, and, on containers that do not meet a standard of fill, net contents. The term ''brand label'' is defined in current § 5.11 generally as the principal display panel that is most likely to be displayed, presented, shown, or examined under normal retail display conditions, as well as any other label appearing on the same side of the bottle as the principal display panel. Further, the definition states that ''[t]he principal display panel appearing on a cylindrical surface is that 40 percent of the circumference which is most likely to be displayed, presented, shown, or examined under normal and customary conditions of display for retail sale.''

TTB believes that the information that currently must appear together on the brand label (or ''principal display panel'') is closely related information that, taken together, conveys important facts to consumers about the identity of the product. Proposed § 5.63(a) would allow this mandatory information to appear anywhere on the labels, as long as it is within the same field of vision, which means a single side of a container (which for a cylindrical container is 40 percent of the circumference) where all pieces of information can be viewed simultaneously without the need to turn the container. TTB believes that requiring that this information appear in the same field of vision, rather than on the display panel ''most likely to be displayed, presented, shown, or examined'' at retail, is a more objective and understandable standard, particularly as applied to cylindrical bottles.

TTB received five comments related to this proposal. A distiller and an industry group each supported the change to a ''single field of vision'' concept. Another distiller noted that it would like the alcohol content to be permitted on the front label or the back label. Diageo said that it supports a provision that would allow all national mandatory information to appear on a single label. DISCUS noted that it supports the increased flexibility that the proposal would allow, bringing distilled spirits more in line with current requirements for wine. However, DISCUS also recommended that TTB liberalize placement rules further, allowing mandatory information to appear anywhere on distilled spirits labels.

TTB Response

TTB is moving forward with liberalizing the placement rules as proposed, by allowing the brand name, class and type designation, and alcohol content to appear anywhere on the label as long as those three pieces of information are in the same field of vision. TTB is not adopting the DISCUS comment to eliminate all placement standards for mandatory information, because TTB believes that it is important to keep together on the label these three closely related elements of information that, taken together, convey important facts to consumers about the identity of the product.

TTB is making a conforming change to existing § 5.32 so that the net contents

statement may appear on any label. TTB is also amending the definition of ''brand label'' in existing § 5.11 to remove the requirement that the brand label be the principal display panel. To clarify, this means that the brand label may be on any side of distilled spirits bottles, but must show the brand name, class and type designation, and alcohol content within the same field of vision.

7. Alcohol Content Tolerance for Distilled Spirits

TTB received 24 comments in response to proposed § 5.65(c), which would expand the tolerance for the labeled alcohol content to plus or minus 0.3 percentage points for distilled spirits. Twenty-three of the commenters expressed support for expanding the tolerance, and one distillery commenter requested that the tolerance be increased further to 0.99 proof for liqueurs. One commenter, DISCUS, requested that TTB amend also 27 CFR 19.353, which sets out requirements for gauging product in the bottling tank at a distilled spirits premises, to be consistent with the 0.3 percentage point tolerance allowed for labeling statements.

TTB Response

TTB is finalizing the expanded alcohol content tolerance as proposed, to plus or minus 0.3 percentage points. This final rule amends §§ 5.37(b) and 19.356(c) and (d) to incorporate the language of the proposal. Regarding the comment requesting a 0.99 proof tolerance for liqueurs, TTB sees no basis for allowing liqueurs to have a higher tolerance than all other classes. Finally, TTB agrees with the comment made by DISCUS regarding the need for a conforming amendment to § 19.353, and is amending that section to provide that the gauge must be made at labeling proof, subject to the tolerances set forth in section 19.356(c).

8. Age Statements

In Notice No. 176, TTB proposed to incorporate its current policy that only the time in a first oak barrel counts towards the ''age'' of a distilled spirit. That is, if spirits are aged in more than one oak barrel (for example, if a whisky is aged 2 years in a new charred oak barrel and then placed into a second new charred oak barrel for an additional 6 months), only the time spent in the first barrel is counted in the ''age'' statement on the label. (See proposed § 5.74(a)(3).)

TTB received approximately 50 comments in opposition to the proposal. For example, St. George Spirits stated, ''We believe that all time spent in a barrel should be counted towards the spirit's age statement—regardless of movement between barrels.'' The Beverage Alcohol Coalition, a coalition of domestic and international distilled spirits industry groups, stated, ''It is a common practice for many distilled spirits products, including Scotch Whisky, to mature in more than one type of cask. As proposed, the rule would mean whiskies matured in more than one cask, could not state the full time the product spent maturing, even if the second cask complies with class/type requirements.'' Five commenters suggested that if multiple barrels are used, the label should contain an optional or mandatory disclosure of that fact.

TTB also received 17 comments supportive of the provision in proposed § 5.74 to eliminate the prohibition on age statements on many classes of distilled spirits, including gin, liqueurs, cordials, cocktails, highballs, bitters, flavored brandy, flavored gin, flavored rum, flavored vodka, flavored whisky, and specialties. Some of the comments specifically noted that they are supportive of expanding the permissibility of an age statement to gin. Three commenters stated that age statements should be permitted on all distilled spirits, including vodka.

TTB Response

After reviewing the comments, TTB agrees that all the time spent in all oak containers should count towards the age statement. TTB notes that where a standard of identity requires aging in a particular kind of barrel, such as straight whisky, which requires aging two years in a new charred oak container, that aging must take place in that specified container type before being transferred to another vessel. TTB is amending existing § 5.40(a)(1) regarding statements of age for whisky that does not contain neutral spirits to provide that multiple barrels may be used and to provide that the label may optionally include information about the types of oak containers used. This does not affect current requirements to disclose aging in reused cooperage under 27 CFR 5.40(a)(4).

TTB believes that the contemporary consumer understands the meaning of age statements and that there is consumer interest for innovative products such as aged gin. As a result, TTB is amending the regulations in current § 5.40(d) to allow age statements on all distilled spirits except for neutral spirits (other than grain spirits). Because neutral spirits and vodka are intended to be neutral, spirits that are aged would not meet the standard to be labeled as neutral spirits or vodka. A spirit that would otherwise be a neutral spirit but is aged would qualify for the designation ''grain spirits,'' which may bear age statements as provided in current § 5.40(c).

9. Multiple Distillation Claims

Proposed § 5.89 would have defined a distillation as a single run through a pot still or one run through a single distillation column of a column (reflux) still. The proposal also would have maintained the current rule that only additional distillations beyond those required to meet the product's production standards may be counted as additional distillations.

TTB received nine comments in support of this definition. Commenters included distillers and industry groups. For example, a distiller stated that ''consumers would reasonably expect that a distillation means a single pass through an alembic or column still and not, for instance, a count of plates in a column.'' The American Distilling Institute stated that ''[w]e believe that [the proposed] definition is clear and readily understood by consumers.'' However, some commenters sought a more scientific or technical definition of distillations.

Many commenters opposed the provision that would not count the distillations necessary to meet the standard of identity towards multiple distillation claims, even though that provision has been in the current TTB regulations. For example, the American Distilling Institute said that the provision ''flies in the face of standard industry convention, is highly dependent on the type of still being used and would require a significant amount of relabeling.'' DISCUS said that the provision would mean that ''brands cannot truthfully articulate the number of distillations a spirits undergoes.'' Spirits Europe also commented that not allowing the distillations necessary to the production process would be ''contrary to long standing labelling conventions.''

TTB Response

After review and consideration of the comments, TTB has determined that allowing distillers to count all distillations, including those required to meet a specific standard of identity when making labeling claims, provides the consumer with truthful and adequate information. TTB is liberalizing the provision found in current § 5.42(b)(6) accordingly.

TTB is also incorporating the proposed definition of a distillation (for purposes of multiple distillation claims)

into existing § 5.42, as well as the clarification that distillations may be understated but not overstated. Multiple distillation claims will remain optional, not mandatory. TTB is making conforming changes to the advertising regulations in § 5.65(a)(9).

10. Standard of Identity for Vodka

In Notice No. 176, TTB proposed to amend the standard of identity for vodka, a type of neutral spirit, to codify the holdings in several past rulings: Revenue Ruling 55–552 and Revenue Ruling 55–740 (vodka may not be stored in wood); ATF Ruling 76–3 (vodka treated with charcoal or activated carbon may be labeled as ''charcoal filtered'' under certain parameters); and Revenue Ruling 56–98 and ATF Ruling 97–1 (allowing treatment with up to 2 grams per liter of sugar and trace amounts (1 gram per liter) of citric acid). In addition, TTB specifically sought comment on whether the current requirement that vodka be without distinctive character, aroma, taste, or color should be retained and, if this requirement is no longer appropriate, what the appropriate standards should be for distinguishing vodka from other neutral spirits.

TTB received twelve comments in response to the proposed changes to the standard of identity for vodka. TTB did not receive any comments relating to the proposal to incorporate several past rulings related to treatment of vodka with sugar, citric acid, and charcoal.

TTB requested comments on whether the requirement that vodka be without distinctive character, aroma, taste, or color should be retained and, if this requirement is no longer appropriate, what the standards should be for distinguishing vodka from other neutral spirits. Ten commenters suggested that the requirement should be eliminated. For example, Altitude Spirits stated that ''[t]he requirement that vodka be without distinctive character, aroma, taste, or color should NOT be retained and is no longer appropriate given the variety in base ingredients, flavors, and flavor profiles found in the diverse vodka category.'' Within this group of comments, two commenters stated that they believe that TTB should reverse its longstanding policy and allow vodka to be aged in wood.

Two individual commenters recommended—without explanation—that the standard be kept unchanged.

TTB Response

Based on its review of the comments, TTB agrees that the requirement that vodka be without distinctive character, aroma, taste, or color no longer reflects consumer expectations and should be eliminated. Vodka will continue to be distinguished by its specific production standards: Vodka may not be labeled as aged, and unlike other neutral spirits, it may contain limited amounts of sugar and citric acid.

Accordingly, TTB is amending the existing regulations at § 5.22(a)(1) to remove the requirement that vodka be without distinctive character, aroma, taste, or color, and to incorporate in the regulations the standards set forth in the rulings discussed above, obviating the need for those rulings which will be canceled. TTB will also make a conforming change to existing § 5.23(a)(3)(iii), which discusses the addition of harmless coloring, flavoring, or blending materials to neutral spirits, to reflect the allowed additions to vodka in amended § 5.22(a)(1).

11. Whisky Labeling

In Notice No. 176, TTB proposed to require that, where a whisky meets the standard for one of the types of whiskies, it must be designated with that type name, with an exception provided for Tennessee Whisky. TTB solicited comments on this proposal as a potentially restrictive change to the regulations, because in the current regulations, when a whisky meets the standard for a type of whisky, it is unclear whether the label must use that type designation or may use the general class ''whisky'' on the label. However, historical documents indicate that TTB's predecessor agencies classified whiskies with the type designation that applied, and required that type to be the label designation. For example, in January 1937, the Federal Alcohol Administration stated that ''[w]here a product conforms to the standard of identity for 'Straight Bourbon Whiskey' it must be so designated and it may not be designated simply as 'Whiskey.''' See FA–91, ''A Digest of Interpretations of Regulations No. 5 Relating to Labeling and Advertising of Distilled Spirits,'' p. 5.

Accordingly, proposed § 5.143 provided that where a whisky meets the standards for one of the type designations, it must be designated with that type name, with an exception for Tennessee Whisky. The current TTB regulations at § 5.35(a) state, in part, that the class and type of distilled spirits shall be stated in conformity with current § 5.22 if defined therein.

Two industry associations (DISCUS and the Kentucky Distillers' Association) opposed the proposed change, stating that it would require a large number of revisions to labels for products currently on the market. The American Craft Spirits Association commented in general support of the proposed § 5.143 without addressing this specific issue.

In § 5.143, TTB also proposed to specifically provide that the designation ''straight'' was an optional labeling designation for whiskies. Currently, TTB labeling policy requires whiskies that are aged more than two years to be designated as ''straight.'' DISCUS commented in support of making ''straight'' an optional designation, stating this would provide labeling flexibility.

TTB Response

After review of the comments, TTB believes that the proposed amendment does not necessarily reflect current industry practice or consumer expectations. We also recognize that requiring distillers to use a specific type designation for whiskies would require a number of labeling changes. Therefore, TTB will maintain its policy that distillers have the option of using the general class ''whisky'' as the designation or one of the type designations that applies. TTB also will liberalize its policy on the term ''straight'' and is amending current § 5.22(b)(2)(iii) to make it an optional labeling designation for whiskies that qualify for the designation, but will not expand the use of the term to other classes of distilled spirits. TTB will cancel and supersede Revenue Ruling 55–399, ''Straight Whisky,'' which relates to outdated provisions regarding wholesale liquor dealer packages.

12. Absinthe

TTB proposed a new standard of identity for Absinthe (or Absinth) in proposed § 5.149 in response to a petition TTB had received. Absinthe products are distilled spirits products produced with herbs, including wormwood, fennel, and anise.

The proposed standard was to remind the reader that the products must be thujone-free under FDA regulations. Based on current limits of detection, a product is considered ''thujone-free'' if it contains less than 10 parts per million of thujone.

TTB proposed to supersede a current requirement that appears in Industry Circular 2007–5 that all wormwood-containing products undergo analysis by TTB's laboratory before approval of the product's formula. In the proposal, TTB explained that it would verify compliance with FDA limitations on thujone through marketplace review and distilled spirits plant investigations, where necessary.

TTB received 10 comments supporting the addition of a standard for absinthe. Most of the commenters, including DISCUS, the American Craft Spirits Association, St. George Spirits, and the American Distilling Institute, recommend that TTB finalize a more restrictive standard for absinthe and provided comments on changes that would better align the standard with the marketplace. With regard to the laboratory testing requirement, St. George Spirits was the only commenter opposed to its elimination, and one commenter supported eliminating the requirement but requested that TTB laboratory services be made available for thujone testing. DISCUS specifically supported removing the laboratory testing requirement, saying that the elimination of the testing requirement will decrease burdens upon industry and TTB.

TTB Response

With regard to the standard of identity for absinthe, TTB is not finalizing its proposed standard of identity for absinthe at this time and intends to air in further rulemaking the standards that were proposed by the commenters. With regard to the laboratory testing requirement, TTB is removing the testing requirement for products made with wormwood, and will update published guidance to reflect this change. However, TTB intends to continue to offer the same type of thujone-testing that it has previously provided for the next year, and will assist industry members and outside laboratories to develop their own thujone-testing capabilities.

13. Agave Spirits

The TTB regulations currently in § 5.22(g) provide for a standard for Tequila, and both Tequila and Mezcal are recognized as distinctive products of Mexico that must be manufactured in Mexico in accordance with the laws and regulations of Mexico governing their manufacture. Currently, spirits that are distilled from agave that are not Tequila or Mezcal are subject to formula requirements.

In Notice No. 176, TTB proposed to create within the standards of identity a class called ''Agave Spirits'' and two types within that class, ''Tequila'' and ''Mezcal'' (see proposed § 5.148), replacing the existing Class 7, Tequila. The proposed standard would include spirits distilled from a fermented mash, of which at least 51 percent is derived from plant species in the genus Agave and up to 49 percent is derived from sugar. Agave spirits must be distilled at less than 95 percent alcohol by volume and bottled at or above 40 percent alcohol by volume. Tequila and Mezcal would be types within the Agave Spirits class, and the standards of identity for those products would not be changed.

TTB received 11 comments in support of the creation of the ''Agave Spirits'' class, including several distillers, the Missouri Craft Distillers Guild, the Kentucky Distillers' Association, the American Craft Spirits Association, and the American Distilled Spirits Association. Some commenters suggested changes to the proposed standards, such as creating an additional type designation for products made from 100 percent agave or allowing the use of agave syrup as the fermentable ingredient. The Tequila Regulatory Council (CRT) stated that it welcomes the proposed class but suggested that Tequila or Mezcal should be required to use the designations ''Tequila'' or ''Mezcal'' on their labels if they meet the requirements for those standards.

Two commenters, Diageo and DISCUS, opposed the creation of the class ''agave spirits,'' arguing that it may create consumer confusion or ''take advantage of Tequila's or Mezcal's prestige.'' Additionally, DISCUS requested ''a carveout'' to clarify that ''additives permitted under Mexican regulations for Tequila and Mezcal do not change the class and type'' of those distilled spirits.

TTB Response

TTB believes that the creation of the ''Agave Spirits'' class will provide more information to consumers and will allow industry members greater flexibility in labeling products that are distilled from agave. Accordingly, TTB is amending the regulations in current § 5.22(g) to incorporate the proposed standard. Industry members who have approved labels for ''spirits distilled from agave'' may choose to change their labels to designate their products as ''agave spirits,'' but will not be required to do so. New applicants will continue to have the option of designating their products as ''spirits distilled from agave'' if they meet the requirements for use of this statement of composition. As a result of this change, products labeled as ''agave spirits'' are not subject to a requirement to submit a formula for approval, which reduces the burden on distillers and importers.

TTB does not plan to move forward with the restrictive amendments suggested by commenters. Such suggestions include a requirement that products meeting the standard of identity for Tequila or Mezcal be labeled with the applicable type designation rather than the class designation. Making use of the type designation optional rather than mandatory is consistent with TTB's approach for other classes and types, such as whisky, as described in Section 11 above, and for brandy and rum. Accordingly, TTB is not adopting this comment. TTB is making conforming changes to § 5.40(b) to clarify that the current provisions relating to age statements for Tequila will apply to all agave spirits.

With regard to the DISCUS comment about Tequila and Mezcal, we have made a revision to clarify that this final rule does permit the use of harmless coloring, flavoring, or blending materials in the production of agave spirits, including Tequila or Mezcal, in accordance with the provisions of § 5.23. This means that such materials may be used when they are ''customarily employed therein in accordance with established trade usage, if such coloring, flavoring, or blending materials do not total more than 2½ percent by volume of the finished product.'' 27 CFR 5.23(a)(2).

TTB has published guidance in the Beverage Alcohol Manual for Distilled Spirits (Distilled Spirits BAM; TTB P 5110.7), which provided that no harmless coloring, flavoring, or blending materials may be used in the production of Tequila or Mezcal. This position was based on the understanding that no such materials were recognized as being customarily used in the production of Tequila or Mezcal in accordance with established trade usage. TTB agrees that in making such a determination, it should take into consideration what Mexican regulations allow. Accordingly, TTB will review this guidance and make appropriate revisions after consulting with the Government of Mexico with regard to what ingredients are customarily used in the production of alcohol beverages designated as ''Tequila'' or Mezcal'' under Mexican regulations. Any coloring or flavoring materials that are allowed based on customary use would be subject to the 2½ percent limit prescribed by § 5.23.

It should be noted that this position does not change certain minimum requirements that are set forth in the standard of identity for all ''agave spirits,'' including Tequila and Mezcal, regarding proof at distillation, bottling proof, and the percentage of mash derived from plant species in the genus Agave. Furthermore, TTB regulations may require the disclosure of certain ingredients on distilled spirits labels even if the ingredients are authorized by the regulations of a foreign country.

D. Malt Beverage Issues

1. Alcohol by Weight

Current regulations at § 7.71 provide that alcohol content may be stated on malt beverage labels unless prohibited by State law. They further provide that when alcohol content is stated, and the manner of statement is not required under State law, it must be expressed as percent alcohol by volume, and not as percent by weight, proof, or by maximums or minimums. Certain States require alcohol content to be expressed as percent alcohol by weight, and some industry members have expressed an interest in using labels that express alcohol content as a percentage of alcohol by volume and by weight, so that they may use the same label throughout the country.

In Notice No. 176, proposed § 7.65 provided that other truthful, accurate, and specific factual representations of alcohol content, such as alcohol by weight, may appear on the label, as long as they appear together with, and as part of, the statement of alcohol content as a percentage of alcohol by volume.

TTB received one comment in response to this proposal. The Beer Institute supported the proposal as long as statements of alcohol by weight appeared with statements of alcohol by volume. The Beer Institute believed that consumers were most familiar with alcohol by volume statements, and alcohol by weight information would be more meaningful to them if presented in conjunction with statements they already recognize. No commenters opposed TTB's proposal.

TTB Response

TTB is incorporating this provision into existing § 7.71(b)(1). This change will provide for an additional manner in which industry members can state truthful alcohol content statements, such as alcohol by weight, that appear together with, and as part of, a statement of alcohol content as a percentage of alcohol by volume. As stated in the proposed rule, this change is also consistent with the policy adopted in TTB Ruling 2013–2, which authorizes per-serving statements of fluid ounces of alcohol, as long as they appear as part of a statement that includes the percentage of alcohol by volume.

This change also reflects TTB's recognition that under current regulations, brewers may have to obtain different labels for sale in States that require different types of alcohol content statements. Under the regulations as amended, brewers will be able to use the same label in States that require alcohol content to be stated as a percentage of alcohol by weight and in other States that neither require nor prohibit alcohol by weight statements.

2. Use of the Term ''Draft'' or ''Draught''

In § 7.87, TTB proposed codifying longstanding Bureau policy, expressed in Industry Circular 65–1, that limited use of the terms ''draft'' or ''draught'' to malt beverages dispensed from a tap, spigot, or similar device, or that were unpasteurized and required refrigeration for preservation.

Two commenters addressed this proposal. The Brewers Association opposed the proposal because it believes that industry members and consumers understand ''draft'' to mean beer served from a keg or barrel. The Brewers Association stated that consumers understand that beer in cans or bottles is not ''draft'' beer, and such labeling claims are ''puffery.'' The Brewers Association therefore requested that TTB remove the proposed restrictions on use of the word ''draft.'' Beverly Brewery Consultants, however, supported the proposal, noting that it ''reflects the requirements outlined in Industry Circular 65–1.''

TTB Response

After further consideration, TTB has decided not to incorporate the proposed restrictions on use of the word ''draft'' or ''draught'' on malt beverages into its regulations, and to cancel Industry Circular 65–1. TTB agrees with the Brewers Association that consumer perceptions have shifted regarding the terms ''draft'' or ''draught,'' and that to most consumers, the term has little or no relation to pasteurization. TTB also agrees that consumers are not likely to confuse beer from a bottle or can with beer from a tap or keg and will not be misled by seeing the term ''draft'' on a label. Therefore, TTB will treat the words ''draft'' or ''draught'' as marketing puffery.

3. Prohibition on Strength Claims

The TTB regulations in § 7.29(f) prohibit the use of the words ''strong,'' ''full strength,'' ''extra strength,'' ''high test,'' ''high proof,'' ''pre-war strength,'' ''full oldtime alcoholic strength,'' and similar words or statements that are likely to be considered as statements of alcohol content on labels of malt beverages, unless required by State law. The regulations in § 7.29(g) prohibit the use on malt beverage labels of any statements, designs, or devices, whether in the form of numerals, letters, characters, figures, or otherwise, which are likely to be considered as statements of alcohol content, unless required by State law. Current § 7.54(c) contains similar provisions for malt beverage advertisements, with an exception allowed for the reproduction of a malt beverage label bearing an alcohol content statement as allowed by the regulations.

As explained in the preamble to the proposed rule, the labeling prohibitions gave effect to section 105(e)(2) of the FAA Act (27 U.S.C. 205(e)(2)), which prohibited placement of alcohol content statements on malt beverage labels, unless required by State law. The Supreme Court struck down this section of the law, as applied to truthful and non-misleading statements of alcohol content, on First Amendment grounds in *Rubin* v. *Coors Brewing Co.,* 514 U.S. 476 (1995). Since then, the TTB regulations have permitted optional alcohol content statements for malt beverage labels, and have mandated alcohol content statements for malt beverages that contain any alcohol derived from added flavors or added nonbeverage ingredients (other than hops extract) containing alcohol. See 27 CFR 7.22(a)(5) and 7.71. Accordingly, sections 7.29(f) and (g) do not prohibit statements of alcohol content as permitted or mandated by those regulations. The advertising provisions of § 7.54(c) are based on 27 U.S.C. 205(f)(2), which was not reviewed in the *Coors* decision.

In Notice No. 176, TTB proposed to modernize the language of these provisions, in proposed § 7.132, by removing some terms (such as ''pre-war strength'' and ''full oldtime alcoholic strength'') that are not likely to be used by today's brewers. TTB also proposed corresponding changes to the malt beverage advertising regulations. The proposed regulations would prohibit strength claims if they mislead consumers by implying that products should be purchased or consumed on the basis of higher alcohol strength.

Three commenters addressed proposed § 7.132. The Beer Institute supported the proposed changes, but noted that all information on product labels essentially exists to entice consumers to purchase a product. The Beer Institute therefore requested examples of claims that TTB would consider to be implying that products should be purchased based on alcohol strength.

A member of the public expressed the belief that certain terms such as ''strong'' should not be prohibited on labels if they are part of a recognized style designation, such as ''Belgian-style Dark Strong Ale.'' The New Civil Liberties Alliance cited removal of the prohibition on ''full oldtime alcoholic strength'' as an example of easing the

burden of regulations on the alcoholic beverage industry.

The Brewers Association commented in support of requiring mandatory statements of alcohol content on malt beverages, which it believed would ''eliminate the need to regulate use of the word 'strong' or similar terms.'' The Brewers Association also called for the removal of the prohibition on the use of ''strong'' and similar terms on malt beverage labels in a comment in response to the Treasury Department Request for Information. In that comment, the Brewers Association expressed the belief that the prohibition is ''an obsolete exercise in light of alcohol content labeling, a more informed consumer, and recognition of first amendment speech rights.''

The Brewers Association also suggested that TTB remove the prohibition in current § 7.29(g) on the use of numerals on malt beverage labels that are likely to be considered as statements of alcohol content. The Brewers Association claimed that numbers on labels are rarely relevant to alcohol content and are instead used to convey information or distinguish products, for example in names that refer to a brewer's area code. Accordingly, the Brewers Association suggested that sections 7.29(f) and (g) should be removed, and that sections 7.54(c)(1) and (c)(2) should also be removed.

TTB Response

After reviewing the comments, TTB has decided not to finalize proposed § 7.132 and to instead remove prohibitions on strength claims on malt beverage labels from the regulations entirely. TTB's proposed regulations defined a ''strength claim'' for the purposes of malt beverage labeling and advertising as ''a statement that directly or indirectly makes a claim about the alcohol content of the product'' and prohibited such statements if they implied that a malt beverage ''should be purchased or consumed on the basis of higher alcohol strength.'' In light of the comments received, TTB believes that the standard articulated in the proposed regulations would be too difficult to define or enforce in practice.

Instead of implementing a separate policy for the evaluation of whether strength claims are misleading, TTB is removing the regulations in §§ 7.29(f) and 7.54(c), which prohibit strength claims in malt beverage labeling and advertising, respectively. These regulations both prohibited the use of several specific terms, such as ''full strength'' and ''strong,'' as well as ''similar words or statements, likely to be considered as statements of alcoholic content.'' The removal of TTB's prohibition on strength claims includes the use of the term ''strong'' or other indications of alcohol strength in malt beverage names, provided such descriptors are not misleading.

Although *Coors* related to labeling, not advertising, TTB believes it is appropriate to have consistent policies regarding statements of alcohol content. While such statements are now permitted, these regulatory changes should not be interpreted to limit TTB's authority to prohibit claims relating to alcohol content that TTB considers false or misleading.

For the same reasons, TTB is removing § 7.29(g), which prohibits the use of numerals likely to be considered statements of alcohol content.

III. Regulatory Analysis and Notices

A. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 et. seq.), TTB certifies that this final rule will not have a significant economic impact on a substantial number of small entities. While TTB has determined that the majority of businesses subject to this rule are small businesses, the regulatory amendments in this final rule will not have a significant impact on those small entities as it will not impose, or otherwise cause, an increase in reporting, recordkeeping, or other compliance burdens on regulated industry members. The final rule will not require industry members to make changes to labels or advertisements. The following analysis provides the factual basis for TTB's certification under 5 U.S.C. 605.

1. Background

In Notice No. 176, published on November 26, 2018, TTB proposed a recodification of the labeling and advertising regulations pertaining to wine, distilled spirits, and malt beverages. The purpose was to clarify and update these regulations to make them easier to understand and to incorporate agency policies. TTB determined that the majority of businesses subject to the proposed rule were small businesses (see Notice No. 176 for more information on this determination). Accordingly, TTB sought comments on the impact of the proposals, and on ways in which the regulations could be improved. TTB also proposed a delayed compliance date to provide all regulated entities three years to come into compliance with the proposed regulations, to minimize the costs associated with any label changes.

In this final rule, TTB is amending certain of its regulations governing the labeling and advertising of wine, distilled spirits, and malt beverages to address comments it received in response to Notice No. 176. TTB is continuing to consider all of the issues raised by comments it received in response to that notice, but is taking this interim step to finalize certain of the liberalizing and clarifying changes that have been decided, and that could be implemented quickly and provide industry members some greater flexibility.

2. Comment From SBA Chief Counsel for Advocacy

As required by section 7805(f) of the Internal Revenue Code (26 U.S.C. 7805(f)), TTB submitted Notice No. 176 to the Chief Counsel for Advocacy of the Small Business Administration (SBA) for comment on the impact of these regulations.

By letter dated August 6, 2019, the Office of Advocacy for the U.S. Small Business Administration (''SBA Office of Advocacy'') provided a comment on Notice No. 176. The comment stated that ''Advocacy commends the TTB on its logical reorganization of the labeling and advertising rules and streamlining some of its processes.'' However, the comment also indicated that in its discussions with small businesses in the alcohol beverage industry, two issues with the proposed rule were brought to its attention: The definition of an ''oak barrel,'' and creating a separate class and type for mead. The comment suggested that TTB revise the rule to reduce the impacts of the proposed definition of ''oak barrel.''

As described in more detail in section II.C.2 of this preamble, in Notice No. 176, TTB proposed to define the term ''oak barrel,'' as a ''cylindrical oak drum of approximately 50 gallons capacity used to age bulk spirits.'' However, TTB specifically solicited comment on whether smaller barrels or non-cylindrical shaped barrels should be acceptable for storing distilled spirits where the standard of identity requires storage in oak barrels.

With regard to TTB's proposed definition of an ''oak barrel'' as a ''cylindrical oak drum of approximately 50 gallons used to age bulk spirits,'' the SBA Office of Advocacy stated that many small distillers use oak barrels of varying sizes, including barrels of 25 and 30 gallons. The comment noted that the SBA Office of Advocacy had spoken with one small distiller that had approximately 5,000 proof gallons of

whisky that is either aging in small cooperage or is in holding tanks after aging in small cooperage, and that under the proposed rule, that product could not be sold as ''whisky.'' The SBA Office of Advocacy noted that this distiller's product is worth approximately $1.5 million at retail.

The comment from the SBA Office of Advocacy also stated that the proposed 3-year compliance date would be inadequate, because it would not provide enough time to sell all spirits aged in barrels smaller than 50 gallons, and because small distillers need to make purchasing decisions for barrels on an ongoing basis. Additionally, some small distillers use square barrels rather than cylindrical barrels.

In response to Notice No. 176, TTB received almost 700 comments from distillers and trade associations that stated that the proposed rule would impose burdens on small businesses that currently use barrels of varying sizes and shapes. Only a handful of commenters supported the proposed definition.

After careful review of the comments received on this issue, TTB has determined that it will not move forward with the proposal to define an ''oak barrel'' as a ''cylindrical oak drum of approximately 50 gallons used to age bulk spirits'' or otherwise define the term in the regulations. In the absence of a regulatory definition for ''oak barrel'' or ''oak container,'' it will be TTB's policy that these terms include oak containers of varying shapes and sizes.

Because TTB is not moving forward with the proposed definition of ''oak barrel,'' the final rule addresses the comment from SBA Office of Advocacy. Accordingly, there is no need to conduct a supplemental initial regulatory flexibility analysis to propose alternatives to the rule. The other issue addressed by the comment from the SBA Office of Advocacy dealt with the proposed regulations on honey wine (also known as ''mead''). This final rule does not address that issue; thus, TTB will review SBA's comment on mead, along with the other comments received on this issue, for further action.

3. Other Proposals That Will Not Be Adopted

In addition to not adopting its proposed definition of an ''oak barrel,'' TTB has decided not to adopt certain other proposals, including the following:

- A proposed restriction on the use of certain types of cross-commodity terms (for example, imposing restrictions on the use of various types of distilled spirits terms, including homophones of distilled spirits classes on wine or malt beverage labels).
- Proposed changes to statements of composition for distilled spirits labels, including changes that would have required disclosure of intermediate products, required distilled spirits and wines used in a finished product to be listed in order of predominance, and removed the flexibility to use an abbreviated statement of composition for cocktails.
- A policy that would have limited ''age'' statements on distilled spirits labels to include only the time the product is aged in the first barrel, and not aging that occurs in subsequent barrels.
- A proposal that would have required that whisky that meets the standards for a specific type designation be labeled with that type designation rather than the broader class designation.

This final rule includes only amendments that TTB believes offer clarifications and liberalize requirements for industry members and that avoid unintended conflicts with current labels or business practices, while still providing adequate protection for consumers. Because the final rule will not require changes to labels, advertisements, or business practices, no delayed compliance date is necessary, and the final rule will take effect 30 days from publication in the **Federal Register**.

The preamble explains in detail the reasons why the proposals that have been adopted in this final rule are either clarifying or liberalizing. For example, the final rule clarifies existing policies regarding personalized labels and exemptions from the labeling regulations for products exported in bond. Some examples of liberalizing measures that TTB is finalizing in this document include: Implementing an increase (to plus or minus 0.3 percentage points) in the tolerance applicable to the alcohol content statements on distilled spirits labels; removing the current prohibition against age statements on several classes and types of distilled spirits; removing outdated prohibitions against the use of the term ''strong'' and other indications of alcohol strength on malt beverage labels; and removing a limitation on the way distilled spirits producers could count the distillations when making optional ''multiple distillation'' claims on their labels. The final rule also liberalizes the advertising regulations for wine, distilled spirits, and malt beverages, by allowing alternate contact information for the responsible advertiser, such as a telephone number, website, or email address, in lieu of the responsible advertiser's location by city and State.

In summary, while the entities affected by the amendments in this final rule include a substantial number of small entities, the final rule does not require labeling or advertising changes by these small businesses, but instead offers industry members additional flexibility in complying with the regulations. Thus, TTB certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

B. Executive Order 12866

It has been determined that this final rule is not a significant regulatory action as defined in Executive Order 12866 of September 30, 1993. Therefore, a regulatory assessment is not necessary.

C. Paperwork Reduction Act

The collections of information in the regulations contained in this final rule have been previously reviewed and approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) and assigned control numbers 1513–0020, 1513–0041, 1513–0064 and 1513–0087. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

The specific regulatory sections in this final rule that contain approved collections of information are §§ 4.62, 5.32, 5.52, 5.63, 7.52, and 19.353. In addition, the new regulations at §§ 4.54, 5.57 and 7.43 include cross-references to regulations covered by an approved collection of information. As explained further below, the regulatory amendments made in this final rule do not change any reporting, recordkeeping, or third-party disclosure requirement of, or the respondent burden associated with, these existing information collections.

Regarding OMB control number 1513–0020, the regulations in §§ 4.54, 5.57, and 7.43, set forth the process for importers and domestic bottlers to make certain changes to approved labels in order to personalize the labels without having to resubmit the labels for TTB approval. These new regulations cross-reference the existing label approval regulations covered under OMB control number 1513–0020 that require applications for label approval for wine, distilled spirits, and malt beverages, respectively. The new regulations do not add any new requirements or respondent burden to that previously-

approved collection as they merely set forth current TTB guidance regarding when the submission of label approval applications for personalized labels is required.

Regarding OMB control number 1513–0041, relating to gauging records for distilled spirits plants, TTB is amending § 19.353 to include conforming language that refers to the expanded labeling tolerance for alcohol content that is provided in the amendments to § 19.356. The addition of that conforming language has no effect on this information collection's requirements or respondent burden.

Regarding OMB control number 1513–0064, related to importer records, amendments to § 5.52 merely make clarifications to the regulations concerning certificates of age and origin for distilled spirits and do not affect the information collection's requirements or respondent burden.

Regarding OMB control number 1513–0087, related to FAA Act-based labeling and advertising requirements, TTB is amending §§ 4.62(a), 5.63(a) 7.52(a) to allow alcohol beverage advertisers optional ways to provide contact information in their advertisements, such as by displaying a telephone number, website, or email address in lieu of the advertiser's city and State. In § 5.32, TTB is amending its distilled spirits labeling requirements to allow the display of a non-standard distilled spirits container's net contents on any label and to remove the TTB regulatory provision relating to country of origin statements. None of these regulatory amendments increase the requirements or respondent burdens associated with OMB control number 1513–0087.

IV. Drafting Information

Personnel of the Regulations and Rulings Division drafted this document with the assistance of other employees of the Alcohol and Tobacco Tax and Trade Bureau.

List of Subjects

27 CFR Part 4

Advertising, Alcohol and alcoholic beverages, Customs duties and inspection, Food additives, Imports, International agreements, Labeling, Packaging and containers, Reporting and recordkeeping requirements, Trade practices, Wine.

27 CFR Part 5

Advertising, Alcohol and alcoholic beverages, Customs duties and inspection, Food additives, Grains, Imports, International agreements, Labeling, Liquors, Packaging and containers, Reporting and recordkeeping requirements, Trade practices.

27 CFR Part 7

Advertising, Alcohol and alcoholic beverages, Beer, Customs duties and inspection, Food additives, Imports, Labeling, Packaging and containers, Reporting and recordkeeping requirements, Trade practices.

27 CFR Part 19

Administrative practice and procedure, Alcohol and alcoholic beverages, Authority delegations (Government agencies), Caribbean Basin initiative, Chemicals, Claims, Customs duties and inspection, Electronic funds transfers, Excise taxes, Exports, Gasohol, Imports, Labeling, Liquors, Packaging and containers, Puerto Rico, Reporting and recordkeeping requirements, Research, Security measures, Spices and flavorings, Stills, Surety bonds, Transportation, Vinegar, Virgin Islands, Warehouses, Wine.

Regulatory Amendments

For the reasons discussed in the preamble, TTB amends 27 CFR, chapter I, as follows:

PART 4—LABELING AND ADVERTISING OF WINE

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

Authority: 27 U.S.C. 205, unless otherwise noted.

Subpart A—Scope

■ 2. Add § 4.6 to read as follows:

§ 4.6 Wines covered by this part.

The regulations in this part apply to wine containing not less than 7 percent and not more than 24 percent alcohol by volume.

■ 3. Add § 4.7 to read as follows:

§ 4.7 Products produced as wine that are not covered by this part.

Certain wine products do not fall within the definition of a ''wine'' under the FAA Act and are thus not subject to this part. They may, however, also be subject to other labeling requirements. See 27 CFR parts 24 and 27 for labeling requirements applicable to ''wine'' as defined by the IRC. See 27 CFR part 16 for health warning statement requirements applicable to ''alcoholic beverages'' as defined by the Alcoholic Beverage Labeling Act.

(a) *Products containing less than 7 percent alcohol by volume.* The regulations in this part do not cover products that would otherwise meet the definition of wine except that they contain less than 7 percent alcohol by volume. Bottlers and importers of alcohol beverages that do not fall within the definition of malt beverages, wine, or distilled spirits under the FAA Act should refer to the applicable labeling regulations for foods issued by the U.S. Food and Drug Administration. See 21 CFR part 101.

(b) *Products containing more than 24 percent alcohol by volume.* Products that would otherwise meet the definition of wine except that they contain more than 24 percent alcohol by volume are classified as distilled spirits and must be labeled in accordance with part 5 of this chapter.

Subpart B—Definitions

■ 4. Amend § 4.10 by adding the definition of ''Certificate of label approval (COLA)'' in alphabetical order to read as follows:

§ 4.10 Meaning of terms.

* * * * *

Certificate of label approval (COLA). A certificate issued on form TTB F 5100.31 that authorizes the bottling of wine, distilled spirits, or malt beverages, or the removal of bottled wine, distilled spirits, or malt beverages from customs custody for introduction into commerce, as long as the product bears labels identical to the labels appearing on the face of the certificate, or labels with changes authorized by TTB on the certificate or otherwise (such as through the issuance of public guidance available on the TTB website at *www.ttb.gov*).

* * * * *

Subpart C—Standards of Identity for Wine

■ 5. Amend § 4.21 by:

■ a. Revising paragraph (a)(1);

■ b. Redesignating paragraphs (a)(2) and (3) as paragraph (a)(5) and (6), respectively;

■ c. Adding new paragraphs (a)(2), (a)(3), and (a)(4);

■ d. Removing and reserving paragraph (d);

■ e. Revising paragraph (e)(1);

■ f. Redesignating paragraphs (e)(2), (3), (4), and (5) as paragraphs (e)(5) (6), (7), and (8), respectively;

■ g. Add new paragraphs (e)(2), (3), and (4);

■ h. In redesignated paragraph (e)(8), in the first sentence, remove the phrase ''*e.g.,* ''peach wine,'' ''blackberry wine.'' '' and add in its place the phrase ''*e.g.,* ''peach wine,'' ''blackberry wine,'' ''orange wine.'' ''; and

■ i. In redesignated paragraph (e)(8), inserting a new sentence after the end of the second sentence.

The additions and revisions read as follows:

§ 4.21 The standards of identity.

* * * * *

(a) * * *

(1) *Grape wine* is wine produced by the normal alcoholic fermentation of the juice of sound, ripe grapes (including restored or unrestored pure condensed grape must), with or without the addition, after fermentation, of pure condensed grape must and with or without added spirits of the type authorized for natural wine under 26 U.S.C. 5382, but without other addition or abstraction except as may occur in cellar treatment of the type authorized for natural wine under 26 U.S.C. 5382.

(2) Still grape wine may be ameliorated, or sweetened, before, during, or after fermentation, in a way that is consistent with the limits set forth in 26 U.S.C. 5383 for natural grape wine.

(3) The maximum volatile acidity, calculated as acetic acid and exclusive of sulfur dioxide is 0.14 gram per 100 mL (20 degrees Celsius) for red wine and 0.12 gram per 100 mL (20 degrees Celsius) for other grape wine, provided that the maximum volatile acidity for wine produced from unameliorated juice of 28 or more degrees Brix is 0.17 gram per 100 mL for red wine and 0.15 gram per 100 mL for white wine.

(4) Grape wine deriving its characteristic color or lack of color from the presence or absence of the red coloring matter of the skins, juice, or pulp of grapes may be designated as ''red wine,'' ''pink (or rose) wine,'' ''amber wine,'' or ''white wine'' as the case may be. Any grape wine containing no added grape brandy or alcohol may be further designated as ''natural.''

* * * * *

(d) [Reserved]

(e) * * *

(1) Fruit wine is wine produced by the normal alcoholic fermentation of the juice of sound, ripe fruit (including restored or unrestored pure condensed fruit must) other than grapes, with or without the addition, after fermentation, of pure condensed fruit must and, with or without added spirits of the type authorized for natural wine under 26 U.S.C. 5382, but without other addition or abstraction except as may occur in cellar treatment of the type authorized for natural wine under 26 U.S.C. 5382.

(2) Fruit wine may be ameliorated, or sweetened, before, during, or after fermentation, in a way that is consistent with the limits set forth in 26 U.S.C. 5384 for natural fruit wine.

(3) The maximum volatile acidity, calculated as acetic acid and exclusive of sulfur dioxide, shall not be, for fruit wine that does not contain added brandy or wine spirits, more than 0.14 gram, and for other fruit wine, more than 0.12 gram, per 100 milliliters (20 degrees Celsius).

(4) Any fruit wine containing no added grape brandy or alcohol may be further designated as ''natural.''

* * * * *

(8) * * * If the fruit wine is derived wholly (except for sugar, water, or added alcohol) from more than one citrus fruit, the designation ''citrus wine'' or ''citrus fruit wine'' may, but is not required to, be used instead of ''fruit wine,'' and the designation must also be qualified by a truthful and adequate statement of composition appearing in direct conjunction therewith. * * *

* * * * *

§ 4.27 [Amended]

■ 6. Amend 4.27 by:

■ a. Removing the phrase ''in containers of 5 liters or less'' from paragraph (b);

■ b. Adding the word ''and'' at the end of paragraph (c)(1);

■ c. Removing paragraph (c)(2); and

■ d. Redesignating paragraph (c)(3) as new paragraph (c)(2).

Subpart D—Labeling Requirements for Wine

■ 7. Amend § 4.35 by revising paragraph (e) to read as follows:

§ 4.35 Name and address.

* * * * *

(e) *Cross reference—country of origin statement.* For U.S. Customs and Border Protection (CBP) rules regarding country of origin marking requirements, see the CBP regulations at 19 CFR parts 102 and 134.

Subpart F—Requirements for Approval of Labels of Wine Domestically Bottled or Packed

■ 8. Add § 4.54 to read as follows:

§ 4.54 Personalized labels.

(a) *General.* Applicants for label approval may obtain permission from TTB to make certain changes in order to personalize labels without having to resubmit labels for TTB approval. A personalized label is an alcohol beverage label that meets the minimum mandatory label requirements and is customized for customers. Personalized labels may contain a personal message, picture, or other artwork that is specific to the consumer who is purchasing the product. For example, a winery may offer individual or corporate customers labels that commemorate an event such as a wedding or grand opening.

(b) *Application.* Any person who intends to offer personalized labels must submit a template for the personalized label as part of the application for label approval required under §§ 4.40 or 4.50 of this part, and must note on the application a description of the specific personalized information that may change.

(c) *Approval of personalized label.* If the application complies with the regulations, TTB will issue a certificate of label approval (COLA) with a qualification allowing the personalization of labels. The qualification will allow the certificate holder to add or change items on the personalized label such as salutations, names, graphics, artwork, congratulatory dates and names, or event dates without applying for a new COLA. All of these items on personalized labels must comply with the regulations of this part.

(d) *Changes not allowed to personalized labels.* Approval of an application to personalize labels does not authorize the addition of any information that discusses either the alcohol beverage or characteristics of the alcohol beverage or that is inconsistent with or in violation of the provisions of this part or any other applicable provision of law or regulations.

Subpart G—Advertising of Wine

■ 9. Amend § 4.62 by revising paragraph (a) to read as follows:

§ 4.62 Mandatory statements.

(a) *Responsible advertiser.* The advertisement must display the responsible advertiser's name, city, and State or the name and other contact information (such as telephone number, website, or email address) where the responsible advertiser may be contacted.

* * * * *

PART 5— LABELING AND ADVERTISING OF DISTILLED SPIRITS

■ 10. The authority citation for part 5 continues to read as follows:

Authority: 26 U.S.C. 5301, 7805, 27 U.S.C. 205.

Subpart A—Scope

■ 11. Revise § 5.1 to read as follows:

§ 5.1 General.

(a) The regulations in this part relate to the labeling and advertising of

distilled spirits. This part applies to the several States of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(b) The regulations in this part shall not apply to distilled spirits exported in bond.

Subpart B—Definitions

■ 12. Amend § 5.11 by:
■ a. Revising the definition of ''Brand label'';
■ b. Adding the definition of ''Certificate of label approval (COLA)'' in alphabetical order; and
■ c. Adding a sentence to the end of the definition of ''Distilled spirits.''

The revision and additions read as follows:

§ 5.11 Meaning of terms.

* * * * *

Brand label. The label or labels bearing the brand name, alcohol content, and class or type designation in the same field of vision. Same field of vision means a single side of a container (for a cylindrical container, a side is 40 percent of the circumference) where all of the pieces of information can be viewed simultaneously without the need to turn the container.

* * * * *

Certificate of label approval (COLA). A certificate issued on form TTB F 5100.31 that authorizes the bottling of wine, distilled spirits, or malt beverages, or the removal of bottled wine, distilled spirits, or malt beverages from customs custody for introduction into commerce, as long as the product bears labels identical to the labels appearing on the face of the certificate, or labels with changes authorized by TTB on the certificate or otherwise (such as through the issuance of public guidance available on the TTB website at *www.ttb.gov*).

* * * * *

Distilled spirits. * * *. The term ''distilled spirits'' also does not include products containing less than 0.5 percent alcohol by volume.

* * * * *

Subpart C—Standards of Identity for Distilled Spirits

■ 13. Amend § 5.22 by:
■ a. Revising paragraph (a)(1);
■ b. Amending paragraph (b)(1)(iii) by removing the word ''shall'' and adding in its place the phrase ''may optionally'' wherever it appears; and
■ c. Revising paragraph (g).

The revisions read as follows:

§ 5.22 The standards of identity.

* * * * *

(a) * * *

(1) ''Vodka'' is neutral spirits which may be treated with up to two grams per liter of sugar and up to one gram per liter of citric acid. Products to be labeled as vodka may not be aged or stored in wood barrels at any time except when stored in paraffin-lined wood barrels and labeled as bottled in bond pursuant to § 5.42(b)(3). Vodka treated and filtered with not less than one ounce of activated carbon or activated charcoal per 100 wine gallons of spirits may be labeled as ''charcoal filtered.''

* * * * *

(g) *Class 7; Agave Spirits.* ''Agave spirits'' are distilled from a fermented mash, of which at least 51 percent is derived from plant species in the genus Agave and up to 49 percent is derived from other sugars. Agave spirits must be distilled at less than 95 percent alcohol by volume (190° proof) and bottled at or above 40 percent alcohol by volume (80° proof). Agave spirits may be stored in wood barrels. Agave spirits may contain added flavoring or coloring materials as authorized by § 5.23. This class also includes mixtures of agave spirits. Agave spirits that meet the standard of identity for ''Tequila'' or ''Mezcal'' may be designated as ''agave spirits'' or as ''Tequila'' or ''Mezcal'' as applicable.

(1) ''Tequila'' is an agave spirit that is a distinctive product of Mexico. Tequila must be made in Mexico, in compliance with the laws and regulations of Mexico governing the manufacture of Tequila for consumption in that country.

(2) ''Mezcal'' is an agave spirit that is a distinctive product of Mexico. Mezcal must be made in Mexico, in compliance with the laws and regulations of Mexico governing the manufacture of Mezcal for consumption in that country.

* * * * *

§ 5.23 [Amended]

■ 14. Amend § 5.23, paragraph (a)(3) by removing the phrase ''a trace amount of citric acid'' and adding in its place the phrase ''citric acid in an amount not to exceed one gram per liter''.

Subpart D—Labeling Requirements for Distilled Spirits

■ 15. Amend § 5.32 by:
■ a. Removing and reserving paragraph (a)(4);
■ b. Removing and reserving paragraph (b)(2); and
■ c. Revising paragraph (b)(3).

The revision reads as follows:

§ 5.32 Mandatory label information.

* * * * *

(a) * * *

(4) [Reserved]

* * * * *

(b) * * *

(2) [Reserved]

(3) Net contents, in accordance with § 5.38.

* * * * *

§ 5.35 [Amended].

■ 16. Amend § 5.35 by removing the word ''designed'' and adding in its place the word ''designated''.

■ 17. Amend § 5.36 by revising paragraph (e) to read as follows:

§ 5.36 Name and address.

* * * * *

(e) *Cross reference—country of origin statement.* For U.S. Customs and Border Protection (CBP) rules regarding country of origin marking requirements, see the CBP regulations at 19 CFR parts 102 and 134.

* * * * *

■ 18. Amend § 5.37 by revising paragraph (b) to read as follows:

§ 5.37 Alcohol content.

* * * * *

(b) *Tolerances.* A tolerance of plus or minus 0.3 percentage points is allowed for actual alcohol content that is above or below the labeled alcohol content.

* * * * *

■ 19. Amend § 5.40 by:
■ a. Redesignating the text of paragraph (a)(1) as paragraph (a)(1)(i);
■ b. Adding paragraph (a)(1)(ii);
■ c. Amending paragraph (b) by removing the word ''Tequila'' and adding in its place the phrase ''agave spirits'' wherever it appears; and
■ d. Revising paragraph (d).

The addition and revision read as follows:

§ 5.40 Statements of age and percentage.

(a) * * *

(1) * * *

(ii) If a whisky is aged in more than one container, the label may optionally indicate the types of oak containers used.

* * * * *

(d) *Other distilled spirits.* (1) Statements regarding age or maturity or similar statements or representations on labels for all other spirits, except neutral spirits, are permitted only when the distilled spirits are stored in an oak barrel and, once dumped from the barrel, subjected to no treatment besides mixing with water, filtering, and bottling. If batches are made from barrels of spirits of different ages, the label may only state the age of the youngest spirits.

(2) Statements regarding age or maturity or similar statements as to

neutral spirits (except for grain spirits as stated in paragraph (c) of this section) are prohibited from appearing on any label.

* * * * *

■ 20. Amend § 5.42 by revising paragraphs (b)(3)(iii) and (b)(6), to read as follows:

§ 5.42 Prohibited practices.

* * * * *

(b) * * *

(3) * * *

(iii) Stored for at least four years in wooden containers wherein the spirits have been in contact with the wood surface, except for vodka, which must be stored for at least four years in wooden containers coated or lined with paraffin or other substance which will preclude contact of the spirits with the wood surface, and except for gin, which must be stored in paraffin-lined or unlined wooden containers for at least four years;

* * * * *

(6) Distilled spirits may not be labeled as ''double distilled'' or ''triple distilled'' or any similar term unless it is a truthful statement of fact. For purposes of this paragraph only, a distillation means a single run through a pot still or a single run through a column of a column (reflux) still. The number of distillations may be understated but may not be overstated.

* * * * *

Subpart F—Requirements for Withdrawal From Customs Custody of Bottled Imported Distilled Spirits

■ 21. Amend § 5.52 by:

■ a. By revising paragraphs (a) and (b);

■ b. In paragraph (c)(1), adding the phrase '', or a conformity assessment body,'' between the words ''Government'' and ''stating'', and by removing the word ''certificate'' and adding the phrase ''Certificate of Tequila Export'' in its place;

■ c. In paragraph (c)(2), adding the phrase '', or a conformity assessment body,'' between the words ''Government'' and ''as'', and by removing the word ''certificate'' and adding the phrase ''Certificate of Tequila Export'' in its place;

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

■ e. In newly redesignated paragraph (g), removing the phrase ''(a) through (e)'' and adding in its place the phrase ''(a) through (f)''; and

■ f. Adding new paragraph (e).

The addition and revisions read as follows:

§ 5.525.52 Certificates of age and origin.

* * * * *

(a) *Scotch, Irish, and Canadian whiskies.* (1) Scotch, Irish, and Canadian whiskies, imported in containers, are not eligible for release from customs custody for consumption, and no person may remove such whiskies from customs custody for consumption, unless that person has obtained and is in possession of an invoice accompanied by a certificate of origin issued by an official duly authorized by the appropriate foreign government, certifying:

(i) That the particular distilled spirits are Scotch, Irish, or Canadian whisky, as the case may be; and

(ii) That the distilled spirits have been manufactured in compliance with the laws of the respective foreign governments regulating the manufacture of whisky for home consumption.

(2) In addition, an official duly authorized by the appropriate foreign government must certify to the age of the youngest distilled spirits in the container. The age certified shall be the period during which, after distillation and before bottling, the distilled spirits have been stored in oak containers.

(b) *Brandy and Cognac.* Brandy (other than fruit brandies of a type not customarily stored in oak containers) or Cognac, imported in bottles, is not eligible for release from customs custody for consumption, and no person may remove such brandy or Cognac from customs custody for consumption, unless the person so removing the brandy or Cognac possesses a certificate issued by an official duly authorized by the appropriate foreign country certifying that the age of the youngest brandy or Cognac in the bottle is not less than two years, or if age is stated on the label that none of the distilled spirits are of an age less than that stated. The age certified shall be the period during which, after distillation and before bottling, the distilled spirits have been stored in oak containers. If the label of any fruit brandy, not stored in oak containers, bears any statement of storage in another type of container, the brandy is not eligible for release from customs custody for consumption, and no person may remove such brandy from customs custody for consumption, unless the person so removing the brandy possesses a certificate issued by an official duly authorized by the appropriate foreign government certifying to such storage. Cognac, imported in bottles, is not eligible for release from customs custody for consumption, and no person may remove such Cognac from customs custody for consumption, unless the person so removing the Cognac possesses a certificate issued by an official duly authorized by the French Government, certifying that the product is grape brandy distilled in the Cognac region of France and entitled to be designated as ''Cognac'' by the laws and regulations of the French Government.

* * * * *

(e) *Rum.* Rum imported in bottles that contain any statement of age is not eligible to be released from customs custody for consumption, and no person may remove such rum from customs custody for consumption, unless the person so removing the rum possesses a certificate issued by an official duly authorized by the appropriate foreign country, certifying to the age of the youngest rum in the bottle. The age certified shall be the period during which, after distillation and before bottling, the distilled spirits have been stored in oak containers.

* * * * *

Subpart G–Requirements for Approval of Labels of Domestically Bottled Distilled Spirits

■ 22. Add § 5.57 to read as follows:

§ 5.575.57 Personalized labels.

(a) *General.* Applicants for label approval may obtain permission from TTB to make certain changes in order to personalize labels without having to resubmit labels for TTB approval. A personalized label is an alcohol beverage label that meets the minimum mandatory label requirements and is customized for customers. Personalized labels may contain a personal message, picture, or other artwork that is specific to the consumer who is purchasing the product. For example, a distiller may offer individual or corporate customers labels that commemorate an event such as a wedding or grand opening.

(b) *Application.* Any person who intends to offer personalized labels must submit a template for the personalized label as part of the application for label approval required under §§ 5.51 or 5.55 of this part, and must note on the application a description of the specific personalized information that may change.

(c) *Approval of personalized label.* If the application complies with the regulations, TTB will issue a certificate of label approval (COLA) with a qualification allowing the personalization of labels. The qualification will allow the certificate holder to add or change items on the personalized label such as salutations, names, graphics, artwork, congratulatory dates and names, or

event dates without applying for a new COLA. All of these items on personalized labels must comply with the regulations of this part.

(d) *Changes not allowed to personalized labels.* Approval of an application to personalize labels does not authorize the addition of any information that discusses either the alcohol beverage or characteristics of the alcohol beverage or that is inconsistent with or in violation of the provisions of this part or any other applicable provision of law or regulations.

Subpart H—Advertising of Distilled Spirits

■ 23. Amend § 5.63 by revising paragraph (a) to read as follows:

§ 5.635.63 Mandatory statements.

(a) *Responsible advertiser.* The advertisement must display the responsible advertiser's name, city, and State or the name and other contact information (such as, telephone number, website, or email address) where the responsible advertiser may be contacted.

* * * * *

■ 24. Amend § 5.65 by revising paragraph (a)(9) to read as follows:

§ 5.655.65 Prohibited practices.

(a) * * *

(9) The words ''double distilled'' or ''triple distilled'' or any similar terms unless it is a truthful statement of fact. For purposes of this paragraph only, a distillation means a single run through a pot still or a single run through a column of a column (reflux) still. The number of distillations may be understated but may not be overstated.

* * * * *

PART 7—LABELING AND ADVERTISING OF MALT BEVERAGES

■ 25. The authority citation for part 7 continues to read as follows:

Authority: 27 U.S.C. 205.

Subpart A—Scope

■ 26. Add § 7.6 to read as follows:

§ 7.67.6 Brewery products not covered by this part.

Certain fermented products that are regulated as ''beer'' under the Internal Revenue Code (IRC) do not fall within the definition of a ''malt beverage'' under the FAA Act and thus are not subject to this part. They may, however, also be subject to other labeling requirements. See 27 CFR parts 25 and 27 for labeling requirements applicable to ''beer'' as defined under the IRC. See 27 CFR part 16 for health warning statement requirements applicable to ''alcoholic beverages'' as defined in the Alcoholic Beverage Labeling Act.

(a) *Saké and similar products.* Saké and similar products (including products that fall within the definition of ''beer'' under parts 25 and 27 of this chapter) that fall within the definition of a ''wine'' under the FAA Act are covered by the labeling regulations for wine in 27 CFR part 4.

(b) *Other beers not made with both malted barley and hops.* The regulations in this part do not cover beer products that are not made with both malted barley and hops, or their parts or their products, or that do not fall within the definition of a ''malt beverage'' under § 7.10 for any other reason. Bottlers and importers of alcohol beverages that do not fall within the definition of malt beverages, wine, or distilled spirits under the FAA Act should refer to the applicable labeling regulations for foods issued by the U.S. Food and Drug Administration. See 21 CFR part 101.

Subpart B—Definitions

■ 27. Amend § 7.10 by adding a definition of ''Certificate of label approval (COLA)'' in alphabetical order to read as follows:

§ 7.107.10 Meaning of terms.

* * * * *

Certificate of label approval (COLA). A certificate issued on form TTB F 5100.31 that authorizes the bottling of wine, distilled spirits, or malt beverages, or the removal of bottled wine, distilled spirits, or malt beverages from customs custody for introduction into commerce, as long as the product bears labels identical to the labels appearing on the face of the certificate, or labels with changes authorized by TTB on the certificate or otherwise (such as through the issuance of public guidance available on the TTB website at *www.ttb.gov*).

* * * * *

Subpart C—Labeling Requirements for Malt Beverages

■ 28. Amend § 7.25 by redesignating paragraph (c) as paragraph (d) and adding new paragraph (c) to read as follows:

§ 7.257.25 Name and address.

* * * * *

(c) *Cross reference—country of origin statement.* For U.S. Customs and Border Protection (CBP) rules regarding country of origin marking requirements, see the CBP regulations at 19 CFR parts 102 and 134.

* * * * *

§ 7.297.29 [Amended]

■ 29. Amend § 7.29 by removing and reserving paragraphs (f) and (g).

Subpart E—Requirements for Approval of Labels of Malt Beverages Domestically Bottled or Packed

■ 30. Add § 7.43 to read as follows:

§ 7.437.43 Personalized labels.

(a) *General.* Applicants for label approval may obtain permission from TTB to make certain changes in order to personalize labels without having to resubmit labels for TTB approval. A personalized label is an alcohol beverage label that meets the minimum mandatory label requirements and is customized for customers. Personalized labels may contain a personal message, picture, or other artwork that is specific to the consumer who is purchasing the product. For example, a brewer may offer individual or corporate customers labels that commemorate an event such as a wedding or grand opening.

(b) *Application.* Any person who intends to offer personalized labels must submit a template for the personalized label as part of the application for label approval required under §§ 7.31 or 7.41 of this part, and must note on the application a description of the specific personalized information that may change.

(c) *Approval of personalized label.* If the application complies with the regulations, TTB will issue a certificate of label approval (COLA) with a qualification allowing the personalization of labels. The qualification will allow the certificate holder to add or change items on the personalized label such as salutations, names, graphics, artwork, congratulatory dates and names, or event dates without applying for a new COLA. All of these items on personalized labels must comply with the regulations of this part.

(d) *Changes not allowed to personalized labels.* Approval of an application to personalize labels does not authorize the addition of any information that discusses either the alcohol beverage or characteristics of the alcohol beverage or that is inconsistent with or in violation of the provisions of this part or any other applicable provision of law or regulations.

Subpart F—Advertising of Malt Beverages

■ 31. Amend § 7.52 by revising paragraph (a) to read as follows:

§ 7.527.52 Mandatory statements.

(a) *Responsible advertiser.* The advertisement must display the responsible advertiser's name, city, and State or the name and other contact information (such as, telephone number, website, or email address) where the responsible advertiser may be contacted.

* * * * *

§ 7.547.54 [Amended]

■ 32. Amend § 7.54 by removing and reserving paragraph (c).

■ 33. Revise the heading to subpart H to read as follows:

Subpart H—Alcoholic Content Statements

■ 34. Amend § 7.71 by revising paragraph (b)(1) to read as follows:

§ 7.717.71 Alcoholic content.

* * * * *

(b) * * *

(1) Statement of alcoholic content shall be expressed in percent alcohol by volume, and not by proof, by a range, or by maximums or minimums, unless required by State law. Other truthful, accurate, and specific factual representations of alcohol content, such as alcohol by weight, may be made, as long as they appear together with, and as part of, the statement of alcohol content as a percentage of alcohol by volume.

* * * * *

PART 19—DISTILLED SPIRITS PLANTS

■ 35. The authority citation for part 19 continues to read as follows:

Authority: 19 U.S.C. 81c, 1311; 26 U.S.C. 5001, 5002, 5004–5006, 5008, 5010, 5041, 5061, 5062, 5066, 5081, 5101, 5111–5114, 5121–5124, 5142, 5143, 5146, 5148, 5171–5173, 5175, 5176, 5178–5181, 5201–5204, 5206, 5207, 5211–5215, 5221–5223, 5231, 5232, 5235, 5236, 5241–5243, 5271, 5273, 5301, 5311–5313, 5362, 5370, 5373, 5501–5505, 5551–5555, 5559, 5561, 5562, 5601, 5612, 5682, 6001, 6065, 6109, 6302, 6311, 6676, 6806, 7011, 7510, 7805; 31 U.S.C. 9301, 9303, 9304, 9306.

Subpart N—Processing of Distilled Spirits

■ 36. Amend § 19.353 by revising the second sentence to read as follows:

§ 19.35319.353 Bottling tank gauge.

* * *. The gauge must be made at labeling or package marking proof, subject to variations in accordance with the tolerances set forth in § 19.356(c); however, the actual measurement of the gauge must be entered on the bottling and packaging record required in § 19.599.

* * * * *

■ 37. Amend § 19.356 by revising paragraphs (c) and (d) to read as follows:

§ 19.35619.356 Alcohol content and fill.

* * * * *

(c) *Variations in alcohol content.* Variations in alcohol content may not exceed 0.3 percent alcohol by volume above or below the alcohol content stated on the label.

(d) *Example.* Under paragraph (c) of this section, a product labeled as containing 40 percent alcohol by volume would be acceptable if the test for alcohol content found that it contained no less than 39.7 percent alcohol by volume and no more than 40.3 percent alcohol by volume.

* * * * *

Signed: January 9, 2020.

Mary G. Ryan,

Acting Administrator.

Approved: March 13, 2020.

Timothy E. Skud,

Deputy Assistant Secretary (Tax, Trade, and Tariff Policy).

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Part IV

Department of the Treasury

Office of the Comptroller of the Currency

12 CFR Part 5

Licensing Amendments; Proposed Rule

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 5

[Docket ID OCC–2019–0024]

RIN 1557–AE71

Licensing Amendments

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is proposing to amend its rules relating to policies and procedures for corporate activities and transactions involving national banks and Federal savings associations to update and clarify the policies and procedures, eliminate unnecessary requirements consistent with safety and soundness, and make other technical and conforming changes.

DATES: Comments must be received on or before May 4, 2020.

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

• *Federal eRulemaking Portal—Regulations.gov Classic or Regulations.gov Beta Regulations.gov Classic:* Go to *https://www.regulations.gov/.* Enter ''Docket ID OCC–2019–0024'' in the Search Box and click ''Search.'' Click on ''Comment Now'' to submit public comments. For help with submitting effective comments please click on ''View Commenter's Checklist.'' Click on the ''Help'' tab on the *Regulations.gov* home page to get information on using *Regulations.gov,* including instructions for submitting public comments.

Regulations.gov Beta: Go to *https://beta.regulations.gov/* or click ''Visit New *Regulations.gov Site*'' from the *Regulations.gov* classic homepage. Enter ''Docket ID OCC–2019–0024'' in the Search Box and click ''Search.'' Public comments can be submitted via the ''Comment'' box below the displayed document information or click on the document title and click the ''Comment'' box on the top-left side of the screen. For help with submitting effective comments please click on ''Commenter's Checklist.'' For assistance with the *Regulations.gov* Beta site please call (877)–378–5457 (toll free) or (703) 454–9859 Monday-Friday, 9am-5pm ET or email to *regulations@erulemakinghelpdesk.com.*

• *Email: regs.comments@occ.treas.gov.*

• *Mail:* Chief Counsel's Office, Attention: Comment Processing, Office of the Comptroller of the Currency, 400 7th Street SW, suite 3E–218, Washington, DC 20219.

• *Hand Delivery/Courier:* 400 7th Street SW, suite 3E–218, Washington, DC 20219.

• *Fax:* (571) 465–4326.

Instructions: You must include ''OCC'' as the agency name and ''Docket ID OCC–2019–0024'' in your comment. In general, the OCC will enter all comments received into the docket and publish the comments on the *Regulations.gov* website without change, including any business or personal information provided such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

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

• *Viewing Comments Electronically—Regulations.gov Classic or Regulations.gov Beta: Regulations.gov Classic:* Go to *https://www.regulations.gov/.* Enter ''Docket ID OCC–2019–0024'' in the Search box and click ''Search.'' Click on ''Open Docket Folder'' on the right side of the screen. Comments and supporting materials can be viewed and filtered by clicking on ''View all documents and comments in this docket'' and then using the filtering tools on the left side of the screen. Click on the ''Help'' tab on the *Regulations.gov* home page to get information on using *Regulations.gov.* The docket may be viewed after the close of the comment period in the same manner as during the comment period.

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The docket may be viewed after the close of the comment period in the same manner as during the comment period.

• *Viewing Comments Personally:* You may personally inspect comments at the OCC, 400 7th Street SW, Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect comments.

FOR FURTHER INFORMATION CONTACT: For additional information, contact Christopher Crawford, Counsel, Valerie Song, Assistant Director, Rima Kundnani, Senior Attorney, or Heidi Thomas, Special Counsel, (202) 649–5490, Chief Counsel's Office; or Karen Marcotte, Director for Licensing Activities, (202) 649–7297, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219. For persons who are deaf or hearing impaired, TTY, (202) 649–5597.

SUPPLEMENTARY INFORMATION:

I. Background

The OCC periodically reviews its regulations to eliminate outdated or otherwise unnecessary provisions and to clarify or revise requirements imposed on national banks and Federal savings associations where possible and when not inconsistent with safety and soundness. These reviews are in addition to the OCC's decennial review of its regulations as required by the Economic Growth and Regulatory Paperwork Reduction Act (EGRPRA) [1] As part of this process, the OCC is proposing to revise its rules in 12 CFR

[1] Public Law 104–208 (1996), codified at 12 U.S.C. 3311(b). Section 2222 of EGRPRA requires that, at least once every 10 years, the OCC along with the other Federal banking agencies and the Federal Financial Institutions Examination Council (FFIEC) conduct a review of their regulations to identify outdated or otherwise unnecessary regulatory requirements imposed on insured depository institutions. Specifically, EGRPRA requires the agencies to categorize and publish their regulations for comment, eliminate unnecessary regulations to the extent that such action is appropriate, and submit a report to Congress summarizing their review. The agencies completed their second EGRPRA review on March 30, 2017 and published their report in the **Federal Register**. 82 FR 15900 (March 30, 2017).

part 5 relating to requirements for national banks and Federal savings associations that seek to engage in certain corporate transactions or activities.

Part 5 addresses the range of an institution's existence from chartering to dissolution and includes, among other things, business combinations, branching matters, operating subsidiaries, and dividend payments. In some cases, a bank is required to apply to engage in a certain transaction or activity while in other situations a bank must submit a notice to the OCC either for informational purposes or as a means for providing the OCC with the opportunity to object to the transaction or activity.

II. Description of the Proposed Rule

Rules of General Applicability (Part 5, Subpart A)

Twelve CFR part 5, subpart A, sets forth the OCC's generally applicable rules and procedures for corporate activities and transactions of national banks and Federal savings associations. The OCC proposes substantive and technical changes to subpart A as explained below.

Rules of General Applicability (§ 5.2) Section 5.2(a) states that the procedures in subpart A apply to all part 5 filings, unless otherwise stated. Section 5.2(b) provides that the OCC may adopt materially different procedures for a particular filing or class of filings in exceptional circumstances or for unusual transactions after providing notice to the applicant and any other party that the OCC determines should receive notice. The OCC is proposing to increase its flexibility to address unusual situations by adding language to clarify that it may adopt materially different procedures as it deems necessary, for example, in exceptional circumstances or for unusual transactions. As discussed below, the OCC also is proposing to change the term ''applicant'' to ''filer'' in this section.

Definitions (§ 5.3) Section 5.3 defines terms that are used throughout part 5. The OCC is proposing several new definitions to this section. First, the OCC is proposing definitions for ''nonconforming assets'' and ''nonconforming activities.'' The OCC uses, but does not define, these terms in §§ 5.23 and 5.24 (conversions to a Federal savings association or national bank, respectively) and § 5.33 (business combinations). The OCC proposes these definitions to mean assets or activities that are impermissible for a national bank or a Federal savings association to hold or conduct, as applicable, or if permissible, are nonetheless held or conducted in a manner that exceeds limits applicable to national banks or Federal savings associations. Under this proposed definition, the term ''assets'' would include a national bank's or Federal savings association's investments in subsidiaries or other entities.

Second, the OCC proposes to define the term ''previously approved activity'' to mean, in the case of a national bank, an activity approved in published OCC precedent for a national bank, an operating subsidiary of a national bank, or a non-controlling investment of a national bank; and in the case of a Federal savings association, an activity approved in published OCC or OTS precedent for a Federal savings association, an operating subsidiary of a Federal savings association, or a pass-through investment of a Federal savings association. The OCC is proposing this definition to provide more clarity given the repeated use of this standard in §§ 5.34, 5.36, 5.38, and 5.58.[2]

Third, the OCC proposes to define ''well capitalized'' in § 5.3. The OCC uses the term ''well capitalized'' throughout part 5 differently. For example, for national banks and Federal savings associations various sections of part 5 apply the definition of well capitalized that is used in 12 CFR 6.4. For Federal branches and agencies, §§ 5.34, 5.35, and 5.36 apply the standard in 12 CFR 4.7(b)(1)(iii) to qualify for an 18-month examination cycle. Finally, for an insured depository institution that is not a national bank or Federal savings association, § 5.39 applies the applicable standard promulgated by the appropriate Federal banking agency under 12 U.S.C. 1831*o*. The OCC proposes to remove this inconsistency by adding a definition of ''well capitalized'' to § 5.3 that would apply to all of part 5 and removing the duplicative definitions included in the various sections. Where appropriate, provisions in part 5 would cross-reference to this new definition.

Fourth, the OCC proposes to add the term ''well managed'' to § 5.3. Currently, part 5 contains two different definitions of ''well managed.'' Consistent with section 5136A of the Revised Statutes (12 U.S.C. 24a), § 5.39 generally defines ''well managed'' for purposes of financial subsidiaries as a 1 or 2 composite rating under the Uniform Financial Institutions Rating System and at least a rating of 2 for management. By contrast, §§ 5.34 and 5.38, governing national bank and Federal savings association operating subsidiaries, respectively, generally define ''well managed'' as a 1 or 2 composite rating without reference to the management rating. Sections 5.35 (bank service company investments), 5.36 (other equity investments by a national bank), and 5.58 (Federal savings association pass-through investments) cross-reference to the §§ 5.34 or 5.38 definition. Additionally, § 5.59(h)(2)(ii)(A) requires a Federal savings association to be well managed to be eligible for expedited review.

The OCC is proposing a single definition of ''well managed'' applicable throughout part 5 to eliminate confusion between the two definitions and to further the OCC's supervisory objectives.[3] The financial subsidiary statute, 12 U.S.C. 24a, defines ''well managed'' to include the management rating, and the OCC proposes to use this definition. The proposal uses an equivalent definition for Federal branches and agencies of foreign banks which is a composite ROCA supervisory rating (which rates risk management, operational controls, compliance and assets quality) of 1 or 2, and at least a rating of 2 for risk management. Further, the OCC believes that a national bank, Federal savings association, or Federal branch or agency with a 2 composite rating but a 3 management, or risk management, rating warrants additional scrutiny. The OCC believes that these changes will enhance bank safety and soundness and provide a clearer and more consistent standard for national banks.

The OCC also is considering amending the definition of ''short-distance relocation.'' Currently, moving the premises of a branch or main office of a national bank or a branch or home

[2] For references to previously approved activities, national banks and Federal savings associations may consult the OCC's publications *Comparison of the Powers of National Banks and Federal Savings Associations,* available at *https://www.occ.gov/publications-and-resources/publications/banker-education/files/pub-comparison-powers-national-banks-fed-sav-assoc.pdf,* and *Activities Permissible for National Banks and Federal Savings Associations, Cumulative,* available at *https://www.occ.gov/publications-and-resources/publications/banker-education/files/pub-activities-permissible-for-nat-banks-fed-saving.pdf.*

[3] There is one instance of the term ''well managed'' in part 5 that does not follow this definition. Specifically, 12 CFR 5.59(e)(7)(i) requires that each Federal savings association ''be well managed and operate safely and soundly.'' This provision is not directly applicable to any filing procedures but is rather a general statement of appropriate management and safety and soundness standards. For example, pursuant to § 5.59(e)(7)(ii) the OCC may limit a Federal savings association's investment in a service corporation, or limit or refuse to permit any activity of a service corporation, for supervisory, legal, or safety or soundness reasons.

office of a Federal savings association is a short-distance relocation if the move is within: (1) A one-thousand foot-radius of the site if the branch, main office, or home office is located within a principal city of a metropolitan statistical area (MSA); (2) a one-mile radius of the site if the branch, main office, or home office is not located within a principal city but is located within an MSA; or (3) a two-mile radius of the site if the branch, main office, or home office is not located within an MSA. Under the branch relocation provisions in § 5.30 (national banks) and § 5.31 (Federal savings associations) and the main office and home office relocation provisions in § 5.40, short-distance relocations have a shorter public comment and OCC approval period than other relocations. Additionally, the OCC generally equates the short-distance relocation provision to be equivalent to a ''relocation'' for the purposes of branch closing under section 42 of the Federal Deposit Insurance Act (FDI Act) (12 U.S.C. 1831r–1).

The OCC has never adjusted the distances in the definition of short-distance relocation, and the distances do not necessarily reflect the individual circumstances of each bank location. Because of the changes in branching activities, locations, and usage since 1996, such as the increased use of electronic banking, the OCC is considering expanding the distances for short-distance relocations to allow national banks and Federal savings associations greater flexibility in their office locations and to reduce regulatory burden for these types of relocations. Specifically, the OCC is considering expanding the distances in the definition to: (1) A two-thousand foot radius within a principal city of an MSA; (2) a two-mile radius not within a principal city but within an MSA; and (3) a four-mile radius not within an MSA. However, any amendment to this definition would provide that this increase in distance would not apply to a branch that would be relocated from a low- or moderate-income area to a non-low- or moderate-income area. For such relocations, the current definition of a short-distance relocation would continue to apply. The OCC invites comment on whether the OCC should amend § 5.3 to adjust the distances included in the definition of short-distance relocation and if so whether the increase suggested above would be appropriate or whether an alternate increase in distance would better reduce regulatory burden on national banks and Federal savings associations while providing appropriate notice to customers.

Finally, the OCC is proposing technical changes to § 5.3. First, current § 5.3 defines ''applicant'' as a ''person or entity that submits a notice or application to the OCC under'' part 5. However, this usage of the term ''applicant' is confusing because it covers persons who submit an application or a notice. Accordingly, the OCC proposes to change the term ''applicant'' to ''filer'' to more clearly cover both a person who files an application or a notice. The proposal would make conforming changes throughout part 5.

Second, the proposal would add a new definition for ''Appropriate Federal banking agency'' that cross-references the definition contained in section 3(q) of the FDI Act, 12 U.S.C. 1813(q).

Third, the proposal would add a new definition clarifying that ''MSA'' means metropolitan statistical area as defined by the Director of the Office of Management and Budget (OMB).[4]

Fourth, part 5 currently defines ''notice'' to mean a submission notifying the OCC that a national bank or Federal savings association intends to engage in or has commenced certain activities or transactions. The definition notes that the specific meaning depends on context and ''may require the filer to obtain prior OCC approval before engaging in the activity or transaction.'' As described later in this *Supplementary Information,* the OCC is proposing to change the term ''notice'' to ''application'' for activities or transactions that require prior OCC approval. Therefore, the OCC proposes to remove the quoted language from the definition.

Fifth, the OCC proposes adding abbreviations for the former OTS, the Federal Deposit Insurance Corporation (FDIC), and generally accepted accounting principles as used in the United States (GAAP) to make their use consistent throughout part 5.

Finally, to reflect the more current regulatory drafting style, the OCC proposes to remove the paragraph designations in § 5.3 and to make conforming changes to cross-references throughout 12 CFR part 5.

Filing required (§ 5.4) Section 5.4 requires depository institutions to file applications or notices with the OCC to engage in certain corporate activities and transactions and provides general information on this filing requirement. Section 5.4(f) currently encourages a potential filer to contact the appropriate OCC licensing office to determine the need for a prefiling meeting, and it specifically provides that the OCC decides whether to require a prefiling meeting on a case-by-case basis. The OCC is proposing to provide more general guidance on when a filer should seek a prefiling meeting with the OCC. Specifically, the OCC proposes to include a new sentence advising potential filers with novel, complex, or unique proposals to contact the appropriate OCC licensing office early in the development of the proposal to help identify and consider relevant policy issues.

Additionally, the OCC proposes to move the certification requirement in current § 5.13(h) to new § 5.4(g). Current § 5.13(h) requires filers to certify that material submitted to the OCC contains no material misrepresentations or omissions. The OCC also may review and verify any information filed in connection with a notice or an application. Section 5.13(h) further provides that material misrepresentations or omissions may be subject to enforcement actions and other penalties, including criminal penalties under 18 U.S.C. 1001. As discussed below, the OCC is proposing to revise § 5.13(h) to clarify the procedures regarding nullification of decisions. The certification requirement in § 5.13(h) does not fit well in the revised provision so the OCC is proposing to move it to § 5.4 with other provisions relating to the form of the filing.

Filing fees (§ 5.5) Section 5.5(a) provides the procedure for submitting filing fees to the OCC. The current rule requires payment to the OCC by check, money order, cashier's check, or wire transfer. The OCC is proposing to update this provision by providing that a filer can pay the fees by check payable to the OCC or by other means acceptable to the OCC. The OCC does not currently charge filing fees for licensing filings and is not proposing any fees as part of this rulemaking.

Investigations (§ 5.7) Section 5.7 provides the OCC with examination and investigation authority related to a filing. As discussed in the OCC's *Licensing Manual,* the OCC routinely engages in background investigations of filers and other individuals involved in filings for new charters, changes in bank control, and changes in directors and senior executive officers. As part of these background investigations, the OCC collects fingerprints and submits them to the Federal Bureau of

[4] According to the OMB,''[t]he general concept of a metropolitan statistical area is that of an area containing a large population nucleus and adjacent communities that have a high degree of integration with that nucleus.'' 75 FR 37246 (June 28, 2010). These standards are then applied to census data to delineate the metropolitan statistical areas.

Investigation for a national criminal history background check. The OCC is proposing to add a new paragraph (b) to § 5.7 to codify this procedure. The OCC also is proposing conforming changes to other sections in part 5 to clarify when it collects fingerprints.

Public availability, Comments, and Hearings and other meetings (§§ 5.9, 5.10, 5.11) Section 5.9 addresses the public availability and confidential treatment of filings. Section 5.10 provides the process for public comment periods and the submission of public comments. Section 5.11 provides the process for hearings and public and private meetings. The OCC is proposing to change the terms ''application'' to ''filing'' and ''applicant'' to ''filer'' in these sections to reflect the more general terminology proposed in this rule. Furthermore, each of these sections currently uses the term ''interested persons'' to refer to persons other than the filer who seek to interact with a filing or related procedure. The OCC understands the term ''interested persons'' to mean any person who is or may wish to be involved in the licensing process. Such a person may, but need not, have any particular financial, pecuniary, or other interest in the transaction itself, the filer, or other party to the transaction. The OCC invites comment about whether the term ''interested persons'' is sufficiently clear, or whether a change in terminology would be helpful to indicate the breadth of this provision.

Decisions (§ 5.13) Section 5.13 contains the OCC's procedures for acting on a filing. Paragraph (a)(2) of this section provides the procedures for the OCC's expedited review, including extending the time frame for reviewing or removing a filing from expedited review. The OCC may change the expedited review procedures if it concludes that the filing, or an adverse comment regarding the filing, presents a significant supervisory, Community Reinvestment Act (CRA) (if applicable), or compliance concern or raises a significant legal or policy issue requiring additional OCC review. However, paragraph (a)(2)(ii) provides that the OCC will not change the expedited procedures if it determines, among other things, that an adverse comment does not raise a significant supervisory, CRA (if applicable), or compliance concern or a significant legal or policy issue, or is frivolous or filed primarily as a means of delaying action on the filing. The OCC proposes to add non-substantive comments to this list to better align the regulation with OCC policy and processes. The OCC also proposes to specify that it considers a comment to be ''non-substantive'' if it is: (1) A generalized opinion that a filing should or should not be approved; or (2) a conclusory statement, lacking factual or analytical support. The OCC intends to apply this non-substantive standard to all comments that it reviews. This change would provide a clear standard for commenters submitting views on a filing.

Section 5.13(a)(2)(ii) also provides that the OCC will not change the expedited procedures if the adverse comment raises a CRA concern that the OCC determines has been satisfactorily resolved. The rule states that the OCC considers a CRA concern to be satisfactorily resolved if the OCC previously reviewed (*e.g.,* in an examination or application) a concern presenting substantially the same issue in substantially the same assessment area during substantially the same time, and the OCC determines that the concern would not warrant denial or imposition of a condition on approval of the application. The OCC proposes to amend this provision to expand what is meant by ''previously reviewed'' to include other supervisory activity and to provide that the OCC's review may occur in a prior filing.

The OCC also proposes to amend the introductory text to paragraph (a)(2) to reflect that some expedited review procedures in part 5 do not require the national bank or Federal savings association to be an eligible bank or eligible savings association, as defined in § 5.3. The proposed rule also would clarify paragraphs (a)(2)(i) and (ii) by revising the punctuation and sentence structure so that it is easier to read.

Paragraph (h) of § 5.13 provides that the OCC may nullify a decision on a filing if: (1) The OCC discovers a material misrepresentation or omission after the OCC has rendered a decision on the filing; (2) the decision is contrary to law, regulation, or OCC policy; or (3) the OCC granted the decision due to clerical or administrative error or a material mistake of law or fact. The OCC's decisions on filings generally contain a statement that the ''OCC may modify, suspend or rescind this approval if a material change in the information on which the OCC relied occurs prior to the date of the transaction to which the decision pertains.''

The OCC proposes to revise paragraph (h) to clarify when the OCC may nullify a decision. The revised provision would state that the OCC may nullify a decision on a filing either prior to or after consummation of the transaction. The proposed rule also would clarify that the OCC may nullify a decision based on a material misrepresentation or omission in any information provided to the OCC in the filing or supporting materials. The OCC is also proposing a new paragraph (i) that would provide that the OCC may modify, suspend, or rescind a decision on a filing if a material change in the information or circumstance on which the OCC relied occurs prior to the date of the consummation of the transaction to which the decision pertains.

These revisions are intended to clarify that nullification is based on the facts, law, and policy as they existed at the time of the OCC's decision. By contrast, modification, suspension, or rescission is based on a change in facts or circumstance from the time of the OCC's decision until consummation of the transaction to which the decision pertains. The OCC welcomes comment on how it could further clarify these procedures.

As indicated previously in this *Supplementary Information,* the proposed rule would move the provisions in current § 5.13(h) regarding certification of the submitted filing and penalties for material misrepresentation and omissions in a filing to new paragraph § 5.4(g).

Organizing a National Bank or Federal Savings Association (§ 5.20)

Section 5.20 provides the procedures and requirements involved in organizing a *de novo* national bank or Federal savings association. The OCC is proposing two new definitions to § 5.20(d). First, the OCC would define ''principal shareholder'' as a person who directly or indirectly or acting in concert with one or more persons or companies, or together with members of their immediate family, will own, control, or hold 10 percent or more of the stock of the proposed national bank or Federal savings association. This definition is consistent with the definition used in the ''Background Investigations'' booklet of the *Comptroller's Licensing Manual* and the instructions for the Interagency Biographical and Financial Report.[5] The OCC is proposing this definition in conjunction with provisions related to background checks and fingerprint collections in proposed § 5.20(i)(3), discussed below.

Second, the OCC proposes to clarify that the term ''organizer'' means a member of the organizing group. This definition is not clearly stated in § 5.20.

[5] The Interagency Biographical and Financial Report is available on the OCC's website at *https://www.occ.gov/static/licensing/form-ia-biographical-financial-report.pdf.*

Paragraph (i) contains procedures for filing a charter application. The OCC proposes a new paragraph (i)(3) requiring each proposed organizer, director, executive officer, or principal shareholder to submit to the OCC the information prescribed in the Interagency Biographical and Financial Report and legible fingerprints. New paragraph (i)(3) also would permit the OCC to request additional information, if appropriate, and waive the requirements of that paragraph if the OCC determines it to be in the public interest. As discussed in the ''Charters'' booklet of the *Comptroller Licensing Manual,* the OCC generally conducts routine background checks on insiders, including proposed organizers, directors, executive officers, and controlling shareholders. The OCC revision, consistent with the background investigation changes in proposed § 5.7(b), would codify this process and authorize the collection of fingerprints for charter applications.

The OCC also is proposing a number of technical changes to § 5.20. First, in the definition of ''organizing group'' the OCC proposes to change the term ''persons'' to ''individuals'' to more accurately reflect who may make up an organizing group. Second, in § 5.20(g)(4)(ii), the OCC proposes to change the phrase ''withdrawal of preliminary approval'' to ''nullification or rescission of preliminary approval'' to align with the terminology in proposed §§ 5.13(h) and (i). Third, in § 5.20(i), Decision notification, the OCC proposes to change the term ''spokesperson'' to ''contact person'' in redesignated paragraph (i)(5) to conform to the use of this term in other paragraphs of this section. Fourth, also in § 5.20(i), redesignated paragraph (i)(5), the OCC proposes to change the term ''interested parties'' to ''relevant parties,'' which more accurately describes who the OCC should notify of its decision on an application. Lastly, the OCC proposes to remove the reference to 12 CFR part 197 in § 5.20(i), redesignated paragraph (i)(6)(iii), because the OCC has removed this regulation. The remaining citation, 12 CFR part 16, now applies to both national banks and Federal savings associations.

Federal Mutual Savings Association Charter and Bylaws (§ 5.21)

Section 5.21 governs the procedures and requirements for charters and bylaws of Federal mutual savings associations. Pursuant to paragraph (f)(2), charter amendments are generally subject to prior approval by the OCC, although under paragraph (g), most applications for charter amendments are subject to expedited review and deemed approved as of the 30th day after filing unless the OCC notifies the filer that it has denied the amendment, or the amendment is not eligible for expedited review. An application is not eligible for expedited review if the charter amendment would render more difficult or discourage a merger, proxy contest, the assumption of control by a mutual account holder of the association, or the removal of incumbent management or involves a significant issue of law or policy. Paragraph (g) further provides that a notice is required within 30 days after adoption if the filer adopts the optional charter amendments contained in paragraph (g) without change.

The OCC is proposing to reorganize these provisions to clarify the procedures Federal mutual savings associations must follow in adopting charter amendments, to align the terminology in § 5.21 with general usage in part 5, and to make other clarifying changes. The OCC does not intend these changes to be substantive. Specifically, the OCC proposes including all of this section's procedural requirements for adopting charter amendments in paragraph (f)(2). These amendments would clarify that charter amendments are subject to a three-part regime: Application with expedited review, standard application, or notice. Paragraph (g) would only contain provisions relating to optional charter amendments. Additionally, the OCC proposes to add a new paragraph (f)(3) specifying that a charter amendment is effective once it is: (1) Approved by the OCC, if approval is required under paragraph (f)(2); and (2) adopted by the association provided the association follows the requirements of its charter in adopting the amendment.

Paragraph (j) governs the bylaws for Federal mutual savings associations. Paragraph (j)(2)(viii) requires the bylaws to specify that the Federal mutual association's board of directors consist of no fewer than five nor more than fifteen members unless the OCC has authorized a higher or lower number. However, unlike the corresponding provision for Federal stock savings associations, 12 CFR 5.22(l)(2), paragraph (j)(2)(viii) does not explicitly address numbers of directors authorized by the former OTS. Accordingly, the OCC proposes to revise this paragraph to explicitly acknowledge that authorizations by the former OTS remain effective.

Paragraph (j)(3) contains the filing requirements for changes to Federal mutual savings association bylaws. Currently, all bylaw amendments require some sort of filing with the OCC. As with the charter amendments discussed above, the OCC is proposing to reorganize these provisions to clarify the procedures Federal mutual savings associations must follow in adopting bylaw amendments and to align the terminology with that used in part 5. The OCC also proposes to eliminate the filing requirement for savings associations that adopt without change the OCC's model or optional bylaws, thereby reducing burden for these Federal mutual savings associations. As a result, these amendments would specify that bylaw amendments are subject to a four-part regime: Application with expedited review, standard application, notice, and no filing required. As with the charter amendments, the OCC also proposes that a bylaw amendment is effective after approval by the OCC, if required, and adoption by the association, provided that the association follows the requirements of its charter and bylaws in adopting the amendment.

As discussed later in this *Supplementary Information,* the OCC is proposing technical changes throughout part 5, including replacing the word ''shall'' with another appropriate word or words. These changes, as well as other minor proposed wording changes, are included in the model charter and bylaw provisions provided in § 5.21. The OCC does not intend these proposed changes to require any changes on the part of Federal mutual savings associations that use the current model language. Further, the OCC does not intend that the changes would have any effect on the provisions or effectiveness of a Federal mutual savings association's current charter or bylaws.

Federal Stock Savings Association Charter and Bylaws (§ 5.22)

Section 5.22 governs the procedures and requirements for Federal stock savings association charters and bylaws. Section 5.22 generally parallels § 5.21, which applies to Federal mutual savings association charters and bylaws. The OCC proposes equivalent changes to § 5.22 as proposed for § 5.21. The OCC also proposes two additional technical amendments to § 5.22. Section 5.22 contains sample charter and bylaw provisions, and paragraph (g)(7) provides an optional ''Section 8'' for Federal stock savings association charters following mutual to stock conversions. This optional section contains a definition of ''acting in concert.'' The OCC proposes minor wording changes to this definition for consistency with the definition of this

term in § 5.50(d)(2), changes in bank control. The OCC also proposes correcting a cross-reference to 12 CFR part 192 in paragraph (e).

Conversion To Become a Federal Savings Association (§ 5.23) and Conversion To Become a National Bank (§ 5.24)

Sections 5.23 and 5.24 are largely parallel rules that provide the procedures and standards for OCC review and approval of an application by an institution to convert to a Federal savings association or national bank, respectively. Sections 5.23(d)(2)(ii)(A) and 5.24(e)(2)(i) each require the president or other duly authorized officer to sign the conversion application. These sections are the only provisions in part 5 that have specific signature requirements for the filing. As discussed above, the OCC is proposing a new provision in § 5.4 requiring that a filing include evidence of authorization for the filing, such as a board resolution. Accordingly, the OCC proposes to remove §§ 5.23(d)(2)(ii)(A) and 5.24(e)(2)(i) as unnecessary.

The ''Conversions to Federal Charter'' booklet of the *Comptroller's Licensing Manual* indicates that filers should include a list of directors and senior executive officers of the converting institution as well as a list of individuals, directors, and shareholders who directly or indirectly, or acting in concert with one or more persons or companies, or together with members of their immediate family, do or will own, control, or hold 10 percent or more of the converting institution's stock. The OCC proposes to codify these requirements in §§ 5.23(d)(2)(ii) and 5.24(e)(2). It is necessary to have a complete list of these individuals because the OCC generally conducts routine background investigations as part of the application process. Furthermore, the OCC proposes to add a new paragraph to each of these rules, §§ 5.23(d)(2)(iv) and 5.24(e)(4), providing that the OCC may require directors and senior executive officers of the converting institution to submit the Interagency Biographical and Financial Report and legible fingerprints. This amendment would codify the background investigation process set forth in the ''Conversions to Federal Charter'' booklet of the *Comptroller's Licensing Manual* and specifically authorize the collection of fingerprints for conversion applications, consistent with the background investigation changes proposed to other sections in this rulemaking.

Additionally, §§ 5.23(d)(4) and 5.24(h) provide for expedited review for conversion from an eligible national bank to a Federal savings association, and vice versa. Currently, this conversion application is deemed approved as of the 60th day after the filing is received by the OCC. The OCC believes that it can review and decide these conversion applications in a shorter period because it already supervises an entity eligible to use the expedited review process. Accordingly, the OCC proposes decreasing the time period for the expedited review to 45 days. The OCC also proposes a technical change to § 5.23(d)(4) to remove the modifier ''national'' before bank as the defined term in § 5.3 is ''eligible bank.'' This deletion would not change the scope of institutions eligible for expedited review as only a national bank, and not a State bank, may be an eligible bank under the definition in § 5.3.

Fiduciary Powers of National Banks and Federal Savings Associations (§ 5.26)

Section 5.26 contains the application requirements and processes for a national bank or Federal savings association to engage in the exercise of fiduciary powers. Paragraph (e)(2)(i)(C) requires a national bank or Federal savings association to submit sufficient biographical information on proposed trust management personnel as part of an application for fiduciary powers. The scope of the term ''trust management personnel'' is unclear, and therefore the OCC is proposing to clarify that the biographical information is required for proposed senior trust management personnel, as identified by the OCC. The OCC also is proposing that the application include, if requested by the OCC, the Interagency Biographical and Financial Report and legible fingerprints for these individuals, consistent with the background investigation changes proposed to other sections in this rulemaking.

Section 5.26(e)(6) requires a national bank or Federal savings association to submit a written notice to the OCC no later than 10 days after it begins previously approved fiduciary activities in additional States. The OCC proposes to reorganize this paragraph with no additional substantive changes. As proposed, paragraph (e)(6)(i) would generally require a written notice after the national bank or Federal savings association begins any of the activities specified in 12 CFR 9.7(d) in a new State. Paragraph (e)(6)(ii) would require the notice to include the new States, the fiduciary activities to be conducted, and the extent to which the activities differ materially from the fiduciary activities currently conducted. Finally, paragraph (e)(6)(iii) would not require any notice if the information required by paragraph (e)(6)(ii) is provided by other means, such as in a merger application.

Establishment, Acquisition, and Relocation of a Branch of a National Bank (§ 5.30)

Section 5.30 describes application procedures to establish and relocate a national bank branch. Paragraph (d) provides definitions applicable to § 5.30. Paragraph (d)(1)(i) lists certain types of facilities that are considered branches. The OCC proposes to reorder this list so that the reference to 12 U.S.C. 36(c) applies only to seasonal agencies and not to the other types of facilities. Additionally, paragraph (d)(1)(iii) specifies that remote service units (RSUs) and certain types of offices are not within the definition of ''branch.'' The OCC proposes to clarify this provision by adding both a cross reference to the description of RSUs contained in 12 CFR 7.4003 and a reference to automated teller machines (ATMs), including interactive ATMs, codifying OCC Interpretive Letter No. 1165 (August 2019).[6] As discussed in OCC Interpretive Letter No. 1165, a national bank establishment of an interactive ATM does not constitute establishing a branch if the machine meets the definition of an ATM used for purposes of 12 U.S.C. 36 consistent with OCC interpretations, and the nature of the interactions between the customer and remote bank personnel are delimited as would be the case with an RSU.

The OCC is considering one additional change to the definition of ''branch'' in paragraph (d). Paragraph (d)(1)(ii)(B) specifies that a drive-in or pedestrian facility located within 500 feet of a public entrance to a main office or branch is not considered a separate branch, provided the functions performed at the drive-in or pedestrian facility are limited to functions that are ordinarily performed at a teller window. The OCC is considering expanding this distance to 1,500 feet to address issues in crowded urban areas. The OCC specifically requests comment on whether this increase in distance, or some other distance, would be appropriate and whether it would be helpful in reducing regulatory burden.

Finally, the OCC proposes a technical change to paragraph (f), which provides the procedures for establishing a

[6] OCC Interpretive Letter No. 1165, Legal Requirements for the Establishment of Interactive Automated Teller Machines (August 2019), available at *https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2019/int1165.pdf.*

national bank branch. Paragraph (f)(1) requires each national bank that proposes to establish a branch to submit an application to the OCC, except in the case of messenger services as specified in paragraph (f)(2). However, paragraph (f)(3) provides that if a national bank proposes to establish a branch jointly with one or more national banks or other depository institutions, only one of the national banks must submit a branch application and this bank may act as agent for the other institutions. Even if a single application is submitted for a joint branch, the OCC still considers the relevant factors for each national bank. The OCC proposes including paragraph (f)(3) as an additional exception to the application requirement in paragraph (f)(1), thereby conforming these two paragraphs.

Establishment, Acquisition, and Relocation of a Branch and Establishment of an Agency Office of a Federal Savings Association (§ 5.31)

Section 5.31 describes application and notice procedures for the establishment, acquisition, or relocation of a Federal savings association branch. Under paragraph (f)(2)(i), a Federal savings association is not required to submit an application for OCC approval to establish a drive-in or pedestrian office located within 500 feet of a public entrance of its home office or a branch. As with national banks, the OCC is considering expanding this distance to 1,500 feet to address issues in crowded urban areas. The OCC specifically requests comment on whether this increase in distance, or some other distance, would be appropriate and whether it would be helpful in reducing regulatory burden.

Paragraph (j), implementing section 5(m) of the Home Owners' Loan Act (HOLA) (12 U.S.C. 1464(m)), requires a Federal or State savings association to obtain prior OCC approval to establish or move a branch or move its principal office in the District of Columbia. The OCC proposes to add a new paragraph (j)(3) to clarify that a branch in the District of Columbia includes any location at which accounts are opened, payments are received, or withdrawals made, including ATMs that perform one or more of these functions. This amendment would implement court opinions finding that ATMs that accept deposits or disburse funds against a customer's account constitute a branch.[7] Although Congress amended 12 U.S.C. 36(j) to remove ATMs and RSUs from the definition of a national bank ''branch,'' Congress has not similarly amended section 5(m) of the HOLA. Therefore, the OCC and OTS have long taken the position that an ATM established by a savings association in the District of Columbia constitutes a branch requiring approval. Because proposed paragraph (j)(3) codifies the OCC's existing legal interpretation, the OCC does not view this proposed amendment as adding burden to savings associations.

Business Combinations Involving a National Bank or Federal Savings Association (§ 5.33)

Section 5.33 provides the application requirements and procedures for business combinations involving national banks and Federal savings associations, such as mergers, consolidations, and certain purchase and assumption transactions. Paragraph (e) of § 5.33 sets forth policies the OCC considers when evaluating business combinations. Paragraph (e)(1)(ii)(F) provides that the OCC will not approve a transaction that would violate the deposit concentration limit in 12 U.S.C. 1828(c)(13). Only interstate merger transactions, as defined 12 U.S.C. 1828(c)(13)(C)(i) are subject to this deposit concentration limit. The OCC proposes adding a reference to 12 U.S.C. 1828(c)(13)(C)(i) in paragraph (e)(1)(ii)(F) for clarity.

Paragraph (e)(1)(iii) provides the OCC's policy for evaluating business combinations under the CRA (12 U.S.C. 2901 *et seq.*). Under 12 U.S.C. 2903(a)(2), the OCC must evaluate an insured national bank's or Federal savings association's CRA record when evaluating its application for a business combination. The OCC proposes three changes to paragraph (e)(1)(iii). First, the OCC proposes a new paragraph (e)(1)(iii)(A) to better describe the OCC's review and to more closely track the statutory requirement that the OCC assess only the CRA record of the filer. Further, the proposal would specify that the OCC's conclusion of whether the CRA performance is or is not consistent with approval of an application is considered in conjunction with the other factors in § 5.33. This amendment codifies the OCC's practice of evaluating all policy factors in light of the whole application, as set forth in the OCC's Policies and Procedures Manual (PPM–6300–2). The OCC practice in this regard is to consider and evaluate a filer's record of performance under the CRA and, more broadly, the filer's plans and ability to enable the combined organization to serve the convenience and needs of its communities. Second, the OCC proposes a new paragraph (e)(1)(iii)(B) to recognize the expanded community reinvestment compliance review required by 12 U.S.C. 1831u(b)(3) when the filing national bank would have a branch or bank affiliate immediately following the transaction in any State in which the filer had no branch or bank affiliate immediately before the transaction. Third, the OCC proposes a new paragraph (e)(1)(iii)(C) requiring the filer to disclose whether it has entered into and disclosed a covered agreement, as defined in 12 CFR 35.2, in accordance with 12 CFR 35.6 and 35.7. These regulations implement the CRA sunshine requirements of section 48 of the FDI Act, 12 U.S.C. 1831y. Requiring disclosure of any covered agreements will better permit the OCC to review the filer's CRA record and any CRA-related comments on the filing. Additionally, the OCC is considering whether to require a filer to memorialize and publish any discussion between the filer and any third party with respect to development of any community reinvestment plan, community benefit plan, or similar plan in connection with a business combination. The OCC requests comment on whether to include this requirement in the final rule.

The OCC also proposes a new paragraph (e)(1)(iv) to state that the OCC considers the standards and requirements contained in 12 U.S.C. 1831u for interstate merger transactions between insured banks, when applicable. Current paragraph (h) describes the application of 12 U.S.C. 1831u to combination between insured banks with different home states. As part of the reorganization of paragraphs (g) and (h), discussed below, the OCC proposes instead to include its review of the 12 U.S.C. 1831u factors in paragraph (e)(1) for clarity.

Paragraph (e)(8)(ii) requires a national bank or Federal savings association with one or more classes of securities subject to registration under sections 12(b) or (g) of the Securities Exchange Act of 1934 to file preliminary proxy material or information statements with the Director, Securities and Corporate Practices Division (SCP) of the OCC. As a result of an internal reorganization, the OCC proposes replacing the reference to SCP in paragraph (e)(8)(ii) with the OCC Chief Counsel's Office.

Paragraph (g) provides procedures for different types of consolidations and mergers. Paragraph (o) provides general procedures for Federal savings association approval of business combinations. These paragraphs provide detailed procedures for national banks

[7] *See Independent Bankers Ass'n of New York State, Inc.* v. *Marine Midland Bank, N.A.,* 757 F.2d 453, 458 (2d Cir. 1985) (collecting cases).

and Federal savings associations engaging in several different types of business combinations. Some of these requirements are imposed by statute. Specifically, 12 U.S.C. 215 and 215a provide procedures for consolidations and mergers, respectively, between national banks and State or national banks located in the same State resulting in a national bank. Similarly, 12 U.S.C. 214 through 214d provide procedures for consolidations and mergers between national banks and State banks located in the same State resulting in a State bank. Other consolidation and merger transactions described in § 5.33 do not have any statutory procedures, including interstate consolidations and mergers involving a national bank under 12 U.S.C. 215a–1; consolidations and mergers of national banks and Federal savings associations under 12 U.S.C. 215c and 1467a(s); consolidations and mergers of Federal savings associations and State banks, State savings associations, State trust companies, or credit unions under 12 U.S.C. 1464(d)(3)(A) and 1467a(s); and mergers of national banks with their non-bank affiliates under 12 U.S.C. 215a–3.

The OCC formerly opined in licensing decisions that 12 U.S.C. 215a–1 incorporates the provisions of 12 U.S.C. 215 for consolidations and 12 U.S.C. 215a for mergers.[8] Twelve U.S.C. 215a–1 is the codification of section 4 of the National Bank Consolidation and Merger Act (NBCMA), which was enacted by section 102(b)(4)(D) of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994.[9] Twelve U.S.C. 215 and 215a are codifications of sections 2 and 3 of the NBCMA, respectively. Section 4 of the NBCMA states that ''a national bank may engage in a consolidation or merger *under this Act* with an out-of-State bank if the consolidation or merger is approved'' (emphasis added)[10] under 12 U.S.C. 1831u, which governs interstate mergers of insured banks. In prior licensing decisions, the OCC interpreted ''under this Act'' to mean that a consolidation or merger under section 4 of the NBCMA is also a consolidation or merger under section 2 or 3 of the NBCMA, respectively, and thus subject to the provisions of those sections. However, after further analysis, the OCC believes that the proper reading of section 4 of the NBCMA is that it is self-referential and does not directly incorporate any provisions of sections 2 or 3 of the NBCMA. A consolidation or merger with an out-of-State bank generally may not be approved under sections of 2 and 3 of the NBCMA, which specifically apply to consolidations or mergers, respectively, between banks located in the same State. Accordingly, ''under this Act,'' as used in section 4 of the NBCMA should not be read as referring to sections 2 or 3 of the NBCMA. As there are no other sections of the NBCMA under which an interstate merger between banks could be conducted, ''under this Act'' can only be read to refer to section 4 itself. As section 4 of the NBCMA, 12 U.S.C. 215a–1, does not contain any statutory procedures, there are no statutory procedures for interstate bank mergers resulting in a national bank. Therefore, the OCC is proposing several procedures that a national bank or Federal savings association may elect for business combinations for which there are no statutory procedural requirements.

First, the national bank or Federal savings association may follow the procedures currently provided in paragraph (g) for the specific transaction if there are no statutory procedures.

Second, the national bank or Federal savings association may elect to follow the procedures applicable to a State bank or State savings association, respectively, chartered by the State in which the national bank's main office or the Federal savings association's home office is located. In connection with this election, the OCC proposes rules of construction so that the State procedures function logically for national banks and Federal savings associations. Specifically, any references to a State agency in the applicable State procedures would be read as referring to the OCC. Additionally, unless otherwise specified in Federal law, all filings required by the applicable State procedures would be made to the OCC. Requiring filings prescribed by State law to be made with the OCC, rather than a State agency, is consistent with past OCC practice for certain transactions under State corporate governance procedures adopted pursuant to 12 CFR 7.2000.[11]

Third, the national bank or Federal savings association that is the acquiring institution in a transaction may follow a *de minimis* procedure not requiring a shareholder vote pursuant to proposed § 5.33(p) if certain criteria are met. Proposed § 5.33(p) is similar to the *de minimis* exception to general shareholder voting requirements for Federal stock savings associations in current § 5.33(o)(3)(ii), which applies if the transaction does not involve an interim savings association; the Federal savings association charter does not change; each share of stock outstanding will be identical to an outstanding share or treasury share after the effective date of the transaction; and either no stock or securities convertible into stock will be issued or delivered under the plan of combination, or the authorized unissued shares or treasury shares of the resulting Federal savings association to be issued or delivered, plus those initially issuable upon conversion of any securities to be issued or delivered, do not exceed 15 percent of the total shares of voting stock outstanding immediately prior to the effective date of the consolidation or merger. The OCC proposes making this *de minimis* exception available to a national bank engaging in transactions not subject to statutory procedural requirements as well as a Federal stock savings association in new paragraph (p) with two revisions. First, the OCC proposes permitting certain combinations involving an interim bank or savings association. Specifically, a national bank or Federal stock savings association engaging in a transaction involving an interim bank or saving association would potentially be able to use the procedures in paragraph (p) if the existing shareholders of the national bank or Federal stock savings association would directly hold the shares of the resulting national bank or Federal stock savings association. In promulgating an amendment to the predecessor to current § 5.33(o)(3)(ii), the Federal Home Loan Bank Board, the predecessor to OTS, stated that ''[a]lthough the ownership interests of shareholders of a reorganizing association generally do not undergo substantive change upon a reorganization into holding company form, the Board believes that shareholders should, nevertheless, be given an opportunity to approve or disapprove a plan of reorganization.''[12] The OCC believes that in a transaction involving reorganization into a holding company structure, shareholders of the national bank or Federal stock savings association should have the opportunity to vote. However, the OCC believes that a national bank or Federal stock savings association may engage in transactions involving interim banks or savings association that do not involve holding company reorganizations where shareholder votes are not necessary, if the rest of the requirements of proposed paragraph (p) are met. Second, to

[8] *See, e.g.,* OCC CRA Decision #94 (June 1999).

[9] Public Law 103–328, 108 Stat. 2338, 2351.

[10] 12 U.S.C. 215a–1(a).

[11] *See, e.g.,* OCC Conditional Approval #859 (July 2008).

[12] 47 FR 17797 at 17799 (Apr. 26, 1982).

provide additional flexibility, the OCC also proposes increasing the maximum issuance of shares eligible under this procedure for both national banks and Federal savings associations from 15 percent of total outstanding shares to 20 percent. This proposal mirrors the 20 percent threshold in similar procedures under Delaware law.[13]

In addition to new paragraph (p), the OCC proposes implementing the changes discussed above through revisions to paragraphs (g), (h), and (o). The proposal redesignates a number of paragraphs in paragraph (g) to keep similar transactions consecutive and to accommodate additional paragraphs. Specifically, the OCC proposes redesignating current paragraphs (g)(2), (g)(3), (g)(6), and (g)(7) as paragraphs (g)(3), (g)(6), (g)(7), and (g)(9), respectively. The proposal includes new paragraph (g)(2) providing procedures for interstate consolidations and mergers under 12 U.S.C. 215a–1 resulting in a national bank and paragraph (g)(8) providing procedures for interstate mergers between an insured national bank and an insured State bank resulting in a State bank. Procedures for these transactions are currently contained in paragraph (h). New paragraphs (g)(2) and (g)(8) generally follow the procedures for intrastate mergers resulting in a national bank or State bank in paragraphs (g)(1) and redesignated paragraph (g)(7), respectively. The proposal includes a new corporate succession provision in new paragraph (g)(2)(iv) for interstate mergers resulting in a national bank to ensure that the resulting bank succeeds to the rights, franchises, and interests, including the fiduciary appointments, of the consolidating or merging banks. The proposal also includes in new and redesignated paragraphs (g)(2), (g)(3), (g)(4), (g)(5), (g)(6), and (g)(8) a reference to a national bank making an election under paragraph (h). Revised paragraph (h) would permit a national bank to elect to follow the procedures of the laws of the State which the national bank association has elected to follow pursuant to 12 CFR 7.2000(b) or to use the *de minimis* procedure in new paragraph (p) if applicable. The proposal also includes coordinating revisions to cross references to paragraph (g).

For Federal savings associations, the OCC proposes reorganizing paragraph (o) to contain the election procedures. Revised paragraph (o)(1)(i) permits a Federal savings association to follow the procedures applicable to a State savings association chartered by the State where the Federal savings association's home office is located or to follow the standard procedures in revised paragraph (o)(2). As discussed above for national banks, revised paragraph (o)(1)(ii) would direct Federal savings associations to read references to State agencies as the OCC and to make filings generally with the OCC.

Revised paragraph (o)(2) would contain the procedures in current paragraphs (o)(1) and (o)(3) governing board and shareholder votes, respectively. The proposal would change the *de minimis* exception to the shareholder voting requirement in current paragraph (o)(3)(ii), redesignated by this proposal as paragraph (o)(2)(ii)(B), to a cross-reference to new paragraph (p). Current paragraph (o)(2) regarding the Federal savings association's change in name or home office would be redesignated as paragraph (o)(3). Finally, the OCC proposes a technical amendment to revised paragraph (o)(2)(ii)(A), replacing the citation to 12 CFR 152.4 with the current citation, 12 CFR 5.22.

Paragraph (k) requires a national bank or Federal savings association engaging in a consolidation or merger in which it is not the filer and the resulting institution to file a notice with the OCC advising of its intention. This requirement currently applies even when the surviving institution is another national bank or Federal savings association. Because the OCC already supervises the surviving institution and has acted on the application for consolidation or merger, the OCC proposes removing this requirement for the disappearing national bank or Federal savings association in this type of transaction. In such a case, the OCC already has the information that it needs to process termination and ensure that the disappearing national bank or Federal savings association has met all applicable requirements. The proposal also includes conforming revisions to paragraph (g).

Paragraph (n) provides authority for, and limits on, certain business combinations for Federal savings associations. In addition to consolidations, mergers, and other specified forms of business combinations, this paragraph addresses ''other combinations,'' the definition of which in section 5.33(d)(10) includes the transfer of any deposit liabilities to another insured depository institution, credit union, or other institution. Paragraph (n)(2)(iii) provides special requirements for mutual savings associations. Specifically, if any combining savings association is a mutual savings association, the resulting institution must be a mutually held depository institution insured by the FDIC, unless the transaction is approved under 12 CFR part 192 governing mutual to stock conversions or the transaction involves a mutual holding company organization under 12 U.S.C. 1467a(o) or a similar transaction under State law. Under the definition of ''other combination,'' § 5.33(n)(2)(iii) applies to any transfer of deposit liabilities, such as the sale of a branch, even if the mutual savings association still exists as an ongoing institution after the transaction. Accordingly, a branch sale would not be permissible unless the sale is to an insured mutual institution or either the mutual to stock or mutual holding company reorganization exception applied.

The OCC did not intend paragraph (n)(2)(iii) to apply to this type of transfer of deposit liabilities when it last amended this provision in 2015 (2015 Final Rule).[14] In fact, § 5.33(n)(4), which requires mutual savings associations to provide notice to accountholders of a proposed account transfer and to give them the option of retaining the account in the transferring Federal savings association if the account liabilities are transferred to an uninsured institution, contemplates just such an account transfer.

In addition, the anomalous reading of § 5.33(n)(2)(iii) was not present in the pre-integration version of the Federal savings association combination rules.[15] Former 12 CFR 146.2(a)(4) contained a similar restriction on the resulting institution being a mutually held savings association with similar exceptions. However, § 146.2(a) applied to combinations, which was defined in 12 CFR 152.13(b)(1) as a merger or consolidation with another depository institution, or an acquisition of all or substantially all of the assets or assumption of all or substantially all of the liabilities of a depository institution by another depository institution. Accordingly, a branch purchase or other transfer of less than substantially all deposits was not a combination and thus not subject to the restrictions in § 146.2(a)(4). Furthermore, in the preamble to the 2015 Final Rule, the OCC did not describe paragraph (n)(2)(iii) as applying to transfers of less than substantially all deposits.[16]

[13] *See* Del. Code Ann. tit. 8, § 251(f).

[14] 80 FR 28346 (May 18, 2015).

[15] The 2015 Final Rule integrated many licensing rules that apply to national banks and Federal savings associations.

[16] The OCC stated, ''in a merger or consolidation with a mutual Federal savings association, a mutual savings association must be the resulting institution.'' 80 FR 28346 at 28374 (May 18, 2015).

Accordingly, the OCC proposes revising paragraph (n)(2)(iii) to state that a consolidation or merger involving a mutual savings association or the transfer of all or substantially all of the deposits of a mutual savings association must result in a mutually held depository institution insured by the FDIC unless one of the exceptions applies.

The OCC also proposes adding an additional exception to paragraph (n)(2)(iii). The OCC and OTS have permitted transactions where a mutual savings association transferred all of its deposits to a non-mutual savings association institution followed by the voluntarily dissolution of the mutual savings association. These transactions are subject to approvals or non-objections by the OCC. However, the literal reading of 5.33(n)(2)(iii) may not permit such transactions. Accordingly, the OCC proposes adding a new paragraph (n)(2)(iii)(C) that provides an exception to the requirement that the resulting institution be an insured mutual institution when the transaction is part of a voluntary liquidation for which the OCC has provided non-objection under § 5.48.

Finally, the OCC proposes technical amendments to paragraph (l) to correct a typographical error and to revise paragraph (o)(2)(ii)(A) to replace the citation to 12 CFR 152.4 with the current citation, 12 CFR 5.22.

Operating Subsidiaries of a National Bank (§ 5.34)

Section 5.34 provides the licensing requirements for a national bank's acquisition or establishment of an operating subsidiary or commencement of a new activity in an existing operating subsidiary. Paragraph (e)(2)(i) specifies what entities may qualify as an operating subsidiary. Paragraph (e)(2)(i)(A) requires that the national bank must have the ability to control the management and operations of the subsidiary and no other person or entity exercises effective operating control over the subsidiary or has the ability to influence the subsidiary's operations to an extent equal to or greater than that of the bank. The OCC is proposing to clarify this provision by requiring that no other person or entity has the ability to exercise effective control or influence over the management or operations of the subsidiary to an extent equal to or greater than that of the bank or an operating subsidiary thereof. The OCC also is proposing conforming amendments to current § 5.34(e)(5)(ii)(A)(*3*)(*i*), redesignated by this proposed rule as § 5.34(f)(2)(i)(C)(*1*), which contains a parallel requirement for operating subsidiary filings and provides additional requirements for how the national bank must effectively control the operating subsidiary to be eligible to submit a notice to the OCC instead of an application to establish or acquire or engage in an activity in an operating subsidiary.

Section 5.34(e)(2)(ii) identifies certain subsidiaries that are not operating subsidiaries for purposes of § 5.34. The OCC is proposing to replace the word ''subsidiaries'' with ''entities'' to further clarify the exclusion. The OCC also is proposing a new paragraph (e)(2)(ii)(C) to specify that a trust formed for purposes of securitizing assets held by the bank as part of its banking business would not be considered an operating subsidiary. This proposal would codify the OCC's position that securitization trusts generally do not qualify as operating subsidiaries because of the bank's limited control over the trust and because beneficial interests in trusts lack many of the indicia of traditional equity. The OCC invites comment on the scope of this proposed provision.

Paragraph (e)(5) provides the procedures for operating subsidiary filings. The OCC is proposing to redesignate the majority of paragraph (e)(5) as paragraph (f) and current paragraph (e)(6), addressing grandfathered operating subsidiaries, as paragraph (g). The OCC also is proposing conforming revisions to cross-references.

Redesignated § 5.34(f)(2) contains the requirements for a national bank to qualify for the notice process for operating subsidiary filings. In addition to meeting additional control requirements and being well capitalized and well managed, paragraph (f)(2)(i)(A) permits a national bank to file a notice instead of an application if the activity is listed in redesignated paragraph (f)(5). The OCC is proposing to expand the scope of this requirement to include any activity that is substantively the same as a previously approved activity and that will be conducted in accordance with the same terms and conditions applicable to the previously approved activity. As discussed above, the proposal defines ''previously approved activity'' in § 5.3 to mean, for national banks, an activity approved in published OCC precedent for a national bank, an operating subsidiary of a national bank, or a non-controlling investment of a national bank. The OCC notes that the expansion of the notice requirement to activities that are substantively the same as previously approved activities does not relieve the national bank from the requirement to ensure that the operating subsidiary is only conducting permissible activities and would not affect the OCC's ability to take action if the OCC finds that the activities are not permissible or are conducted in an unsafe or unsound manner.

Proposed § 5.34(f)(2)(ii) would exempt from this expanded scope of permissible activities eligible for a notice the holding of an entity that is or will be chartered or licensed by a State as a bank, trust company, or savings association as an operating subsidiary. The proposed rule instead would require a national bank to file an application to hold these entities as an operating subsidiary.

The OCC also is considering as an alternative amendment removing all filing requirements for permissible activities, even for those not previously approved by the OCC. Under this alternative amendment, national banks would be able to acquire or establish an operating subsidiary or commence a new activity in an existing operating subsidiary without filing a notice or application if the activity to be engaged in by the operating subsidiary is a permissible national bank activity, provided that the operating subsidiary meets the ownership and structural aspects currently required for notice and the national bank is well capitalized and well managed. National banks are generally not required to notify or seek approval from the OCC before they engage in new permissible bank activities. Accordingly, removing the application and notice requirement would apply this logic to operating subsidiaries, which may only engage in activities permissible for national banks. Because the use of the operating subsidiary structure requires additional controls on the part of the national bank to ensure that the bank is not subject to unlimited liability and that the appropriate formalities for the subsidiary are met, this alternative amendment would maintain the additional control and well managed and well managed requirement. The OCC requests comment on the proposed amendment to the notice provision, the alternative amendment described above, and any intermediate options, such as removing the filing requirement for activities that are substantively the same as previously approved activities.

Redesignated § 5.34(f)(2)(i)(B) requires that an operating subsidiary eligible to file a notice must be a corporation, limited liability company, or limited partnership. Redesignated paragraphs (f)(2)(i)(C)(*1*) and (*2*) contain specific requirements for the management, control, and ownership of these entities to be eligible for the notice process. If

a national bank does not meet these requirements, the OCC requires the filer to submit an application so that it may conduct a case-by-case review to ensure that the national bank has effective control over the operating subsidiary and that the bank is not exposed to undue risks.[17] As trusts are currently not entities eligible for notice under redesignated paragraph (f)(2)(i)(B), a national bank must file an application for a trust to be an operating subsidiary. In recent years, the OCC has processed a number of applications for operating subsidiaries organized as trusts. From this experience, the OCC believes that a national bank in certain circumstances possesses sufficient control over trust structures that the notice process is appropriate. Accordingly, the OCC is proposing to add trusts to the list of entities eligible for notice in redesignated paragraph (f)(2)(i)(B). To qualify for the notice process, the national bank or an operating subsidiary must have the ability to replace the trustee at will and be the sole beneficial owner of the trust. The OCC believes that these requirements are appropriate in light of the flexible ownership and control permitted by trust structures. Requiring a national bank or its operating subsidiary to be able to replace the trustee at will and to be the sole beneficial owner of the trust would ensure that the bank has sufficient control over the trust making it unnecessary for the OCC to conduct a case-by-case review through an application process. Additionally, the OCC is proposing to reorganize redesignated paragraphs (f)(2)(i)(C)(*1*) and (*2*) to reflect the addition of trust structures and to explicitly recognize that the national bank may meet the required control provisions indirectly through another operating subsidiary. The OCC intends no substantive change to the provisions that address corporations, limited liability partnerships, or limited liability companies.

Current 5.34(e)(7) requires national banks to file an annual report with the OCC describing operating subsidiaries that do business directly with consumers. The OCC publishes this information on its website. The OCC is proposing to remove this requirement to reduce burden and because it generally duplicates information contained elsewhere, such as the FFIEC's National Information Center (NIC).[18] In addition, the majority of the operating subsidiaries reported are subject to the jurisdiction of the Consumer Financial Protection Bureau, and not the OCC, for most consumer law issues.

Finally, the OCC is proposing a technical change that would remove the definitions of ''well capitalized'' and ''well managed'' from § 5.34(d). As described above, the OCC is proposing to define these terms in § 5.3.

Bank Service Company Investments by a National Bank or Federal Savings Association (§ 5.35)

Section 5.35 addresses national bank and Federal savings association investments in bank service companies as authorized by the Bank Service Company Act (BSCA) (12 U.S.C. 1861–1867). Pursuant to section 2 of the BSCA (12 U.S.C. 1862), paragraph (i) of § 5.35 provides that a national bank or Federal savings association may not invest more than 10 percent of its capital and surplus in a bank service company. In addition, paragraph (i) also provides that the national bank's or Federal savings association's total investments in all bank service companies may not exceed five percent of the national bank's or Federal savings association's total assets. However, section 2 of the BSCA also specifies that the investment limitations in section 5(c)(4)(B) of the HOLA apply to Federal savings associations with regard to bank service company investments. This limitation is not currently included in paragraph (i). Accordingly, the OCC proposes to revise paragraph (i) to directly reference the limitations in section 2 of the BSCA.

The OCC also is proposing a technical correction to the title of this section that would remove the extraneous word ''investment.''

Other Equity Investments by a National Bank (§ 5.36)

Section 5.36 provides the procedures for national banks to make certain types of equity investments. Paragraphs (e) and (f) provide the procedures and requirements for a national bank to make a non-controlling investment that is not prescribed by other OCC rules. The OCC is proposing to clarify the types of national bank equity investments that are subject to § 5.36 by adding a new definition to paragraph (c) that would define ''non-controlling investment'' to mean an equity investment made pursuant to 12 U.S.C. 24(Seventh) that is not governed by procedures prescribed by another OCC rule. Additionally, the OCC is proposing to specify in the definition that ''non-controlling investment'' does not include a national bank holding interests in a trust formed for the purposes of securitizing assets held by the bank as part of its banking business or for the purposes of holding multiple legal titles of motor vehicles or equipment in conjunction with lease financing transactions. This would codify OCC interpretation that these interests do not have sufficient indicia of ownership and control to qualify as an equity investment for purposes of § 5.36. The OCC also is proposing a conforming change to paragraphs (e) and (f).

For a national bank to make a noncontrolling investment, current § 5.36 requires a filing with the OCC that: (1) Describes the structure of the investment and the activity or activities conducted by the enterprise in which the bank is investing; (2) describes how the bank has the ability to prevent the enterprise from engaging in impermissible activities or has the ability to withdraw its investment; (3) describes how the investment is convenient and useful to the bank in carrying out its business and not a mere passive investment; (4) certifies that the bank's loss exposure is limited; and (5) certifies that the enterprise agrees to be subject to OCC supervision and examination, subject to the limitations and requirements of section 45 of the FDI Act (12 U.S.C. 1831v) and section 115 of the Gramm-Leach-Bliley Act (12 U.S.C. 1820a).

A national bank must file an application with the OCC to make a non-controlling investment unless it qualifies for the notice procedure in § 5.36(e). A national bank may file a notice if: (1) The investment meets the above requirements; (2) the enterprise engages in activities that are listed in § 5.34(e)(5)(v) (permissible operating subsidiary activities) or an activity that is substantively the same as that contained in published OCC precedent approving a non-controlling investment by a national bank or its operating subsidiary; and (3) the bank is well managed and well capitalized. As discussed above for operating subsidiary notices, the OCC is proposing to expand the activities eligible for notice for non-controlling investments to all previously approved activities, as defined in proposed § 5.3. This definition includes activities approved for national banks and their operating subsidiaries, in addition to previously approved non-controlling investments. The proposal also reorganizes paragraph (e) and makes conforming changes to paragraphs (e)(2) and (e)(4). Additionally, the OCC is considering removing the filing requirement for non-controlling investments in enterprises engaging in bank permissible activities, as discussed above for national bank

[17] *See* 61 FR 60350 (Nov. 27, 1996).

[18] The NIC may be found at *https://www.ffiec.gov/NPW.*

operating subsidiaries. The OCC requests comment on the proposed amendment to the notice provision, the alternative amendment described above, and any intermediate options, such as removing the filing requirement for activities that are substantively the same as previously approved activities.

As noted, whether a national bank is filing a notice under paragraph (e) or an application under paragraph (f), the current rule requires the enterprise in which the bank will make a non-controlling investment to agree to OCC supervision and examination. The OCC is proposing to amend paragraph (f), redesignated as paragraph (f)(1), to permit national banks to file an application for prior approval to invest in an enterprise that has not agreed to be subject to OCC supervision and examination. The OCC believes that this will give national banks greater flexibility to make permissible non-controlling investments, while giving the OCC an opportunity for an in-depth review of the proposed investment to ensure there is no inappropriate risk to the national bank's safety and soundness.

Additionally, the OCC is proposing a new paragraph (f)(2) to provide for expedited review of certain applications for investments in enterprises that do not agree to OCC supervision and examination that pose minimal risk to the national bank's safety and soundness. An application under proposed paragraph (f)(2) would be deemed approved by the OCC within 10 days after the application is received if five additional requirements are met. First, the enterprise must engage in permissible bank activities as described in proposed paragraph (e) of this section. Second, the national bank must be well managed and well capitalized. These two requirements parallel the requirements for filing a notice. Third, the book value of the national bank's non-controlling investment for which the application is submitted must not be more than 1% of the bank's capital and surplus. Fourth, no more than 50% of the enterprise may be owned or controlled by banks or savings associations subject to examination by an appropriate Federal banking agency or credit unions insured by the National Credit Union Association. Many enterprises in which national banks make non-controlling investments are owned by a consortium of banks and savings associations and provide services to their owners and others. Given the potentially complex interactions between these enterprises and their owners and the additional risks posed to the owners, the OCC believes that OCC supervision and examination of these enterprises is necessary for the safety and soundness of the investing national banks and Federal savings associations. Accordingly, the proposed rule does not permit investments in these entities without their commitment to OCC supervision and examination, and therefore expedited review of these investments would not be available. Finally, the OCC must not have notified the national bank that the application has been removed from expedited review, or that the expedited review process has been extended, pursuant to the standards contained in § 5.13(a)(2).

In addition, the proposed rule would permit a national bank to make a non-controlling investment without a filing to the OCC in certain circumstances. Under proposed paragraph (g), a national bank would be permitted to make a non-controlling investment without an application or notice if the activities of the enterprise are limited to those activities previously reported by the bank in connection with making or acquiring a non-controlling investment; the activities in the enterprise continue to be legally permissible for a national bank; the bank's non-controlling investment will be made in accordance with any conditions imposed by the OCC in approving any prior non-controlling investment in an enterprise conducting these same activities; and the bank is able to make the representations and certifications specified in §§ 5.36(e)(3) through (e)(7), as proposed to be amended. As the national bank would already have a non-controlling investment in an entity conducting particular activities, the OCC believes that there would be little risk in the bank making an additional non-controlling investment in an entity conducting the same activities. Furthermore, the OCC believes that non-controlling investments pose similar risks to national banks as operating subsidiaries, and proposed paragraph (g) would parallel current § 5.34(e)(5)(vi), redesignated in this proposal as § 5.34(f)(6), which permits national banks to make investments in operating subsidiaries without a filing. Therefore, the OCC believes that proposed paragraph (g) would reduce burden without jeopardizing the national bank's safety and soundness. As a conforming amendment, the OCC is proposing to redesignate current paragraphs (g) through (i) as paragraphs (h) through (j), respectively.

Redesignated paragraph (j) provides exceptions to the rules of general applicability. The OCC is proposing to remove the exception to § 5.9, public availability, because some of these investments may be of public interest. Further, the proposal would permit the OCC to determine that some or all provisions in §§ 5.8, 5.10, and 5.11 apply if it concludes that an application presents significant or novel policy, supervisory, or legal issues. This proposed paragraph (j) would parallel the equivalent provision for operating subsidiary filings in current § 5.34(e)(5)(iii).

Investment in National Bank or Federal Savings Association Premises (§ 5.37)

Section 5.37 describes the procedures for national bank and Federal savings association investment in bank premises. Paragraph (d)(1)(i) provides that the procedures of § 5.37 are applicable to investments in the stocks, bonds, debentures, or other obligations of any corporation holding the premises of the national bank or Federal savings association in addition to direct investments in the bank premises. Twelve CFR 7.1000 provides the authority for national bank and Federal savings association investments in bank premises. In addition to the investments listed in § 5.37(d)(1)(i), § 7.1000(a)(3) provides that national banks and Federal savings associations may hold bank premises through a subsidiary organized as a corporation, partnership, or similar entity (*e.g.,* a limited liability company). The OCC proposes to revise § 5.37(d)(1)(i) to recognize the permissibility of holding bank premises through partnerships and similar entities, such as limited liability companies, so that it is consistent with § 7.1000(a)(3).

In addition, the OCC proposes to remove the definition of ''capital and surplus'' in § 5.37. Because § 5.3 defines this term, it is not necessary to include it in § 5.37. Finally, the OCC proposes to correct a technical error in paragraph (a), replacing ''12 U.S.C. 317d'' with ''12 U.S.C. 371d.''

Operating Subsidiaries of a Federal Savings Association (§ 5.38)

Section 5.38 provides the application requirements for a Federal savings association's acquisition or establishment of an operating subsidiary or commencement of a new activity in an existing operating subsidiary when required by section 18(m) of the FDI Act (12 U.S.C. 1828(m)). Section 5.38 is largely parallel to § 5.34 for national bank operating subsidiaries, except that where a national bank would file a notice, a Federal savings association would file an application eligible for expedited review. Accordingly, the OCC is proposing coordinating revisions to

§ 5.38 including: (1) Revising the standard for qualifying subsidiaries in paragraph (e)(2)(i)(A); (2) excluding securitization trusts from the scope of the section in new paragraph (e)(2)(iii)(C); (3) redesignating paragraphs (e)(5), (e)(6), and (e)(7) as paragraphs (f), (g), and (h), respectively; (4) expanding the activities eligible for expedited review to include activities substantially the same as a previously approved activity (as proposed to be defined in § 5.3) and conducted in accordance with the same terms and conditions applicable to the previously approved activity, in redesignated paragraph (f)(2)(ii)(B); (5) expanding the entities eligible for expedited review to include certain trusts where the Federal savings association or its operating subsidiary is the sole beneficiary and has the ability to replace the trustee at will, in redesignated paragraphs (f)(2)(ii)(C) and (D); and (6) explicitly recognizing that the control required by redesignated paragraphs (f)(2)(ii)(D) may be met through an operating subsidiary of the Federal savings association. In addition, the OCC is proposing technical changes that would remove the definitions of ''well capitalized'' and ''well managed'' from § 5.38, as in proposed § 5.34, and replace the word ''subsidiary'' with the more appropriate word ''entity'' in the introductory text of paragraph (e)(2)(iii).

In addition, the OCC is proposing to correct an inadvertent omission in the 2015 Final Rule by amending redesignated § 5.38(f)(2)(ii)(D)(*1*), which contains requirements for how a Federal savings association must effectively control an operating subsidiary to be eligible for expedited review of an application. Although the OCC made changes in the 2015 Final Rule to current §§ 5.34(e)(2)(i)(A), 5.34(e)(5)(ii)(A)(*3*)(*i*), and 5.38(e)(2)(i)(A) to address commenter's concerns regarding the application of the rule to joint ventures,[19] the OCC did not make corresponding conforming changes to current § 5.38(e)(5)(ii)(B)(*4*)(*i*), redesignated in this proposal as § 5.38(f)(2)(ii)(D)(*1*). However, all of these provisions should contain parallel language. Accordingly, the OCC is proposing to revise redesignated § 5.38(f)(2)(ii)(D)(*1*) so that it parallels current § 5.34(e)(5)(ii)(A)(*3*)(*i*), redesignated in this proposal as § 5.34(f)(2)(i)(C)(*1*).

Financial Subsidiaries of a National Bank (§ 5.39)

Section 5.39 describes the procedures for national bank acquisition of, and conduct of activities in, a financial subsidiary pursuant to section 5136A of the Revised Statutes (12 U.S.C. 24a). Paragraph (h)(5)(ii) of § 5.39 specifies that the restrictions contained in section 23A(a)(1)(A) of the Federal Reserve Act (12 U.S.C. 371c(a)(1)(A)), do not apply to a covered transaction between a bank and its financial subsidiary. However, section 609 of the Dodd-Frank Wall Street Reform and Consumer Protection Act removed this section 23A exclusion. Accordingly, the OCC proposes to remove paragraph (h)(5)(ii).

The OCC also proposes to clarify the approval process for financial subsidiary activities. First, consistent with other changes in part 5, the OCC proposes to change the terminology for filings under § 5.39 from notice to application. However, the OCC does not intend any substantive change in standards or procedures.

Second, as the OCC recognized in the initial proposal for § 5.39, section 24a states that OCC approval shall be based solely upon specific statutory factors.[20] Accordingly, the OCC proposed the current procedures for § 5.39 upon the understanding that the approval may occur upon a bank's submission of information demonstrating satisfaction of the statutory criteria.[21] The OCC proposes to add a new paragraph (i)(3) specifying that an application is deemed approved upon filing of the information required by the procedures of paragraphs (i)(1) or (i)(2) within the time frames provided.

In addition, the OCC is proposing technical changes to paragraph (d) that would remove the definitions of ''appropriate Federal banking agency,'' ''well capitalized,'' and ''well managed.'' As discussed above, the proposal would amend § 5.3 to add these definitions without any substantive changes.

Finally, consistent with other proposed changes in part 5, the OCC proposes changing the terminology for ''notice'' to ''application'' thereby conforming the terminology to the licensing action provided in § 5.39. No substantive change is intended from this change in nomenclature.

National Bank Director Residency and Citizenship Waivers (New § 5.43)

The OCC proposes a new § 5.43 to provide procedures for waivers of the national bank director residency and citizenship requirements. Section 5146 of the Revised Statues (12 U.S.C. 72) requires every director of a national bank to be a citizen of the United States and that a majority of the directors reside in the State, Territory, or District where the national bank is located, or within one hundred miles of the location of the office of the bank. These requirements reflect the principle of local ownership and control of national banks. Twelve U.S.C. 72 provides the Comptroller the discretion to waive the residency requirement and to waive the citizenship requirement for not more than a minority of the total number of directors.

The OCC has processed requests for waivers of the residency and citizenship requirements for many years. The ''National Bank Director Waivers'' booklet of the *Comptroller's Licensing Manual* currently describes the procedures for requesting and granting waivers. The OCC proposes codifying these procedures in a new 12 CFR 5.43 to better clarify and structure the waiver process.

Proposed paragraph (a) would set forth the authority for the regulation, 12 U.S.C. 72 and 93a, the latter of which grants the OCC general rulemaking authority. Proposed paragraph (b) would set forth the scope of the section as describing the procedures for the OCC to waive the residency and citizenship requirements.

Proposed paragraph (c) would set forth the application procedures. Under paragraph (c)(1), a national bank would file a written application with the OCC to request a waiver of the residency requirement. Proposed paragraph (c)(1) also provides that the OCC may grant this waiver for individual directors or for any number of director positions. The OCC typically grants residency waivers for a certain number of directors on the board rather than to specific individuals. However, the OCC proposes to increase flexibility by permitting either procedure.

Under proposed paragraph (c)(2), a national bank could request a waiver of the citizenship requirements for individuals who comprise up to a minority of the total number of directors by filing a written application with the OCC. Proposed paragraph (c)(2) also provides that the OCC may grant a waiver on an individual basis. Given the more prescriptive nature of the citizenship requirement and the greater background investigation that the OCC undertakes on proposed non-citizen directors, OCC practice is to grant waivers to individuals and not to a designated number of directors. Accordingly, the OCC also proposes specifying in paragraph (c)(2) that a citizenship waiver is valid until the individual leaves the board or the OCC revokes the waiver in accordance with

[19] *See* 80 FR 28346, at 28375 (May 18, 2015).

[20] 65 FR 3159 (Jan. 20, 2000).

[21] *Id.*

proposed paragraph (d), discussed below.

Proposed paragraph (c)(3)(i) requires the subject of a citizenship waiver application to submit the information prescribed in the Interagency Biographical and Financial Report. Proposed paragraph (c)(3)(ii) provides that the OCC may require additional information about the subject of a citizenship waiver application, including legible fingerprints, if appropriate. This proposed paragraph also permits the OCC to waive any of the information requirements if the OCC determines that doing so is in the public interest.

Proposed paragraph (c)(4) provides for exceptions to the rules of general applicability. The OCC proposes that §§ 5.8 (public notice), 5.9 (public availability), 5.10 (comments), and 5.11 (hearings and other meetings) not apply to applications for citizenship waivers. The OCC believes that the applications will largely consist of information specific to a bank's internal practices as well as significant private information about the individuals subject to the waiver applications. Accordingly, the OCC does not believe that these applications should be publicly available or subject to public notice, comment, or hearings.

The OCC also would add a new paragraph (d) that would provide procedures for the OCC's revocation of a residency or citizenship waiver. Under these procedures, the OCC would provide written notice before a revocation to the national bank and affected director(s) of its intention to revoke the waiver and the basis for its intention. The bank and the affected director(s) may respond in writing to the OCC within 10 calendar days, unless the OCC determines that a shorter period is appropriate in light of relevant circumstances. The OCC will consider the written responses of the bank and affected director(s), if any, prior to deciding whether or not to revoke a residency or citizenship waiver. The OCC will notify the national bank and the director of the OCC's decision to revoke a residency or citizenship waiver in writing. The OCC's decision to revoke a residency or citizenship waiver would be effective, if the director appeals pursuant to proposed paragraph (e), upon the director's receipt of the decision of the Comptroller, an authorized delegate, or the appellate official, to uphold the initial decision to revoke the residency or citizenship waiver. If the director does not appeal, the revocation would be effective the expiration of the period to appeal.

Although 12 U.S.C. 72 does not contain any explicit provisions for revoking a waiver, the OCC believes that the decision to revoke a waiver is consistent with the Comptroller's authority to grant a waiver. Absent this authority, many residency waivers effectively would be perpetual as the OCC generally grants residency waivers for a designated number of director positions. Further, changing geo-political circumstances may in some circumstances warrant the revocation of citizenship waivers, particularly if foreign governments are unduly influencing directors' activities with regard to a national bank.

The OCC recognizes that discretion in revoking residency and citizenship waivers is premised upon the guarantee of due process. Accordingly, the proposed rule provides affected national banks and directors the opportunity to respond to the OCC's intention to revoke a waiver. The OCC will specifically consider written responses prior to deciding on the revocation.

Proposed paragraph (e) would provide an appeals process for a director whose residency or citizenship waiver the OCC has decided to revoke. This proposed appeals process is parallel to that provided for disapprovals of directors and senior executive officers in 12 CFR 5.51, and provides review by the Comptroller, an authorized delegate, or a designated appellate official. A director may appeal on the grounds that the reasons for the initial decision to revoke were contrary to fact or arbitrary and capricious. The Comptroller, an authorized delegate, or the appellate official will independently determine whether the reasons given for the initial decision to revoke are contrary to fact or arbitrary and capricious. If they determine either to be the case, the Comptroller, an authorized delegate, or the appellate official may reverse the initial decision to revoke the waiver.

Proposed paragraph (f) provides that waivers outstanding on the effective date of a final rule would remain in effect notwithstanding proposed paragraph (c)(2), unless revoked pursuant to proposed paragraph (d).

Increases in Permanent Capital of a Federal Stock Savings Association (§ 5.45)

Section 5.45 sets out the OCC's rules addressing increases in permanent capital by a Federal savings association organized in stock form. The OCC is proposing two technical amendments to this section. First, the proposed rule would change the term ''Federal savings association'' or ''savings association'' to ''Federal stock savings association'' each time it appears, except as used in the defined term ''eligible savings association,'' to more accurately reflect the scope of this section. Second, the proposed rule would replace the reference to 12 CFR part 197 in paragraph (h) with 12 CFR part 16, which now applies to Federal savings associations.

The OCC is considering one other change to § 5.45. Under the current rule, Federal savings associations that meet the criteria for an eligible savings association described in § 5.3 may have their applications for capital increases, when required, reviewed under an expedited process. In the OCC's experience, the most relevant factors in considering such applications are the financial and managerial conditions of the requesting Federal savings association, given the more direct relationship between capital, on the one hand, and the financial and managerial conditions, on the other hand. Accordingly, the OCC requests comment on whether the agency should amend its regulations to focus the eligibility criteria such that only well capitalized and well managed Federal savings associations are eligible to request expedited review of their applications for capital increases. If the OCC makes this change to § 5.45 in the final rule, it also would amend its other capital filing-related rules in part 5 based on this same rationale, §§ 5.46 (Changes in permanent capital of a national bank), 5.47 (Subordinated debt issued by a national bank), 5.55 (Capital distributions by Federal savings associations), and 5.56 (Inclusion of subordinated debt securities and mandatorily redeemable preferred stock as Federal savings association supplementary (tier 2) capital).

Changes in Permanent Capital of a National Bank (§ 5.46)

Section 5.46 sets out the OCC's rules addressing changes in permanent capital for a national bank. Paragraph (g)(1)(ii) provides that prior OCC approval is required for an increase in permanent capital in certain cases. In addition, pursuant to 12 U.S.C. 57, paragraph (i)(3) of § 5.46 requires a bank to submit a notice to the appropriate licensing office after it completes an increase in capital, regardless of whether prior approval is required. The OCC proposes to clarify these procedures for increases in capital requiring prior approval by referencing paragraph (i)(3) in the introductory text of paragraph (g)(1)(ii) and removing it from paragraph (g)(1)(ii)(C). The OCC also proposes to clarify the introductory text of paragraph (g)(1)(ii) to specifically

indicate that an application to increase a national bank's permanent capital may be eligible for expedited review under paragraph (i)(2).

Paragraph (h) provides that a national bank must apply and obtain the OCC's prior approval for any reduction in its permanent capital. Paragraph (i)(2) provides expedited review procedures and currently provides that an eligible bank may request approval for decreasing its capital for up to four consecutive quarters. The OCC proposes a number of amendments to paragraphs (h) and (i) to add flexibility for national banks and to clarify procedures. First, the proposal would amend paragraph (h) to permit a national bank to request approval in a standard application for a reduction in capital for multiple quarters. The request need only specify a total dollar amount for the requested period and need not specify amounts for each quarter. As a result, a national bank may request approval for a reduction in permanent capital over more than four consecutive quarters. However, this request would not be eligible for expedited review so that the OCC may have the time to carefully review the request. Second, the proposed rule would add flexibility to the expedited process in paragraph (i)(2) by specifying that an eligible national bank need only state the total dollar amount rather than per-quarter reductions in requests for four-quarter decreases. As a conforming change, the OCC proposes to amend paragraph (i)(5) to clarify that the OCC's approval of a capital change does not expire within one year of the date of the approval if the OCC specifies a longer period.

Subordinated Debt Issued By a National Bank (§ 5.47)

Section 5.47 describes the requirements applicable to a national bank's issuance of subordinated debt, including subordinated debt intended for inclusion in tier 2 capital. The OCC is proposing to add a new definition of ''subordinated debt document'' to § 5.47(c) to mean any document pertaining to an issuance of subordinated debt, and any renewal, extension, amendment, modification, or replacement thereof, including the subordinated debt note, and any global note, pricing supplement, note agreement, trust indenture, paying agent agreement, or underwriting agreement. The OCC intends this list of documents to be illustrative and not exclusive.

This change would clarify that a national bank should submit with their applications all material documents needed for the OCC to review the application for compliance with its regulatory requirements. The OCC reviews ancillary securities documents to ensure that they do not contain language that conflicts with required disclosures or statements made in the subordinated debt note. The OCC invites comment on revisions to the proposed definition and the scope of relevant documents typically employed in subordinated debt issuances. The OCC also is proposing conforming revisions throughout § 5.47 to better reflect this terminology.

Paragraph (d)(3)(ii) contains a list of statements and descriptions that a national bank must clearly and accurately disclose in the subordinated debt note. The OCC proposes adding language to paragraph (d)(3)(ii)(C) to clarify that a national bank is only required to disclose the OCC's authority under 12 CFR 3.11 to limit certain distributions if the disclosure requirement is applicable to the subordinated debt issuance. Specifically, a national bank only will be required to incorporate this disclosure language into a subordinated debt note if the issuing bank, or any successor institution to the issuing bank, would have discretion under the terms of the subordinated debt to permanently or temporarily suspend payments without triggering an event of default. This amendment would provide flexibility and reduce burden by permitting national banks to omit the provisions when warranted.

The OCC also proposes to add a new paragraph (d)(3)(ii)(D) that would require a national bank to disclose in a subordinated debt note that the subordinated debt obligation may be fully subordinated to interests held by the U.S. government in the event that the national bank enters into a receivership, insolvency, liquidation, or similar proceeding. This proposed requirement mirrors the language in 12 CFR 3.20(d)(1)(xi), which requires advanced approaches banks to disclose this information in the governing agreement, offering circular, or prospectus of an instrument to be included in tier 2 capital. The OCC believes that disclosing this information to potential investors in subordinated debt is beneficial for all national banks, even those that are not advanced approaches banks or that do not intend to include the debt in tier 2 capital. The proposal would make a conforming change to paragraph (e) introductory text to remove the reference to advanced approaches national banks.

Paragraphs (f)(1)(ii) and (h) govern the procedure for a national bank to include subordinated debt in tier 2 capital. Currently, these provisions provide that a national bank may not include subordinated debt as tier 2 capital unless it has filed a notice with the OCC and received notification from the OCC that the subordinated debt qualifies as tier 2 capital. The OCC proposes to make these paragraphs consistent with the rest of part 5 by changing the terminology from notice to application. This change is not intended to be substantive. The OCC also is proposing clarifying changes to this paragraph.

Additionally, the OCC proposes to provide explicit regulatory authority for a national bank to seek approval to include subordinated debt as tier 2 capital before issuance of the subordinated debt in paragraphs (f)(1)(ii) and (h)(1). National banks routinely seek confirmation from the OCC that subordinated debt will qualify as tier 2 capital prior to issuance to mitigate the risk of issuing nonqualifying subordinated debt. This amendment would codify this practice. Under the proposal, and as with current practice, the OCC would not provide final approval that the subordinated debt qualifies as tier 2 capital until after the debt is issued and final pricing is available. Relatedly, the OCC proposes a conforming revision to paragraph (h)(2)(ii), which requires the application to include the amount and date of receipt of funds, to permit submission of the projected amount and date of receipt.

The OCC also proposes to add a new paragraph (h)(2)(iii) requiring the application to include the interest rate or expected calculation method for the interest rate for the subordinated debt. This would assist the OCC in reviewing applications for inclusion of the subordinated debt in tier 2 capital.

Paragraphs (f)(2)(ii) and (g)(1)(ii) require OCC approval for a national bank to prepay subordinated debt. The approval requirements for prepayment of subordinated debt include specific additional requirements for prepayment that is in the form of a call option. Specifically, a national bank seeking to prepay subordinated debt in the form of a call option is required to provide: (1) A statement explaining why the national bank believes that following the proposed prepayment the national bank would continue to hold an amount of capital commensurate with its risk; or (2) a description of the replacement capital instrument that meets the criteria for tier 1 or tier 2 capital under 12 CFR 3.20, including the amount of such instrument, and the time frame for issuance. The OCC has found that in the distinction between prepayment and prepayment in the form of a call option is immaterial to OCC review, that the

additional requirements are generally satisfied in most prepayment applications, and that the additional information is helpful for the OCC to determine the impact of the prepayment on the national bank's capital levels and safety and soundness. Accordingly, the OCC proposes having a single procedure for the prepayment of subordinated debt that would incorporate the requirements for prepayment in the form of a call option. The proposal contains a coordinating revision to paragraph (g)(2)(ii) regarding OCC approval.

Currently, § 5.47 does not explicitly require a national bank to make a filing with the OCC if the national bank makes a material change to its outstanding subordinated debt note or any related subordinated debt documents. The OCC proposes to add new paragraphs (f)(3) and (g)(1)(iii) to ensure that subordinated debt issuances remain compliant with OCC regulatory requirements, including the requirements for inclusion in tier 2 capital. This revision would require OCC approval for a material change to an existing subordinated debt document if the bank would have been required to receive OCC approval to issue the security under paragraph (f)(1) or to include it in tier 2 capital under paragraph (h). An application to make a material change would include: (1) A description of the proposed changes; (2) a statement of whether the national bank is subject to or required to file a capital plan with the OCC, and if so, how the proposed change conforms to the capital plan; (3) a copy of the revised subordinated debt documents reflecting all proposed changes; and (4) a statement that the proposed changes to the subordinated debt documents comply with all applicable laws and regulations.

The OCC also is proposing to make certain stylistic changes to the rule text of § 5.47 that are not intended to impact the substantive requirements applicable to national banks.

Change in Control of a National Bank or Federal Savings Association; Reporting of Stock Loans (§ 5.50)

Section 5.50 sets forth the procedures and standards for changes in control of national banks and Federal savings associations. Paragraph (d)(8) contains a definition of insured depository institution. However, that term is not used within § 5.50. Accordingly, the OCC proposes to replace that definition with the definition of ''depository institution,'' to mean a depository institution as defined in section 3(c)(1) of the FDI Act (12 U.S.C. 1813(c)(1)).

Paragraph (f)(3)(iv) states that an applicant may request a hearing by the OCC within 10 days of receipt of a notice disapproving a change in control and that following final agency action under 12 CFR part 19, further review by the courts is available. Paragraph (f)(6) provides that the OCC will notify the proposed acquiror in writing of a disapproval within three days and will indicate the basis of its disapproval. For clarity, the OCC proposes combining these provisions in a revised paragraph (f)(6). The OCC also proposes to add language stating that this disapproval notice will inform the filer of the availability of a hearing. Additionally, the OCC proposes a new paragraph (f)(6)(iii) specifying that if a filer fails to request a hearing with a timely request, the notice of disapproval constitutes a final and unappealable order. This language is currently included in 12 CFR 19.161 and the OCC believes it also should be included in § 5.50 to put filers on notice of the implications of failure to request a hearing in a timely manner.

Finally, paragraph (g)(2)(i) provides procedures for the OCC's release of information related to a change in control notice, including publication of information in the OCC's Weekly Bulletin. The OCC proposes revising this provision to reflect the information that the OCC publishes in the Weekly Bulletin in practice, namely the date of filing, the disposition of the notice and date thereof, and the consummation date of the transaction, if applicable.

Changes in Directors and Senior Executive Officers of a National Bank or Federal Savings Association (§ 5.51)

Section 5.51 implements section 914 of the Financial Institutions Reform, Recovery, and Enforcement of 1989 (12 U.S.C. 1831i). Section 914 requires a national bank or Federal savings association to provide prior notice to the OCC of the proposed addition of any individual to the board of directors or the employment of any individual as a senior executive officer of a bank if, among other things, the bank is in troubled condition. Paragraph (c)(4) defines ''senior executive officer'' to mean the president, chief executive officer, chief operating officer, chief financial officer, chief lending officer, chief investment officer, and any other individual the OCC identifies in writing to the national bank or Federal savings association who exercises significant influence over, or participates in, major policy making decisions of the bank or savings association without regard to title, salary, or compensation. The term also includes employees of entities retained by a national bank or Federal savings association to perform functions in lieu of directly hiring the individuals, and the individual functioning as the chief managing official of the Federal branch of a foreign bank. The OCC proposes to add chief risk officer to the definition of senior executive officer given the increase in that role at many national banks and Federal savings associations. The OCC invites comment on whether it should add others to the definition or remove any currently included in the definition.

Paragraph (c)(7) provides the definition of ''troubled condition,'' which is one of the circumstances in which a national bank or Federal savings association is required to file a notice under § 5.51. Pursuant to paragraph (c)(7)(ii), this definition includes a national bank or Federal savings association that is subject to a cease and desist order, a consent order, or a formal written agreement, unless otherwise informed in writing by the OCC. The OCC is proposing to amend paragraph (c)(7)(ii) to specify that the cease and desist order, consent order, or formal written agreement must require the bank or savings association to improve its financial condition for the institution to be considered in ''troubled condition'' solely as a result of the enforcement action. The OCC expects to inform a bank in writing when an enforcement action does not require action to improve the financial condition of the bank. The OCC's general policy is not to apply troubled condition status to national banks or Federal savings associations solely as a result of cease and desist orders, consent orders, or formal written agreements that do not require improvement in the financial condition of the bank or savings association, such as enforcement actions that address certain compliance-related deficiencies that do not affect the financial condition of the bank or savings association. Typically, the OCC has specifically noted in these actions that the bank or savings association is not in troubled condition as a result of the action. This proposal would update the definition of troubled condition in § 5.51 to align with the OCC's current supervisory practice. The OCC notes that this practice is consistent with that of the Federal Reserve Board (Board) and the FDIC, and the proposed revision would align the OCC's regulations with the Board's and FDIC's regulations implementing section 914.[22]

[22] *See* 12 CFR 225.71(d) (Board); 12 CFR 303.101(c) (FDIC).

Capital Distributions by Federal Savings Associations (§ 5.55)

Section 5.55 provides standards and procedures for capital distributions made by Federal savings associations. Paragraph (d)(2) defines ''capital'' as total capital, computed under 12 CFR part 3. The OCC proposes to delete this definition as unnecessary because all references to ''capital'' are either in relation to the defined term ''capital distribution'' or contain an explicit reference to calculations under 12 CFR part 3. Additionally, the OCC proposes a new definition of ''control,'' to have the same meaning as in section 10(a)(2) of the HOLA (12 U.S.C. 1467a(a)(2)), and to use this term to describe control relationships, rather than the current use of the term ''subsidiary'' in § 5.55.

Current paragraph (e)(1) requires a Federal savings association to file an application if it is not an eligible savings association. Current paragraphs (e)(2) and (g)(2) require eligible savings associations to file a notice if certain requirements are met. Consistent with other proposed changes in part 5, the OCC proposes to change the terminology for notice to application and to make corresponding changes throughout § 5.55. As a result, filings that are currently notices would be applications subject to expedited review. In addition, the OCC proposes to reorganize paragraphs (e) and (g) to clarify the procedures; however no substantive change is intended. The OCC also would make additional stylistic revisions to current paragraph (e)(4) to clarify that the notice mentioned in this paragraph is that of the notice filed with the Board of Governors of the Federal Reserve System.

Further, the OCC proposes one substantive change to the application procedures. Current paragraph (e)(1)(ii) requires a Federal savings association to file an application if the total amount of all its capital distributions (including the proposed capital distribution) for the applicable calendar year exceeds its net income for that year to date plus retained net income for the preceding two years. Under 12 CFR 5.64(c)(2), a national bank may calculate its dividends in excess of a single year's current net income by offsetting certain excess dividends against retained net income from each of the prior two years, with the potential to incorporate net income from up to four years prior to the current year when determining the maximum dividend payout possible without prior OCC approval. To provide additional flexibility, the OCC would permit a Federal savings association to conduct this calculation when determining whether this application requirement applies. Specifically, if the capital distribution is from retained earnings, a Federal savings association would be able to calculate the aggregate limitation for a capital distribution in accordance with 12 CFR 5.64(c)(2), substituting ''capital distributions'' for ''dividends'' in that section.

Paragraph (f)(2) provides that the capital distribution application may include a schedule proposing capital distributions over a specified period, not to exceed 12 months. The OCC proposes to remove this 12-month limitation to allow a Federal savings association more flexibility for its distributions and to align this provision with the analogous national bank provision, 12 CFR 5.46(i)(1)(ii).

Additionally, the OCC is proposing a new paragraph (g)(3) to clarify the appropriate OCC filing office for capital distribution applications and notices. In general, a Federal savings association would file with the appropriate OCC licensing office. However, the Federal savings association must submit the application to the appropriate OCC supervisory office if the application involves solely a cash dividend from retained earnings or involves a cash dividend from retained earnings and a concurrent cash distribution from permanent capital.

Finally, the OCC is proposing to reorganize paragraph (h), which addresses OCC review of an application, by providing separate paragraphs for OCC denials and approvals. As a result, proposed paragraph (h)(1) would address OCC denials and include the majority of current paragraph (h) and proposed paragraph (h)(2) would address OCC approvals. In doing so, the proposal would clarify that the OCC may approve an application in whole or in part and that the OCC may waive any waivable prohibition or condition to permit a distribution. The proposal also would change the cross-reference in the current introductory text to the more appropriate paragraph (e)(1).

Inclusion of Subordinated Debt Securities and Mandatorily Redeemable Preferred Stock as Federal Savings Association Supplementary (tier 2) Capital (§ 5.56)

Section 5.56 provides the requirements and procedures for a Federal savings association to include subordinated debt and mandatorily redeemable preferred stock (collectively, ''covered securities'') in tier 2 capital. Paragraph (b) provides the filing procedures, including the application and notice procedures. Under § 5.56, the OCC must approve an application or notice before a Federal savings association may include covered securities as tier 2 capital. As proposed in § 5.47, the OCC proposes to make this process consistent with the rest of part 5 by changing the terminology from notice to application where appropriate throughout § 5.56. The proposal also would clarify that a savings association may not include covered securities in tier 2 capital until the OCC approves the application and the securities are issued. This change is not intended to be substantive.

Paragraph (b)(2) requires an application and prior approval from the OCC for a Federal savings association to prepay covered securities included in tier 2 capital. Similar to the national bank requirement in § 5.47, §§ 5.56(b)(2)(ii) and (h) contain additional application requirements for and OCC review of prepayments in the form of a call option. As provided above in the discussion for § 5.47, and for the same reasons, the OCC is proposing to incorporate the application requirements currently applicable to prepayment in the form of a call option to all prepayment applications. The OCC is proposing one additional technical change in § 5.56(b)(2) to replace a reference to ''a tier 1 or tier 2 instrument'' to refer to ''tier 1 or tier 2 capital.''

Paragraph (d)(1) contains disclosure requirements for covered securities. The OCC proposes to add a new paragraph (d)(1)(i)(H) to require the covered security to state that it may be fully subordinated to interests held by the U.S. government in the event that the savings association enters into a receivership, insolvency, liquidation, or similar proceeding. As discussed above regarding § 5.47, a Federal savings association that is an advanced approaches institution must make this disclosure under 12 CFR 3.20(d)(1)(xi). The OCC believes that disclosing this information to potential investors in the covered security is beneficial for all Federal savings associations, even those that are not advanced approaches Federal savings associations or that do not intend to include the debt in tier 2 capital.

In addition, the proposed rule would replace the reference to 12 CFR part 197 in paragraphs (b)(1)(iii) and (d)(2)(i) with 12 CFR part 16, which now applies to Federal savings associations. The OCC also is proposing to make certain purely stylistic changes to the rule text of § 5.56 that are not intended to impact the substantive requirements applicable to Federal savings associations.

Pass-Through Investments by a Federal Savings Association (§ 5.58)

Section 5.58 provides the licensing procedures for Federal savings associations making pass-through investments. Although based on different authority, § 5.58 is largely analogous to the provisions in § 5.36 governing national bank non-controlling investments. Accordingly, the OCC is proposing amendments to § 5.58 similar to those proposed for § 5.36, and for the same reasons.

First, the OCC is proposing to amend paragraph (d), Definitions, by defining ''pass-through investment'' as an investment authorized under 12 CFR 160.32(a). As discussed above for the proposed definition of ''non-controlling investment'' in § 5.36, the proposed definition for ''pass-through investment'' would exclude a Federal savings association holding interests in a trust formed for the purposes of securitizing assets held by the bank as part of its business or for the purposes of holding multiple legal titles of motor vehicles or equipment in conjunction with lease financing transactions. The OCC also is proposing to amend paragraph (d) by removing the definitions of ''well capitalized'' and ''well managed.'' As described above, the OCC is proposing to define these terms in § 5.3.

Second, the proposal would expand the activities eligible for notice to include activities that are substantially the same as previously approved activities, as proposed to be defined in § 5.3. In making this change, the proposal reorganizes paragraph (e) and makes conforming changes to paragraphs (e)(2) and (e)(4). Additionally, the OCC is considering removing the filing requirement for pass-through investments in enterprises engaging in activities permissible for a Federal savings association, as discussed above for national bank operating subsidiaries and non-controlling investments. The OCC would not remove the filing requirement if the enterprise would be a subsidiary of the Federal savings association for purposes of section 18(m) of the FDIA Act (12 U.S.C. 1828(m)), which generally requires a Federal savings association to provide 30-days prior notice to the OCC before establishing or acquiring a subsidiary defined in section 3(w)(4) of the FDI Act (12 U.S.C. 1813(w)(4)). The OCC requests comment on the proposed amendment to the notice provision, the alternative amendment described above, and any intermediate options, such as removing the filing requirement for activities that are substantively the same as previously approved activities.

Third, the proposal would revise paragraph (f)(1) to permit a Federal savings association to file an application to make a pass-through investment in an entity that does not agree to OCC supervision and examination. The proposal also would redesignate paragraph (f)(2) as paragraph (f)(3) and add a new paragraph (f)(2) providing for expedited review for certain applications. The qualifications for expedited review are equivalent to those in proposed § 5.36(f).

Fourth, the OCC is proposing to add a new paragraph (g) that would permit a Federal savings association to make a pass-through investment without a notice or application to the OCC. The standards would be equivalent to those in proposed § 5.36(g) except that the enterprise must not be a subsidiary of the Federal savings association for purposes of section 18(m) of the FDI Act. In such a case, an application would be required under § 5.58(f)(2).

Finally, the OCC is proposing to amend redesignated paragraph (j) to provide exceptions to the rules of general applicability in the same manner as proposed § 5.36(j).

Earnings Limitation Under 12 U.S.C. 60 (§ 5.64)

Section 5.64 describes the calculations for earnings available for dividends under 12 U.S.C. 60. Paragraph (d) provides special rules for what the OCC referred to as ''surplus surplus,'' which is an amount in capital surplus in excess of capital stock that the national bank can demonstrate came from earnings in prior periods. A national bank had been required to retain a certain percentage of net income as capital surplus whenever it paid dividends. In addition, a variety of statutes and regulations established limits for banks based on permanent capital, including capital surplus, and ignored any amounts in retained earnings, which provided an incentive for banks to shift earnings into permanent capital. After Congress revised the statutes to provide more flexibility to include retained earnings as capital for purposes of the statutory limits, the OCC permitted banks to distribute these surplus surplus funds as dividends rather than as reductions in permanent capital given the surplus surplus funds' origin as earnings rather than paid in capital. As these statutory and regulatory changes occurred decades ago, national banks have not needed to create new surplus surplus for many years but may still incur recordkeeping burden associated with identifying regulatory surplus surplus within capital surplus. Accordingly, the OCC proposes to remove the concept of surplus surplus and associated procedures described in paragraph (d). However, removal of paragraph (d) would not prevent a bank from distributing amounts contained in the capital surplus accounts. A national bank may make an appropriate filing under 12 CFR 5.46 for a reduction in capital to distribute these funds.

Dividends Payable in Property Other Than Cash (§ 5.66)

Section 5.66 provides procedures for payment of dividends in non-cash property by national banks. This section currently provides that these dividends are equivalent to a cash dividend in an amount equal to the actual current value of the property, even if the bank previously has charged down or written off the property. Before the dividend is declared, the bank should show the excess of the actual value over book value on its books as a recovery and should declare the dividend in the amount of the full book value (equivalent to the actual current value) of the property being distributed. The OCC proposes to revise this section to clarify that the dividend is equivalent to a cash dividend in an amount equal to the actual current value of the property, regardless of whether the book value is higher or lower under GAAP. The OCC also proposes to apply this valuation methodology to all non-cash dividends, not just those for property that has been charged down or written off. Further, the amendment would provide that the bank should show the difference between the actual value and book value on its books as gain or loss, as applicable, prior to recording the non-cash dividend reflecting the actual value of the property. The OCC believes this approach better reflects the value of the property being distributed from the bank, particularly in cases where the non-cash property was recorded at historical cost under GAAP.

Fractional Shares (§ 5.67)

Section 5.67 provides a number of potential arrangements that a national bank may adopt to avoid the issuance of fractional shares. The OCC proposes to simplify this section for a national bank by retaining only one of these options, the remittance of the cash equivalent of the fraction not being issued to those to whom fractional shares would otherwise be issued. The OCC believes this procedure is the simplest and is the predominant method of disposing of fractional shares today. Other options in the current rule include issuing

warrants for fractional shares or permitting shareholders to purchase additional fractions up to one whole share. While the OCC permitted these methods historically, these methods can create significant recordkeeping costs today when bank stock may be traded in ''round lots'' of 100 shares or more. Because a transaction that would result in the issuance of fractional shares will generally require an application with the OCC, proposed § 5.67 maintains flexibility for banks by permitting the bank to propose an alternate method in the application for the stock issuance, which could include one of the options proposed to be removed from the rule.

Federal Branches and Agencies (§ 5.70)

Section 5.70 provides the filing procedures for corporate activities and transactions involving Federal branches and agencies of foreign banks. Consistent with the background investigation changes proposed to other sections, the OCC proposes adding a new paragraph (d)(3) to explicitly permit the OCC to require any senior executive officer of a Federal branch or agency submitting a filing to submit an Interagency Biographical and Financial Report and legible fingerprints.

General Technical Changes

The OCC proposes numerous technical changes throughout 12 CFR part 5. Specifically, the proposed rule would:

- Replace the word ''shall'' with ''must,'' ''will,'' or other appropriate language, which is the more current rule writing convention for imposing an obligation and is the recommended drafting style of the **Federal Register**;
- Replace the term ''notice'' with the term ''application'' where prior OCC approval is required, thereby conforming the terminology to the licensing action provided in the provision (notices would continue to include informational filings to the OCC as well as certain transactions that the OCC has the power to disapprove, such as changes in control);
- Amend the expedited review provisions throughout part 5 to refer to the OCC removing a filing from expedited review rather than making a determination that the filing is not eligible for expedited review to accord with the language and procedure in § 5.13(a)(2).
- Revise citations to the U.S. Code and the Code of Federal Regulations by adjusting cross-references and making citations more specific;
- Update and standardize references to the OCC website;
- Simplify gender references by replacing ''his or her'' with the neutral ''their;''
- Uniformly capitalize the word ''State,'' in conformance with **Federal Register** drafting style; and
- Replace the term ''bank'' and ''savings association'' with ''national bank'' or ''Federal savings association,'' respectively, where appropriate.

III. Regulatory Analyses

A. Paperwork Reduction Act

Paperwork Reduction Act

Certain provisions of the proposed rulemaking contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521). In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and a 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 reviewed the proposed rulemaking and determined that it revises certain information collection requirements previously cleared by OMB under OMB Control No. 1557–0014. The OCC has submitted the revised information collection to OMB for review under section 3507(d) of the PRA (44 U.S.C. 3507(d)) and section 1320.11 of the OMB's implementing regulations (5 CFR 1320).

Current Actions

The proposed rulemaking would:

- Add new definitions to add clarity and consistency across Part 5. This includes proposing a single definition of *well managed* applicable throughout Part 5. 12 CFR 5.3.
- Require each proposed organizer, director, executive officer, or principal shareholder to submit information prescribed in the Interagency Biographical and Financial Report and legible fingerprints. This amendment merely codifies current application requirements and will not result in a change in burden. 12 CFR 5.20.
- Eliminate the bylaw amendment notice requirement for Federal savings associations that adopt without change the OCC's model or optional bylaws set forth in the rule. 12 CFR 5.21, 5.22.
- Require that applications to convert to a Federal savings association or national bank include: A list of directors and senior executive officers of the converting institution; and a list of individuals, directors, and shareholders who directly or indirectly, or acting in concert with one or more persons or companies, or together with members of their immediate family, do or will own, control, or hold 10 percent or more of the converting institution's stock. This amendment merely codifies current application requirements and will not result in a change in burden. 12 CFR 5.23(d)(2)(ii), 5.24(e)(2).
- Permit the OCC to require directors and senior executive officers of a converting institution to submit the Interagency Biographical and Financial Report and legible fingerprints. This amendment merely codifies current application requirements and will not result in a change in burden. 12 CFR 5.23, 5.24.
- Require that applications for national banks or Federal savings associations that wish to engage in the exercise of fiduciary powers include, if requested by the OCC, the Interagency Biographical and Financial Report and legible fingerprints. 12 CFR 5.26.
- Require a filer of a business combination application under CRA to disclose whether it has entered into and disclosed a covered agreement, as defined in 12 CFR 35.2. 12 CFR 5.33(e)(1)(iii)(B).
- Remove the requirement that a disappearing national bank or Federal savings association consolidating or merging with another OCC-supervised institution provide a notice to the OCC. § 5.33(g), (k).
- For national bank operating subsidiaries, expand the after the fact notice for national banks to activities that are substantially the same as previously approved activities that will be conducted in accordance with the same terms and conditions applicable to the previously approved activity. Expand the list of eligible entities to include trusts provided that the bank or operating subsidiary has the ability to replace the trustee at will and be the sole beneficial owner of the trust. 12 CFR 5.34.
- Remove the requirement for a national bank to file an annual report identifying its operating subsidiaries that do business directly with consumers and are not functionally regulated. 12 CFR 5.34.
- For national bank non-controlling investments and Federal savings association pass-through investments, expand the activities eligible for notice to activities that are substantially the same as previously approved activities., 12 CFR 5.36, 5.58.
- Allow national banks and Federal savings associations to file an application to make a non-controlling investment or a pass-through investment, respectively, in an enterprise that has not agreed to be

subject to OCC supervision and examination. 12 CFR 5.36(f), 5.58(f).

• Allow national banks and Federal savings associations to make non-controlling investments or a pass-through investments, respectively, without a filing if the activities of the enterprise are limited to those previously reported to the OCC in connection with a prior investment. 12 CFR 5.36, 5.58.

• For Federal savings association operating subsidiaries, expand the expedited approval process for Federal savings associations to include activities that are substantially the same as previously approved activities that will be conducted in accordance with the same terms and conditions applicable to the previously approved activity. Expanded the list of eligible entities to include trusts provided that the Federal savings association or operating subsidiary has the ability to replace the trustee at will and be the sole beneficial owner of the trust. 12 CFR 5.38.

• Permit national banks to request approval for a reduction in permanent capital for multiple quarters. 12 CFR 5.46.

• Regarding subordinated debt notes, allow national banks to omit inapplicable provisions when warranted, and require national banks to disclose in subordinated debt notes that the subordinated debt obligation may be fully subordinated to interests held by the U.S. government in the event that the national bank enters into a receivership, insolvency, liquidation, or similar proceeding. 12 CFR 5.47.

• Revise the standard for when prior approval is required for a national bank's issuance of subordinated debt and for prepayment of any subordinated debt that is not included in tier 2 capital 12 CFR 5.47(f).

• Require OCC approval for a material change to an existing subordinated debt document if the national bank would have been required to receive OCC approval to issue the security under § 5.47(f)(1) or to include it in tier 2 capital under § 5.47(h). 12 CFR 5.47.

• Add the position of *chief risk officer* to the definition of senior executive officer. This change would require prior OCC approval for the employment of an individual as a chief risk officer by a national bank or Federal savings association in troubled condition. 12 CFR 5.51.

• Require a covered security (inclusion of subordinated debt and mandatorily redeemable preferred stock) issued by a Federal savings association to state that it may be fully subordinated to interests held by the U.S. government in the event that the savings association enters into a receivership, insolvency, liquidation, or similar proceeding. 12 CFR 5.56.

• Permit the OCC to require any senior executive officer of a Federal branch or agency submitting a filing to submit an Interagency Biographical and Financial Report and legible fingerprints. This amendment merely codifies current application requirements and will not result in a change in burden. 12 CFR 5.70.

Title of Information Collection: Licensing Manual.

Frequency: Event generated.

Affected Public: Businesses or other for-profit.

Estimated number of respondents: 1,196.

Total estimated annual burden: 12,481 hours.

Comments are invited on:

a. Whether the collections of information are necessary for the proper performance of the agencies' functions, including whether the information has practical utility;

b. The accuracy or the estimate of the burden of the information collections, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record. Comments on aspects of this notice that may affect reporting, recordkeeping, or disclosure requirements and burden estimates should be sent to the addresses listed in the **ADDRESSES** section of this document. A copy of the comments may also be submitted to the OMB desk officer by mail to U.S. Office of Management and Budget, 725 17th Street NW, #10235, Washington, DC 20503; facsimile to (202) 395–6974; or email to *oira_submission@omb.eop.gov,* Attention, Federal Banking Agency Desk Officer.

B. Regulatory Flexibility Act Analysis

In general, the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency, in connection with a proposed rule, to prepare an Initial Regulatory Flexibility Analysis describing the impact of the rule on small entities (defined by the SBA for purposes of the RFA to include commercial banks and savings institutions with total assets of $600 million or less and trust companies with total revenue of $41.5 million or less). However, under section 605(b) of the RFA, this analysis is not required if an agency certifies that the rule would not have a significant economic impact on a substantial number of small entities and publishes its certification and a short explanatory statement in the **Federal Register** along with its rule.

The OCC currently supervises approximately 1,196 institutions (commercial banks, trust companies, FSAs, and branches or agencies of foreign banks, collectively banks), of which 782 are small entities.[23] Because the rule applies to all OCC-supervised depository institutions, the proposed rule would affect all small OCC-supervised entities, and thus a substantial number of them.

The OCC classifies the economic impact of total costs on an OCC-regulated entity as significant if the total costs for the entity in a single year are greater than 5 percent of total salaries and benefits, or greater than 2.5 percent of total non-interest expense. The OCC estimates that the monetized direct cost of this rulemaking would range from a low of approximately $4,560 per bank (40 hours × $114 per hour)[24] to a high of approximately $18,240 per bank (160 hours × $114 per hour). Using the upper bound average direct cost per bank, the OCC finds the compliance costs would have a significant economic impact on no more than 20 small banks, which is not a substantial number.[25] Therefore, the OCC certifies that this regulation, if adopted, would not have a significant economic impact on a substantial number of small entities supervised by the OCC. Accordingly, an Initial Regulatory Flexibility Analysis is not required.

C. Unfunded Mandates Reform Act of 1995

The OCC has analyzed the proposed rule under the factors in the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*). Under this

[23] Consistent with the General Principles of Affiliation 13 CFR 121.103(a), the OCC counts the assets of affiliated financial institutions when determining if it should classify an institution as a small entity. The OCC used December 31, 2018, to determine size because a ''financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.'' *See* footnote 8 of the U.S. Small Business Administration's *Table of Standards.*

[24] This per hour dollar amount is based on the U.S. Bureau of Labor Statistics data for wages (by industry and occupation).

[25] The OCC's threshold for a substantial number of small entities is five percent of OCC-supervised small entities, or 39 as of December 31, 2018.

analysis, the OCC considered whether the proposed rule includes a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year (adjusted annually for inflation). The UMRA does not apply to regulations that incorporate requirements specifically set forth in law.

Based on the OCC estimate that the monetized direct cost of this rulemaking would range from a low of approximately $4,560 per bank to a high of approximately $18,240 per bank, the OCC's overall estimate of the total effect of the proposed rule ranges from approximately $5.5 million to approximately $21.8 million for the approximately 1,196 institutions supervised by the OCC. Therefore, the OCC finds that the proposed rule does not trigger the UMRA cost threshold. Accordingly, the OCC has not prepared the written statement described in section 202 of the UMRA.

D. Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (12 U.S.C. 4802(a)), in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, the OCC will consider, consistent with the principles of safety and soundness and the public interest: (1) Any administrative burdens that the proposed rule would place on depository institutions, including small depository institutions and customers of depository institutions; and (2) the benefits of the proposed rule. The OCC requests comment on any administrative burdens that the proposed rule would place on depository institutions, including small depository institutions, and their customers, and the benefits of the proposed rule that the OCC should consider in determining the effective date and administrative compliance requirements for a final rule.

List of Subjects

12 CFR Part 5

Administrative practice and procedure, Federal savings associations, National banks, Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, the OCC proposes to amend 12 CFR chapter I as follows:

PART 5—RULES, POLICIES, AND PROCEDURES FOR CORPORATE ACTIVITIES

■ 1. The authority citation for part 5 is revised to read as follows:

Authority: 12 U.S.C. *1 et seq.,* 24a, 35, 93a, 214a, 215, 215a, 215a–1, 215a–2, 215a–3, 215c, 371d, 481, 1462a, 1463, 1464, 1817(j), 1831i, 1831u, 2901 *et seq.,* 3101 *et seq.,* 3907, and 5412(b)(2)(B).

§ 5.2 [Amended]

■ 2. Amend § 5.2 by:

■ a. In paragraph (b), removing the word ''filings,'' and adding in its place the phrase ''filings as it deems necessary, for example,'' and removing the word ''applicant'' and adding in its place the word ''filer''; and

■ b. In paragraph (c), removing the phrase ''on the OCC's internet web page''.

■ 3. Revise § 5.3 to read as follows.

§ 5.3 Definitions.

As used in this part:

Application means a submission requesting OCC approval to engage in various corporate activities and transactions.

Appropriate Federal banking agency has the meaning set forth in section 3(q) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(q).

Appropriate OCC licensing office means the OCC office that is responsible for processing applications or notices to engage in various corporate activities or transactions, as described at *www.occ.gov.*

Appropriate OCC supervisory office means the OCC office that is responsible for the supervision of a national bank or Federal savings association, as described in subpart A of 12 CFR part 4.

Capital and surplus means:

(1) For qualifying community banking organizations that have elected to use the community bank leverage ratio framework, as set forth under the OCC's Capital Adequacy Standards at part 3 of this chapter:

(i) A qualifying community banking organization's tier 1 capital, as used under § 3.12 of this chapter; plus

(ii) A qualifying community banking organization's allowance for loan and lease losses or adjusted allowances for credit losses, as applicable, as reported in the national bank's or Federal savings association's Consolidated Report of Condition and Income (Call Report); or

(2) For all other national banks and Federal savings associations:

(i) A national bank's or Federal savings association's tier 1 and tier 2 capital calculated under the OCC's risk-based capital standards set forth in part 3 of this chapter, as applicable, as reported in the bank's or savings association's Call Report, respectively; plus

(ii) The balance of the national bank's or Federal savings association's allowance for loan and lease losses or adjusted allowances for credit losses, as applicable, not included in the institution's tier 2 capital, as reported in the Call Report.

Depository institution means any bank or savings association.

Eligible bank or eligible savings association means a national bank or Federal savings association that:

(1) Is well capitalized as defined in § 5.3;

(2) Has a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System (CAMELS);

(3) Has a Community Reinvestment Act (CRA), 12 U.S.C. 2901 *et seq.,* rating of ''Outstanding'' or ''Satisfactory,'' if applicable;

(4) Has a consumer compliance rating of 1 or 2 under the Uniform Interagency Consumer Compliance Rating System; and

(5) Is not subject to a cease and desist order, consent order, formal written agreement, or Prompt Corrective Action directive (*see* 12 CFR part 6, subpart B) or, if subject to any such order, agreement, or directive, is informed in writing by the OCC that the bank or savings association may be treated as an ''eligible bank or eligible savings association'' for purposes of this part.

Eligible depository institution means:

(1) With respect to a national bank, a State bank or a Federal or State savings association that meets the criteria for an ''eligible bank or eligible savings association'' under § 5.3 and is FDIC-insured; and

(2) With respect to a Federal savings association, a State or national bank or a State savings association that meets the criteria for an ''eligible bank or eligible savings association'' under § 5.3 and is FDIC-insured.

FDIC means the Federal Deposit Insurance Corporation.

Filer means a person or entity that submits a notice or application to the OCC under this part.

Filing means an application or notice submitted to the OCC under this part.

GAAP means generally accepted accounting principles as used in the United States.

MSA means metropolitan statistical area as defined by the Director of the Office of Management and Budget.

Nonconforming assets and nonconforming activities mean assets or activities, respectively, that are

impermissible for national banks or Federal savings associations to hold or conduct, as applicable, or, if permissible, are held or conducted in a manner that exceeds limits applicable to national banks or Federal savings associations, as applicable. Assets include investments in subsidiaries or other entities.

Notice, in general, means a submission notifying the OCC that a national bank or Federal savings association intends to engage in or has commenced certain corporate activities or transactions. The specific meaning of *notice* depends on the context of the rule in which it is used and may provide the OCC with authority to disapprove the notice or may be informational requiring no official OCC action.

OTS means the former Office of Thrift Supervision.

Previously approved activity means:

(1) In the case of a national bank, an activity approved in published OCC precedent for a national bank, an operating subsidiary of a national bank, or a non-controlling investment of a national bank; and

(2) In the case of a Federal savings association, an activity approved in published OCC or OTS precedent for a Federal savings association, an operating subsidiary of a Federal savings association, or a pass-through investment of a Federal savings association.

Principal city means an area designated as a ''principal city'' by the Office of Management and Budget.

Short-distance relocation means moving the premises of a branch or main office of a national bank or a branch or home office of a Federal savings association within a:

(1) One thousand foot-radius of the site if the branch, main office, or home office is located within a principal city of an MSA;

(2) One-mile radius of the site if the branch, main office, or home office is not located within a principal city, but is located within an MSA; or

(3) Two-mile radius of the site if the branch, main office, or home office is not located within an MSA.

Well capitalized means:

(1) In the case of a national bank or Federal savings association, the capital level described in 12 CFR 6.4;

(2) In the case of a Federal branch or agency, the capital level described in 12 CFR 4.7(b)(1)(iii); or

(3) In the case of another depository institution, the capital level designated as ''well capitalized'' by the institution's appropriate Federal banking agency pursuant to section 38 of the Federal Deposit Insurance Act (12 U.S.C. 1831*o*).

Well managed means:

(1) In the case of a national bank or Federal savings association:

(i) Unless otherwise determined in writing by the OCC, the national bank or Federal savings association has received a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System in connection with its most recent examination, and at least a rating of 2 for management, if such a rating is given; or

(ii) In the case of a national bank or Federal savings association that has not been examined by the OCC, the existence and use of managerial resources that the OCC determines are satisfactory.

(2) In the case of a Federal branch or agency of a foreign bank:

(i) Unless determined otherwise in writing by the OCC, the Federal branch or agency has received a composite ROCA supervisory rating (which rates risk management, operational controls, compliance, and asset quality) of 1 or 2 at its most recent examination, and at least a rating of 2 for risk management, if such a rating is given; or

(ii) In the case of a Federal branch or agency that has not been examined by the OCC, the existence and use of managerial resources that the OCC determines are satisfactory.

(3) In the case of another depository institution:

(i) Unless otherwise determined in writing by the appropriate Federal banking agency, the institution has received a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System (or an equivalent rating under an equivalent rating system) in connection with the most recent examination or subsequent review of the depository institution and, at least a rating of 2 for management, if such a rating is given; or

(ii) In the case of another depository institution that has not been examined by its appropriate Federal banking agency, the existence and use of managerial resources that the appropriate Federal banking agency determines are satisfactory.

■ 4. Amend § 5.4 by:

■ a. In paragraph (a), removing the word ''shall'' and adding in its place the word ''must'';

■ b. In paragraph (b), removing the phrase ''on the OCC's internet web page'';

■ c. In paragraph (c), removing the word ''applicant'' each time that it appears and adding in its place the word ''filer'';

■ d. In paragraphs (d) and (e), removing the phrase ''an applicant'' each time that it appears and adding in its place the phrase ''a filer'';

■ e. In paragraph (d), removing the phrase ''the OCC's internet web page at'';

■ f. Revising paragraph (f); and

■ g. Adding paragraph (g).

The addition and revision read as follows:

§ 5.4 Filing required.

* * * * *

(f) *Prefiling meeting.* Before submitting a filing to the OCC, a potential filer is encouraged to contact the appropriate OCC licensing office to determine the need for a prefiling meeting. The OCC decides whether to require a prefiling meeting on a case-by-case basis. Submission of a draft business plan or other relevant information before any prefiling meeting may expedite the filing review process. A potential filer considering a novel, complex, or unique proposal is encouraged to contact the appropriate OCC licensing office to schedule a prefiling meeting early in the development of its proposal for the early identification and consideration of policy issues. Information on model business plans can be found in the Comptroller's Licensing Manual.

(g) *Certification.* A filer must certify that any filing or supporting material submitted to the OCC contains no material misrepresentations or omissions. The OCC may review and verify any information filed in connection with a notice or an application. Any person responsible for any material misrepresentation or omission in a filing or supporting materials may be subject to enforcement action and other penalties, including criminal penalties provided in 18 U.S.C. 1001.

■ 5. Amend § 5.5 by revising paragraph (a) to read as follows:

§ 5.5 Filing fees.

(a) *Procedure.* A filer must submit the appropriate filing fee, if any, in connection with its filing. Filing fees must be paid by check payable to the OCC or by other means acceptable to the OCC. Additional information on filing fees, including where to file, can be found in the Comptroller's Licensing Manual. The OCC generally does not refund the filing fees.

* * * * *

■ 6. Amend § 5.7 by redesignating paragraph (b) as paragraph (c) and adding a new paragraph (b) to read as follows:

§ 5.7 Investigations.

* * * * *

(b) *Fingerprints.* For certain filings, the OCC collects fingerprints for submission to the Federal Bureau of Investigation for a national criminal history background check.

* * * * *

§ 5.8 [Amended]

■ 7. Amend § 5.8 by:

■ a. In paragraph (a), removing the phrase ''An applicant shall publish'' and adding in its place the phrase ''A filer must publish'' and removing the phrase ''the applicant proposes'' and adding in its place the phrase ''the filer proposes'';

■ b. In paragraphs (a) and (b), removing the word ''shall'' and adding in its place the word ''must'';

■ c. In paragraphs (b) and (g)(1), removing the word ''applicant'' and adding in its place the word ''filer'';

■ d. In paragraphs (c) and (d), removing the phrase ''applicant shall'' and adding in its place the phrase ''filer must''; and

■ e. In paragraph (e) and paragraph (g) introductory text, removing the phrase ''an applicant'' and adding in its place the phrase ''a filer''.

§ 5.9 [Amended]

■ 8. Amend § 5.9 by:

■ a. In paragraph (b), in the second sentence, removing the word ''Applicants'' and adding in its place the word ''Filers''; and

■ b. In paragraph (c), removing the word ''applicant'' and adding in its place the word ''filer''.

§ 5.10 [Amended]

■ 9. Amend § 5.10 by:

■ a. In paragraphs (b)(2)(i) and (b)(3), removing the word ''applicant'' and adding in its place the word ''filer'';

■ b. In paragraph (b)(2)(ii), removing the word ''application'' and adding in its place the word ''filing''; and

■ c. In paragraph (b)(3), revising the paragraph heading by removing the word ''*Applicant*'' and adding in its place the word ''*Filer*''.

§ 5.11 [Amended]

■ 10. Amend § 5.11 by:

■ a. In paragraphs (a), (e), and (g)(2), removing the word ''shall'' each time it appears and adding in its place the word ''must'';

■ b. In paragraphs (a), (d)(1), (e), (g)(1), and (g)(2), removing the word ''applicant'' each time it appears and adding in its place the word ''filer'';

■ c. In paragraph (c), removing the word ''shall'' and adding in its place the word ''will'';

■ d. In paragraphs (e) and (f), removing the phrase ''his or her'' and adding in its place the word ''their'';

■ e. In paragraph (h), removing the word ''applicant's'' and adding in its place the word ''filer's''; and

■ f. In paragraph (i)(1) removing the phrase ''an application'' and adding in its place the phrase ''a filing'' and removing the phrase ''the application'' and adding in its place the phrase ''the filing''; and

■ g. In paragraph (i)(2), removing the phrase ''an applicant'' and adding in its place the phrase ''a filer''.

§ 5.12 [Amended]

■ 11. Amend § 5.12 by removing the phrase ''an application'' and adding in its place the phrase ''a filing''.

■ 12. Amend § 5.13 by:

■ a. In paragraph (a) introductory text and paragraphs (b)(1), (b)(3), (d), and (g), removing the phrase ''the applicant'' each time that it appears and adding in its place the phrase ''the filer'';

■ b. Revising paragraph (a)(2) introductory text and paragraphs (a)(2)(i) and (ii);

■ c. In paragraphs (c) and (f), removing the phrase ''an applicant'' and adding in its place the phrase ''a filer'';

■ d. In paragraph (g), removing the word ''applicant's'' and adding in its place the word filer's'';

■ e. Revising paragraph (h); and

■ f. Adding paragraph (i).

The revisions and addition read as follows:

§ 5.13 Decisions.

(a) * * *

(2) *Expedited review.* The OCC grants qualifying national banks and Federal savings associations expedited review within a specified time after filing or commencement of the public comment period for certain filings.

(i) The OCC may extend the expedited review period or remove a filing from expedited review procedures if it concludes that the filing, or an adverse comment regarding the filing, presents a significant supervisory, CRA (if applicable), or compliance concern or raises a significant legal or policy issue requiring additional OCC review. The OCC will provide the filer with a written explanation if it decides not to process an application from a qualifying national bank or Federal savings association under expedited review pursuant to this paragraph.

(ii) Adverse comments that the OCC determines do not raise a significant supervisory, CRA (if applicable), or compliance concern or a significant legal or policy issue; are frivolous, non-substantive, or filed primarily as a means of delaying action on the filing; or raise a CRA concern that has been satisfactorily resolved do not affect the OCC's decision under paragraph (a)(2)(i) of this section. The OCC considers a comment to be non-substantive if it is (1) a generalized opinion that a filing should or should not be approved or (2) a conclusory statement, lacking factual or analytical support. The OCC considers a CRA concern to have been satisfactorily resolved if the OCC previously reviewed (*e.g.,* in an examination, other supervisory activity, or a prior filing) a concern presenting substantially the same issue in substantially the same assessment area during substantially the same time, and the OCC determines that the concern would not warrant denial or imposition of a condition on approval of the application.

* * * * *

(h) *Nullifying a decision.* The OCC may nullify any decision on a filing either prior to or after consummation of the transaction if:

(1) The OCC discovers a material misrepresentation or omission in any information provided to the OCC in the filing or supporting materials;

(2) The decision is contrary to law, regulation, or OCC policy thereunder; or

(3) The decision was granted due to clerical or administrative error, or a material mistake of law or fact.

(i) *Modifying, Suspending, or Rescinding a Decision.* The OCC may modify, suspend, or rescind a decision on a filing if a material change in the information or circumstance on which the OCC relied occurs prior to the date of the consummation of the transaction to which the decision pertains.

■ 13. Amend § 5.20 by:

■ a. In paragraph (b), paragraph (e)(1)(iii) introductory text, and paragraphs (h)(1)(i), (h)(2), (h)(3), (h)(5)(i), (h)(5)(ii), (h)(5)(iii), (h)(7), (i)(2), (i)(3), (i)(5)(ii)(A), (i)(5)(ii)(B), (i)(5)(iii), (i)(5)(iv), (k)(1), (l)(1), and (l)(2), removing the word ''shall'' each time that it appears and adding in its place the word ''must'';

■ b. In paragraph (d)(2), removing the phrase ''section 2'' and adding in its place ''section 2(a)(2)'' and removing the phrase ''section 10'' and adding in its place ''section 10(a)(2)'';

■ c. Redesignating paragraphs (d)(7) and (8) as paragraphs (d)(8) and (9), respectively, and adding new paragraphs (d)(7) and (d)(10);

■ d. In newly redesignated paragraph (d)(8), removing the word ''persons'' and adding in its place the word ''individuals''; and

■ e. In newly redesignated paragraph (d)(9), removing the phrase ''an

applicant'' and adding in its place the phrase ''a filer'';

■ f. In paragraph (e)(1)(ii)(A), removing the word ''applicants'' and adding in its place the word ''filers''; and

■ g. In paragraph (e)(3), removing the phrase ''Federal Deposit Insurance Corporation (FDIC)'' and adding in its place the word ''FDIC'';

■ h. In paragraph (g)(4) removing the word ''shall'' and adding in its place the word ''may'' and removing the phrase ''withdrawal of preliminary approval'' and adding in its place the phrase ''nullification or rescission of a preliminary approval'' in paragraph (g)(4)(ii);

■ i. In paragraphs (i)(1), (j)(1), and (j)(2), removing the word ''applicant'' and adding in its place the word ''filer'';

■ j. Redesignating paragraphs (i)(3) through (5) as paragraphs (i)(4) through (i)(6) and adding a new paragraph (i)(3);

■ k. In newly redesignated paragraph (i)(5), removing the phrase ''spokesperson and other interested persons'' and adding in its place the phrase ''contact person and other relevant parties''; and

■ l. In newly redesignated paragraph (i)(6)(iii), removing the phrase ''or part 197'';

■ m. Revising paragraph (j)(1); and

n. In paragraphs (k)(2) and (l)(1), removing the phrase ''An applicant'' each time that it appears and adding in its place the phrase ''A filer''.

The additions and revision read as follows:

§ 5.20 Organizing a national bank or Federal savings association.

* * * * *

(d) * * *

(7) *Organizer* means a member of the organizing group.

* * * * *

(10) *Principal shareholder* means a person who directly or indirectly or acting in concert with one or more persons or companies, or together with members of their immediate family, will own, control, or hold 10 percent or more of the voting stock of the proposed national bank or Federal savings association.

* * * * *

(i) * * *

(3) *Biographical and financial reports*—(i) Each proposed organizer, director, executive officer, or principal shareholder must submit to the appropriate OCC licensing office:

(A) The information prescribed in the Interagency Biographical and Financial Report, available at *www.occ.gov;* and

(B) Legible fingerprints.

(ii) The OCC may require additional information about any proposed organizer, director, executive officer, or principal shareholder, if appropriate. The OCC may waive any of the information requirements of this paragraph if the OCC determines that it is in the public interest.

* * * * *

(j) * * *

(1) Notifies the filer prior to that date that the filing has been removed from expedited review, or the expedited review process is extended, under § 5.13(a)(2); or

* * * * *

■ 14. Amend § 5.21 by:

■ a. In paragraph (d), removing the word ''shall'' and adding in its place the word ''do'';

■ b. In paragraph (e) introductory text, removing the word ''shall'' and adding in its place the word ''must'' in the first and second sentence; and removing the word ''shall'' and adding in its place the word ''will'' in the last sentence;

■ c. In the form ''Federal Mutual Charter'' following paragraph (e):

■ i. Removing the phrase ''shall be'' and adding in its place the word ''is'' each time it appears in Section 2 and Section 7;

■ ii. In Section 6:

A. Removing the phrase ''shall be permitted'' and adding in its place the phrase ''is permitted'';

B. Removing the phrase ''shall cast'' and adding in its place the phrase ''may cast''; and

C. Removing the phrase ''accounts shall be'' and adding in its place the phrase ''accounts are'';

■ iii. Removing the phrase ''shall not'' and adding in its place the phrase ''may not'' in Section 7; and

■ iv. Removing the word ''shall'' and adding in its place the word ''will'' each time it appears in Section 8 and Section 9;

■ d. Revising paragraph (f)(2) and adding paragraph (f)(3);

■ e. Revising paragraph (g) introductory text;

■ f. In paragraph (g)(1):

■ i. Removing the phrase ''shall have the'' and adding in its place the phrase ''has the'';

■ ii. Removing the phrase ''shall require'' and adding in its place the word ''requires'';

■ iii. Removing the phrase ''raise capital, which shall be unlimited,'' and adding in its place the phrase ''raise unlimited capital'';

■ iv. Removing the phrase ''accounts as shall'' and adding in its place the phrase ''accounts as will'';

■ v. Removing the phrase ''shall have such'' and adding in its place the phrase ''will have such''; and

■ vi. Removing the phrase ''shall have power'' and adding in its place the phrase ''has the power'';

■ g. Revising paragraph (i); and

■ h. Revising paragraph (j):

The revisions and addition read as follows.

§ 5.21 Federal mutual savings association charter and bylaws.

* * * * *

(f) * * *

(2) *Form of filing*—(i) *Application requirement.* Except as provided in paragraph (f)(2)(ii) of this section, a Federal mutual savings association must file the proposed charter amendment with, and obtain the prior approval of, the OCC.

(A) *Expedited review.* Except as provided in paragraph (f)(2)(i)(B) of this section, the charter amendment will be deemed approved as of the 30th day after filing, unless the OCC notifies the filer that the amendment is denied or that the amendment contains procedures of the type described in paragraph (f)(2)(i)(B) of this section and is not eligible for expedited review, provided the association follows the requirements of its charter in adopting the amendment.

(B) *Amendments exempted from expedited review.* Expedited review is not available for a charter amendment that would render more difficult or discourage a merger, proxy contest, the assumption of control by a mutual account holder of the association, or the removal of incumbent management; or involve a significant issue of law or policy.

(ii) *Notice requirement.* No application under paragraph (f)(2)(i) of this section is required if the text of the amendment is contained within paragraphs (e) or (g) of this section. In such case, the Federal mutual savings association must submit a notice with the charter amendment to the OCC within 30 days after adoption.

(3) *Effectiveness.* A charter amendment is effective after approval by the OCC, if required pursuant to paragraph (f)(2) of this section, and adoption by the association, provided the association follows the requirements of its charter in adopting the amendment.

(g) *Optional charter amendments.* The following charter amendments are subject to the notice requirement in paragraph (f)(2)(ii) of this section if adopted without change:

* * * * *

(i) *Availability of chartering documents.* A Federal mutual savings association must make available a true copy of its charter and bylaws and all

amendments thereto to accountholders at all times in each office of the savings association, and must upon request deliver to any accountholders a copy of such charter and bylaws or amendments thereto.

(j) *Bylaws for Federal mutual savings associations*—(1) *In general.* A Federal mutual savings association must operate under bylaws that contain provisions that comply with all requirements specified by the OCC in this paragraph and that are not otherwise inconsistent with the provisions of this paragraph; the association's charter; and all other applicable laws, rules, and regulations *provided that,* a bylaw provision inconsistent with the provisions of this paragraph may be adopted with the approval of the OCC. Bylaws may be adopted, amended or repealed by a majority of the votes cast by the members at a legal meeting or a majority of the association's board of directors. The bylaws for a Federal mutual savings bank must substitute the term ''savings bank'' for ''association''. The term ''trustee'' may be substituted for the term ''director''.

(2) *Requirements.* The following requirements are applicable to Federal mutual savings associations:

(i) *Annual meetings of members.* (A) An association must provide for and conduct an annual meeting of its members for the election of directors and at which any other business of the association may be conducted. Such meeting must be held at any convenient place the board of directors may designate, and at a date and time within 150 days after the end of the association's fiscal year.

(B) At each annual meeting, the officers must make a full report of the financial condition of the association and of its progress for the preceding year and must outline a program for the succeeding year.

(ii) *Special meetings of members.* Procedures for calling any special meeting of the members and for conducting such a meeting must be set forth in the bylaws. The board of directors of the association or the holders of 10 percent or more of the voting capital must be entitled to call a special meeting. For purposes of this paragraph, ''voting capital'' means FDIC-insured deposits as of the voting record date.

(iii) *Notice of meeting of members.* Notice specifying the date, time, and place of the annual or any special meeting and adequately describing any business to be conducted must be published for two successive weeks immediately prior to the week in which such meeting will convene in a newspaper of general circulation in the city or county in which the principal place of business of the association is located, or mailed postage prepaid at least 15 days and not more than 45 days prior to the date on which such meeting will convene to each of its members of record. A similar notice must be posted in a conspicuous place in each of the offices of the association during the 14 days immediately preceding the date on which such meeting will convene. The bylaws may permit a member to waive in writing any right to receive personal delivery of the notice. When any meeting is adjourned for 30 days or more, notice of the adjournment and reconvening of the meeting must be given as in the case of the original meeting.

(iv) *Fixing of record date.* The bylaws must provide for the fixing of a record date and a method for determining from the books of the association the members entitled to vote. Such date may not more than 60 days nor fewer than 10 days prior to the date on which the action, requiring such determination of members, is to be taken. The same determination must apply to any adjourned meeting.

(v) *Member quorum.* Any number of members present and voting, represented in person or by proxy, at a regular or special meeting of the members constitutes a quorum. A majority of all votes cast at any meeting of the members determines any question, unless otherwise required by regulation. At any adjourned meeting, any business may be transacted that might have been transacted at the meeting as originally called. Members present at a duly constituted meeting may continue to transact business until adjournment.

(vi) *Voting by proxy.* Procedures must be established for voting at any annual or special meeting of the members by proxy pursuant to the rules and regulations of the OCC. Proxies may be given telephonically or electronically as long as the holder uses a procedure for verifying the identity of the member. All proxies with a term greater than eleven months or solicited at the expense of the association must run to the board of directors as a whole, or to a committee appointed by a majority of such board.

(vii) *Communications between members.* Provisions relating to communications between members must be consistent with § 144.8 of this chapter. No member, however, may have the right to inspect or copy any portion of any books or records of a Federal mutual savings association containing:

(A) A list of depositors in or borrowers from such association;

(B) Their addresses;

(C) Individual deposit or loan balances or records; or

(D) Any data from which such information could be reasonably constructed.

(viii) *Number of directors, membership.* The bylaws must set forth a specific number of directors, not a range. The number of directors may not be fewer than five nor more than fifteen, unless a higher or lower number has been authorized by the OTS prior to July 21, 2011 or by the OCC. Each director of the association must be a member of the association. Directors may be elected for periods of one to three years and until their successors are elected and qualified, but if a staggered board is chosen, provision must be made for the election of approximately one-third or one-half of the board each year, as appropriate. State-chartered savings banks converting to Federal savings banks may include alternative provisions for the election and term of office of directors so long as such provisions are authorized by the OCC, and provide for compliance with the standard provisions of this paragraph no later than six years after the conversion to a Federal savings association.

(ix) *Meetings of the board.* The board of directors determines the place, frequency, time, procedure for notice, which must be at least 24 hours unless waived by the directors, and waiver of notice for all regular and special meetings. The board also may permit telephonic or electronic participation at meetings. The bylaws may provide for action to be taken without a meeting if unanimous written consent is obtained for such action. A majority of the authorized directors constitutes a quorum for the transaction of business. The act of a majority of the directors present at any meeting at which there is a quorum will be the act of the board.

(x) *Officers, employees and agents.* (A) The bylaws must contain provisions regarding the officers of the association, their functions, duties, and powers. The officers of the association must consist of a president, one or more vice presidents, a secretary, and a treasurer or comptroller, each of whom must be elected annually by the board of directors. Such other officers and assistant officers and agents as may be deemed necessary may be elected or appointed by the board of directors or chosen in such other manner as may be prescribed in the bylaws. Any two or more offices may be held by the same person, except the offices of president and secretary.

(B) Any officer may be removed by the board of directors with or without cause, but such removal, other than for cause, must be without prejudice to the contractual rights, if any, of the person so removed. Termination for cause, for purposes of this section and § 5.22, includes termination because of the person's personal dishonesty; incompetence; willful misconduct; breach of fiduciary duty involving personal profit; intentional failure to perform stated duties; willful violation of any law, rule, or regulation (other than traffic violations or similar offenses) or final cease and desist order; or material breach of any provision of an employment contract.

(xi) *Vacancies, resignation or removal of directors.* In the event of a vacancy on the board, the board of directors may, by their affirmative vote, fill such vacancy, even if the remaining directors constitute less than a quorum. A director elected to fill a vacancy may serve only until the next election of directors by the members. The bylaws must set out the procedure for the resignation of a director. Directors may be removed only for cause, as defined in paragraph (j)(2)(x)(B) of this section, by a vote of the holders of a majority of the shares then entitled to vote at an election of directors.

(xii) *Powers of the board.* The board of directors has the power to exercise any and all of the powers of the association not expressly reserved by the charter to the members.

(xiii) *Nominations for directors.* The bylaws must provide that nominations for directors may be made at the annual meeting by any member and must be voted upon, except, however, the bylaws may require that nominations by a member must be submitted to the secretary and then prominently posted in the principal place of business at least 10 days prior to the date of the annual meeting. However, if such provision is made for prior submission of nominations by a member, then the bylaws must provide for a nominating committee, which, except in the case of a nominee substituted as a result of death or other incapacity, must submit nominations to the secretary and have such nominations similarly posted at least 15 days prior to the date of the annual meeting.

(xiv) *New business.* The bylaws must provide procedures for the introduction of new business at the annual meeting.

(xv) *Amendment.* Bylaws may include any provision for their amendment that would be consistent with applicable law, rules, and regulations and adequately addresses its subject and purpose.

(A) Amendments will be effective:

(*1*) After approval by a majority vote of the authorized board, or by a majority of the vote cast by the members of the association at a legal meeting; and

(*2*) After receipt of any applicable regulatory approval.

(B) When an association fails to meet its quorum requirement, solely due to vacancies on the board, the bylaws may be amended by an affirmative vote of a majority of the sitting board.

(xvi) *Miscellaneous.* The bylaws also may address any other subjects necessary or appropriate for effective operation of the association.

(3) *Form of filing*—(i) *Application requirement.* Except as provided in paragraphs (j)(3)(ii) or (j)(3)(iii) of this section, a Federal mutual savings association must file the proposed bylaw amendment with, and obtain the prior approval of, the OCC.

(A) *Expedited review.* Except as provided in paragraph (j)(3)(i)(B) of this section, the bylaw amendment will be deemed approved as of the 30th day after filing, unless the OCC notifies the filer that the bylaw amendment is denied or that the amendment contains procedures of the type described in paragraph (f)(3)(i)(B) of this section and is not eligible for expedited review, provided the association follows the requirements of its charter and bylaws in adopting the amendment.

(B) *Amendments not subject to expedited review.* A bylaw amendment is not subject to expedited review if it would render more difficult or discourage a merger, proxy contest, the assumption of control by a mutual account holder of the association, or the removal of incumbent management; involve a significant issue of law or policy, including indemnification, conflicts of interest, and limitations on director or officer liability; or be inconsistent with the requirements of this paragraph or with applicable laws, rules, regulations, or the association's charter.

(ii) *Notice Requirement.* A Federal mutual association may elect to follow the corporate governance procedures of the laws of the State where the home office of the institution is located, provided that such procedures are not inconsistent with applicable Federal statutes, regulations, and safety and soundness, and such procedures are not of the type described in paragraph (j)(3)(i)(B) of this section. If this election is selected, a Federal mutual association must designate in its bylaws the provision or provisions from the body of law selected for its corporate governance procedures, and must submit a notice containing a copy of such bylaws, within 30 days after adoption. The notice must indicate, where not obvious, why the bylaw provisions meet the requirements stated in paragraph (j)(3)(i)(B) of this section.

(iii) *No filing required.* No filing is required for purposes of paragraph (j)(3) of this section if a bylaw amendment adopts the language of the OCC's model or optional bylaws without change.

(4) *Effectiveness.* A bylaw amendment is effective after approval by the OCC, if required, and adoption by the association, provided that the association follows the requirements of its charter and bylaws in adopting the amendment.

(5) *Effect of subsequent charter or bylaw change.* Notwithstanding any subsequent change to its charter or bylaws, the authority of a Federal mutual savings association to engage in any transaction is determined only by the association's charter or bylaws then in effect.

■ 15. Amend § 5.22 by:

■ a. In paragraph (d), removing the word ''shall'' and adding in its place the word ''do'';

■ b. In paragraph (e) introductory text removing the word ''shall'' each time it appears and adding in its place the word ''must'' and removing ''§ 192.3(c)(13)'' and adding in its place ''§ 192.485'';

■ c. In the form ''Federal Stock Charter'' following paragraph (e):

■ i. In *Section 2,* removing the phrase ''shall be'' and adding in its place the word ''is'';

■ ii. Revising *Section 5*;

■ iii. In *Section 6,* removing the phrase ''shall not be entitled'' and adding in its place the phrase ''are not entitled'';

■ iv. In *Section 7,* removing the phrase ''shall be'' and adding in its place the phrase ''will be'' and removing the phrase ''shall not be'' and adding in its place the phrase ''may not be''; and

■ v. In *Section 8,* removing the phrase ''shall be'' and adding in its place ''may be'';

■ d. Revising paragraph (f)(2) and adding paragraph (f)(3);

■ e. Revising paragraph (g) introductory text and paragraph (g)(4);

■ f. Removing the word ''shall'' each time it appears and adding in its place the word ''will'' in paragraph (g)(6); and

■ g. Revising paragraph (g)(7);

■ h. In paragraph (h):

■ i. Removing the phrase ''shall file'' and adding in its place the word ''files'';

■ ii. Removing the phrase ''for approval'' and adding in its place the phrase ''pursuant to paragraph (f)(2)(i) of this section'';

■ iii. Removing the word ''state'' and adding in its place the word ''State''; and

■ iv. Removing the phrase ''shall not'' and adding in its place the phrase ''may not'';
■ i. In paragraph (i), removing the phrase ''under (c) of this part'' and adding in its place ''in the form ''Federal Stock Charter'' in paragraph (c) of this section'';
■ j. Revising paragraphs (j)(2) and (3);
■ k. In paragraph (j)(4), removing the phrase ''shall be'' and adding in its place the word ''is'':
■ l. Revising paragraphs (k)(1) through (7);
■ m. Revising paragraphs (l)(1) through (10);
■ n. In paragraph (m)(1) removing the phrase ''shall be a president'' and adding in its place the phrase ''must consist of a president''; removing the phrase ''shall be elected'' and adding in its place the phrase ''must be elected''; and removing the word ''chairman'' and adding in its place the word ''chair''; and
■ o. In paragraph (m)(2) removing the phrase ''shall be'' and adding in its place the phrase ''will be'' and removing the phrase ''shall conform'' and adding in its place the phrase ''must conform''; and
■ p. Revising paragraph (n).

The addition and revisions read as follows.

§ 5.22 Federal stock savings association charter and bylaws.

* * * * *

(e) * * *

Federal Stock Charter

* * * * *

Section 5. Capital stock. The total number of shares of all classes of the capital stock that the association has the authority to issue is __, all of which is common stock of par [or if no par is specified then shares have a stated] value of __ per share. The shares may be issued from time to time as authorized by the board of directors without the approval of its shareholders, except as otherwise provided in this Section 5 or to the extent that such approval is required by governing law, rule, or regulation. The consideration for the issuance of the shares must be paid in full before their issuance and may not be less than the par [or stated] value. Neither promissory notes nor future services may constitute payment or part payment for the issuance of shares of the association. The consideration for the shares must be cash, tangible or intangible property (to the extent direct investment in such property would be permitted to the association), labor, or services actually performed for the association, or any combination of the foregoing. In the absence of actual fraud in the transaction, the value of such property, labor, or services, as determined by the board of directors of the association, is conclusive. Upon payment of such consideration, such shares are deemed to be fully paid and nonassessable. In the case of a stock dividend, that part of the retained earnings of the association that is transferred to common stock or paid-in capital accounts upon the issuance of shares as a stock dividend is deemed to be the consideration for their issuance.

Except for shares issued in the initial organization of the association or in connection with the conversion of the association from the mutual to stock form of capitalization, no shares of capital stock (including shares issuable upon conversion, exchange, or exercise of other securities) may be issued, directly or indirectly, to officers, directors, or controlling persons of the association other than as part of a general public offering or as qualifying shares to a director, unless the issuance or the plan under which they would be issued has been approved by a majority of the total votes eligible to be cast at a legal meeting. The holders of the common stock exclusively possess all voting power. Each holder of shares of common stock is entitled to one vote for each share held by such holder, except as to the cumulation of votes for the election of directors, unless the charter provides that there will be no such cumulative voting. Subject to any provision for a liquidation account, in the event of any liquidation, dissolution, or winding up of the association, the holders of the common stock will be entitled, after payment or provision for payment of all debts and liabilities of the association, to receive the remaining assets of the association available for distribution, in cash or in kind. Each share of common stock must have the same relative rights as and be identical in all respects with all the other shares of common stock.

(f) * * *

(2) *Form of filing*—(i) *Application requirement.* Except as provided in paragraph (f)(2)(ii) of this section, a Federal stock savings association must file the proposed charter amendment with, and obtain the prior approval of the OCC.

(A) *Expedited review.* Except as provided in paragraph (f)(2)(i)(B) of this section, the charter amendment will be deemed approved as of the 30th day after filing, unless the OCC notifies the filer that the amendment is denied or that the amendment contains procedures of the type described in paragraph (f)(2)(ii)(B) of this section and is not subject to expedited review, provide the association follows the requirements of its charter in adopting the amendment.

(B) *Amendments exempted from expedited review.* Expedited review is not available for a charter amendment that would render more difficult or discourage a merger, tender offer, or proxy contest, the assumption of control by a holder of a block of the association's stock, the removal of incumbent management, or involve a significant issue of law or policy.

(ii) *Notice requirement.* No application under paragraph (f)(2)(i) of this section is required if the amendment is contained within paragraphs (e) or (g) of this section. In such case, the Federal stock savings association must submit a notice with the charter amendment to the OCC within 30 days after adoption.

(3) *Effectiveness.* A charter amendment is effective after approval by the OCC, if required, and adoption by the association, provided the association follows the requirements of its charter in adopting the amendments.

(g) *Optional charter amendments.* The following charter amendments are subject to the notice requirement in paragraph (f)(2)(ii) of this section if adopted without change:

* * * * *

(4) *Capital stock.* A Federal stock association may amend its charter by revising Section 5 to read as follows:

Section 5. Capital stock. The total number of shares of all classes of capital stock that the association has the authority to issue is __, of which __ is common stock of par [or if no par value is specified the stated] value of __ per share and of which [list the number of each class of preferred and the par or if no par value is specified the stated value per share of each such class]. The shares may be issued from time to time as authorized by the board of directors without further approval of shareholders, except as otherwise provided in this Section 5 or to the extent that such approval is required by governing law, rule, or regulation. The consideration for the issuance of the shares must be paid in full before their issuance and may not be less than the par [or stated] value. Neither promissory notes nor future services may constitute payment or part payment for the issuance of shares of the association. The consideration for the shares must be cash, tangible or intangible property (to the extent direct investment in such property would be permitted), labor, or services actually performed for the

association, or any combination of the foregoing. In the absence of actual fraud in the transaction, the value of such property, labor, or services, as determined by the board of directors of the association, will be conclusive. Upon payment of such consideration, such shares will be deemed to be fully paid and nonassessable. In the case of a stock dividend, that part of the retained earnings of the association that is transferred to common stock or paid-in capital accounts upon the issuance of shares as a stock dividend will be deemed to be the consideration for their issuance.

Except for shares issued in the initial organization of the association or in connection with the conversion of the association from the mutual to the stock form of capitalization, no shares of capital stock (including shares issuable upon conversion, exchange, or exercise of other securities) may be issued, directly or indirectly, to officers, directors, or controlling persons of the association other than as part of a general public offering or as qualifying shares to a director, unless their issuance or the plan under which they would be issued has been approved by a majority of the total votes eligible to be cast at a legal meeting.

Nothing contained in this Section 5 (or in any supplementary sections hereto) entitles the holders of any class of a series of capital stock to vote as a separate class or series or to more than one vote per share, except as to the cumulation of votes for the election of directors, unless the charter otherwise provides that there will be no such cumulative voting: *Provided,* That this restriction on voting separately by class or series does not apply:

i. To any provision which would authorize the holders of preferred stock, voting as a class or series, to elect some members of the board of directors, less than a majority thereof, in the event of default in the payment of dividends on any class or series of preferred stock;

ii. To any provision that would require the holders of preferred stock, voting as a class or series, to approve the merger or consolidation of the association with another corporation or the sale, lease, or conveyance (other than by mortgage or pledge) of properties or business in exchange for securities of a corporation other than the association if the preferred stock is exchanged for securities of such other corporation: *Provided,* That no provision may require such approval for transactions undertaken with the assistance or pursuant to the direction of the OCC or the Federal Deposit Insurance Corporation;

iii. To any amendment which would adversely change the specific terms of any class or series of capital stock as set forth in this Section 5 (or in any supplementary sections hereto), including any amendment which would create or enlarge any class or series ranking prior thereto in rights and preferences. An amendment which increases the number of authorized shares of any class or series of capital stock, or substitutes the surviving association in a merger or consolidation for the association, is not considered to be such an adverse change.

A description of the different classes and series (if any) of the association's capital stock and a statement of the designations, and the relative rights, preferences, and limitations of the shares of each class of and series (if any) of capital stock are as follows:

A. *Common stock.* Except as provided in this Section 5 (or in any supplementary sections thereto) the holders of the common stock exclusively possess all voting power. Each holder of shares of the common stock is entitled to one vote for each share held by each holder, except as to the cumulation of votes for the election of directors, unless the charter otherwise provides that there will be no such cumulative voting.

Whenever there has been paid, or declared and set aside for payment, to the holders of the outstanding shares of any class of stock having preference over the common stock as to the payment of dividends, the full amount of dividends and of sinking fund, retirement fund, or other retirement payments, if any, to which such holders are respectively entitled in preference to the common stock, then dividends may be paid on the common stock and on any class or series of stock entitled to participate therewith as to dividends out of any assets legally available for the payment of dividends.

In the event of any liquidation, dissolution, or winding up of the association, the holders of the common stock (and the holders of any class or series of stock entitled to participate with the common stock in the distribution of assets) will be entitled to receive, in cash or in kind, the assets of the association available for distribution remaining after: (i) Payment or provision for payment of the association's debts and liabilities; (ii) distributions or provision for distributions in settlement of its liquidation account; and (iii) distributions or provision for distributions to holders of any class or series of stock having preference over the common stock in the liquidation, dissolution, or winding up of the association. Each share of common stock will have the same relative rights as and be identical in all respects with all the other shares of common stock.

B. *Preferred stock.* The association may provide in supplementary sections to its charter for one or more classes of preferred stock, which must be separately identified. The shares of any class may be divided into and issued in series, with each series separately designated so as to distinguish the shares thereof from the shares of all other series and classes. The terms of each series must be set forth in a supplementary section to the charter. All shares of the same class must be identical except as to the following relative rights and preferences, as to which there may be variations between different series:

a. The distinctive serial designation and the number of shares constituting such series;

b. The dividend rate or the amount of dividends to be paid on the shares of such series, whether dividends are cumulative and, if so, from which date(s), the payment date(s) for dividends, and the participating or other special rights, if any, with respect to dividends;

c. The voting powers, full or limited, if any, of shares of such series;

d. Whether the shares of such series are redeemable and, if so, the price(s) at which, and the terms and conditions on which, such shares may be redeemed;

e. The amount(s) payable upon the shares of such series in the event of voluntary or involuntary liquidation, dissolution, or winding up of the association;

f. Whether the shares of such series are entitled to the benefit of a sinking or retirement fund to be applied to the purchase or redemption of such shares, and if so entitled, the amount of such fund and the manner of its application, including the price(s) at which such shares may be redeemed or purchased through the application of such fund;

g. Whether the shares of such series are convertible into, or exchangeable for, shares of any other class or classes of stock of the association and, if so, the conversion price(s) or the rate(s) of exchange, and the adjustments thereof, if any, at which such conversion or exchange may be made, and any other terms and conditions of such conversion or exchange.

h. The price or other consideration for which the shares of such series are issued; and

i. Whether the shares of such series which are redeemed or converted have the status of authorized but unissued

shares of serial preferred stock and whether such shares may be reissued as shares of the same or any other series of serial preferred stock.

Each share of each series of serial preferred stock must have the same relative rights as and be identical in all respects with all the other shares of the same series.

The board of directors has authority to divide, by the adoption of supplementary charter sections, any authorized class of preferred stock into series, and, within the limitations set forth in this section and the remainder of this charter, fix and determine the relative rights and preferences of the shares of any series so established.

Prior to the issuance of any preferred shares of a series established by a supplementary charter section adopted by the board of directors, the association must file with the OCC a dated copy of that supplementary section of this charter established and designating the series and fixing and determining the relative rights and preferences thereof.

* * * * *

(7) *Anti-takeover provisions following mutual to stock conversion.* Notwithstanding the law of the State in which the association is located, a Federal stock association may amend its charter by renumbering existing sections as appropriate and adding a new section 8 as follows:

Section 8. Certain Provisions Applicable for Five Years. Notwithstanding anything contained in the Association's charter or bylaws to the contrary, for a period of [specify number of years up to five] years from the date of completion of the conversion of the Association from mutual to stock form, the following provisions will apply:

A. *Beneficial Ownership Limitation.* No person may directly or indirectly offer to acquire or acquire the beneficial ownership of more than 10 percent of any class of an equity security of the association. This limitation does not apply to a transaction in which the association forms a holding company without change in the respective beneficial ownership interests of its stockholders other than pursuant to the exercise of any dissenter and appraisal rights, the purchase of shares by underwriters in connection with a public offering, or the purchase of less than 25 percent of a class of stock by a tax-qualified employee stock benefit plan as defined in 12 CFR 192.25.

In the event shares are acquired in violation of this section 8, all shares beneficially owned by any person in excess of 10 percent will be considered ''excess shares'' and will not be counted as shares entitled to vote and may not be voted by any person or counted as voting shares in connection with any matters submitted to the stockholders for a vote.

For purposes of this section 8, the following definitions apply:

1. The term ''person'' includes an individual, a group acting in concert, a corporation, a partnership, an association, a joint stock company, a trust, an unincorporated organization or similar company, a syndicate or any other group formed for the purpose of acquiring, holding or disposing of the equity securities of the association.

2. The term ''offer'' includes every offer to buy or otherwise acquire, solicitation of an offer to sell, tender offer for, or request or invitation for tenders of, a security or interest in a security for value.

3. The term ''acquire'' includes every type of acquisition, whether effected by purchase, exchange, operation of law or otherwise.

4. The term ''acting in concert'' means (a) knowing participation in a joint activity or parallel action towards a common goal of acquiring control whether or not pursuant to an express agreement, or (b) a combination or pooling of voting or other interests in the securities of an issuer for a common purpose pursuant to any contract, understanding, relationship, agreement or other arrangement, whether written or otherwise.

B. *Cumulative Voting Limitation.* Stockholders may not cumulate their votes for election of directors.

C. *Call for Special Meetings.* Special meetings of stockholders relating to changes in control of the association or amendments to its charter may be called only upon direction of the board of directors.

* * * * *

(j) * * *

(2) *Form of filing*—(i) *Application requirement.* Except as provided in paragraphs (j)(2)(ii) or (j)(2)(iii) of this section, a Federal stock savings association must file the proposed bylaw amendment with, and obtain the prior approval of, the OCC.

(A) *Expedited review.* Except as provided in paragraph (j)(2)(i)(B) of this section, the bylaw amendment will be deemed approved as of the 30th day after filing, unless the OCC notifies the filer that the application is denied or that the amendment contains procedures of the type described in paragraph (j)(2)(i)(B) of this section and is not eligible for expedited review, provided the association follows the requirements of its charter and bylaws in adopting the amendment.

(B) *Amendments exempted from expedited review.* Expedited review is not available for a bylaw amendment that would:

(*1*) Render more difficult or discourage a merger, tender offer, or proxy contest, the assumption of control by a holder of a large block of the association's stock, or the removal of incumbent management; or

(*2*) Be inconsistent with paragraphs (k) through (n) of this section, with applicable laws, rules, regulations or the association's charter or involve a significant issue of law or policy, including indemnification, conflicts of interest, and limitations on director or officer liability.

(ii) *Notice Requirement.* A Federal stock association may elect to follow the corporate governance procedures of: The laws of the State where the home office of the association is located; the laws of the State where the association's holding company, if any, is incorporated or chartered; Delaware General Corporation law; or The Model Business Corporation Act, provided that such procedures may be elected to the extent not inconsistent with applicable Federal statutes and regulations and safety and soundness, and such procedures are not of the type described in paragraph (j)(2)(i)(B) of this section. If this election is selected, a Federal stock association must designate in its bylaws the provision or provisions from the body or bodies of law selected for its corporate governance procedures, and must file a notice containing a copy of such bylaws, within 30 days after adoption. The notice must indicate, where not obvious, why the bylaw provisions meet the requirements stated in paragraph (j)(2)(i)(B) of this section.

(iii) *No filing required.* No filing is required for purposes of paragraph (j)(2) of this section if a bylaw amendment adopts the language of the OCC's model or optional bylaws without change.

(3) *Effectiveness.* A bylaw amendment is effective after approval by the OCC, if required, and adoption by the association, provided that the association follows the requirements of its charter and bylaws in adopting the amendment.

* * * * *

(k) *Shareholders of Federal stock savings associations*—(1) *Shareholder meetings.* A meeting of the shareholders of the association for the election of directors and for the transaction of any other business of the association must be held annually within 150 days after the end of the association's fiscal year.

Unless otherwise provided in the association's charter, special meetings of the shareholders may be called by the board of directors or on the request of the holders of 10 percent or more of the shares entitled to vote at the meeting, or by such other persons as may be specified in the bylaws of the association. All annual and special meetings of shareholders may be held at any convenient place the board of directors may designate.

(2) *Notice of shareholder meetings.* Written notice stating the place, day, and hour of the meeting and the purpose or purposes for which the meeting is called must be delivered not fewer than 20 nor more than 50 days before the date of the meeting, either personally or by mail, by or at the direction of the chair of the board, the president, the secretary, or the directors, or other persons calling the meeting, to each shareholder of record entitled to vote at such meeting. If mailed, such notice will be deemed to be delivered when deposited in the mail, addressed to the shareholder at the address appearing on the stock transfer books or records of the association as of the record date prescribed in paragraph (i)(3) of this section, with postage thereon prepaid. When any shareholders' meeting, either annual or special, is adjourned for 30 days or more, notice of the adjourned meeting must be given as in the case of an original meeting. Notwithstanding anything in this section, however, a Federal stock association that is wholly owned is not subject to the shareholder notice requirement.

(3) *Fixing of record date.* For the purpose of determining shareholders entitled to notice of or to vote at any meeting of shareholders or any adjournment thereof, or shareholders entitled to receive payment of any dividend, or in order to make a determination of shareholders for any other proper purpose, the board of directors must fix in advance a date as the record date for any such determination of shareholders. Such date in any case may not more than 60 days and, in case of a meeting of shareholders, not less than 10 days prior to the date on which the particular action, requiring such determination of shareholders, is to be taken. When a determination of shareholders entitled to vote at any meeting of shareholders has been made as provided in this section, such determination will apply to any adjournment thereof.

(4) *Voting lists.* (i) At least 20 days before each meeting of the shareholders, the officer or agent having charge of the stock transfer books for the shares of the association must make a complete list of the stockholders of record entitled to vote at such meeting, or any adjournments thereof, arranged in alphabetical order, with the address and the number of shares held by each. This list of shareholders must be kept on file at the home office of the association and is subject to inspection by any shareholder of record or the stockholder's agent during the entire time of the meeting. The original stock transfer book will constitute *prima facie* evidence of the stockholders entitled to examine such list or transfer books or to vote at any meeting of stockholders. Notwithstanding anything in this section, however, a Federal stock association that is wholly owned is not subject to the voting list requirements.

(ii) In lieu of making the shareholders list available for inspection by any shareholders as provided in paragraph (j)(4)(i) of this section, the board of directors may perform such acts as required by paragraphs (a) and (b) of Rule 14a–7 of the General Rules and Regulations under the Securities and Exchange Act of 1934 (17 CFR 240.14a–7) as may be duly requested in writing, with respect to any matter which may be properly considered at a meeting of shareholders, by any shareholder who is entitled to vote on such matter and who must defray the reasonable expenses to be incurred by the association in performance of the act or acts required.

(5) *Shareholder quorum.* A majority of the outstanding shares of the association entitled to vote, represented in person or by proxy, constitutes a quorum at a meeting of shareholders. The shareholders present at a duly organized meeting may continue to transact business until adjournment, notwithstanding the withdrawal of enough shareholders to leave less than a quorum. If a quorum is present, the affirmative vote of the majority of the shares represented at the meeting and entitled to vote on the subject matter will be the act of the stockholders, unless the vote of a greater number of stockholders voting together or voting by classes is required by law or the charter. Directors, however, are elected by a plurality of the votes cast at an election of directors.

(6) *Shareholder voting*—(i) *Proxies.* Unless otherwise provided in the association's charter, at all meetings of shareholders, a shareholder may vote in person or by proxy executed in writing by the shareholder or by a duly authorized attorney in fact. Proxies may be given telephonically or electronically as long as the holder uses a procedure for verifying the identity of the shareholder. Proxies solicited on behalf of the management must be voted as directed by the shareholder or, in the absence of such direction, as determined by a majority of the board of directors. No proxy may be valid more than eleven months from the date of its execution except for a proxy coupled with an interest.

(ii) *Shares controlled by association.* Neither treasury shares of its own stock held by the association nor shares held by another corporation, if a majority of the shares entitled to vote for the election of directors of such other corporation are held by the association, may be voted at any meeting or counted in determining the total number of outstanding shares at any given time for purposes of any meeting.

(7) *Nominations and new business submitted by shareholders.* Nominations for directors and new business submitted by shareholders must be voted upon at the annual meeting if such nominations or new business are submitted in writing and delivered to the secretary of the association at least five days prior to the date of the annual meeting. Ballots bearing the names of all the persons nominated must be provided for use at the annual meeting.

* * * * *

(l) *Board of directors*—(1) *General powers and duties.* The business and affairs of the association must be under the direction of its board of directors. Directors need not be stockholders unless the bylaws so require.

(2) *Number and term.* The bylaws must set forth a specific number of directors, not a range. The number of directors may not be fewer than five nor more than fifteen, unless a higher or lower number has been authorized by the OTS prior to July 21, 2011 or the OCC. Directors must be elected for a term of one to three years and until their successors are elected and qualified. If a staggered board is chosen, the directors must be divided into two or three classes as nearly equal in number as possible and one class must be elected by ballot annually.

(3) *Regular meetings.* The board of directors determines the place, frequency, time and procedure for notice of regular meetings.

(4) *Quorum.* A majority of the number of directors constitutes a quorum for the transaction of business at any meeting of the board of directors. The act of the majority of the directors present at a meeting at which a quorum is present will be the act of the board of directors, unless a greater number is prescribed by regulation of the OCC.

(5) *Vacancies.* Any vacancy occurring in the board of directors may be filled

by the affirmative vote of a majority of the remaining directors although less than a quorum of the board of directors. A director elected to fill a vacancy may serve only until the next election of directors by the shareholders. Any directorship to be filled by reason of an increase in the number of directors may be filled by election by the board of directors for a term of office continuing only until the next election of directors by the shareholders.

(6) *Removal or resignation of directors.* (i) At a meeting of shareholders called expressly for that purpose, any director may be removed only for cause, as termination for cause is defined in § 5.21(j)(2)(x)(B), by a vote of the holders of a majority of the shares then entitled to vote at an election of directors. Associations may provide for procedures regarding resignations in the bylaws.

(ii) If less than the entire board is to be removed, no one of the directors may be removed if the votes cast against the removal would be sufficient to elect a director if then cumulatively voted at an election of the class of directors of which such director is a part.

(iii) Whenever the holders of the shares of any class are entitled to elect one or more directors by the provisions of the charter or supplemental sections thereto, the provisions of this section apply, in respect to the removal of a director or directors so elected, to the vote of the holders of the outstanding shares of that class and not to the vote of the outstanding shares as a whole.

(7) *Executive and other committees.* The board of directors, by resolution adopted by a majority of the full board, may designate from among its members an executive committee and one or more other committees. No committee may have the authority of the board of directors with reference to: The declaration of dividends; the amendment of the charter or bylaws of the association; recommending to the stockholders a plan of merger, consolidation, or conversion; the sale, lease, or other disposition of all, or substantially all, of the property and assets of the association otherwise than in the usual and regular course of its business; a voluntary dissolution of the association; a revocation of any of the foregoing; or the approval of a transaction in which any member of the executive committee, directly or indirectly, has any material beneficial interest. The designation of any committee and the delegation of authority thereto does not operate to relieve the board of directors, or any director, of any responsibility imposed by law or regulation.

(8) *Notice of special meetings.* Written notice of at least 24 hours regarding any special meeting of the board of directors or of any committee designated thereby must be given to each director in accordance with the bylaws, although such notice may be waived by the director. The attendance of a director at a meeting constitutes a waiver of notice of such meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any meeting need be specified in the notice or waiver of notice of such meeting. The bylaws may provide for electronic participation at a meeting.

(9) *Action without a meeting.* Any action required or permitted to be taken by the board of directors at a meeting may be taken without a meeting if a consent in writing, setting forth the actions so taken, is signed by all of the directors.

(10) *Presumption of assent.* A director of the association who is present at a meeting of the board of directors at which action on any association matter is taken is presumed to have assented to the action taken unless their dissent or abstention is entered in the minutes of the meeting or unless a written dissent to such action is filed with the person acting as the secretary of the meeting before the adjournment thereof or is forwarded by registered mail to the secretary of the association within five days after the date on which a copy of the minutes of the meeting is received. Such right to dissent does not apply to a director who voted in favor of such action.

* * * * *

(n) *Certificates for shares and their transfer*—(1) *Certificates for shares.* Certificates representing shares of capital stock of the association must be in such form as determined by the board of directors and approved by the OCC. The name and address of the person to whom the shares are issued, with the number of shares and date of issue, must be entered on the stock transfer books of the association. All certificates surrendered to the association for transfer must be cancelled and no new certificate may be issued until the former certificate for a like number of shares has been surrendered and cancelled, except that in the case of a lost or destroyed certificate a new certificate may be issued upon such terms and indemnity to the association as the board of directors may prescribe.

(2) *Transfer of shares.* Transfer of shares of capital stock of the association may be made only on its stock transfer books. Authority for such transfer may be given only by the holder of record or by a legal representative, who must furnish proper evidence of such authority, or by an attorney authorized by a duly executed power of attorney and filed with the association. The transfer may be made only on surrender for cancellation of the certificate for the shares. The person in whose name shares of capital stock stand on the books of the association is deemed by the association to be the owner for all purposes.

■ 16. Amend § 5.23 by:

■ a. In paragraph (b)(2), removing the phrase ''an industrial bank or a credit union, chartered in'' and adding in its place the phrase ''an industrial bank, or a credit union chartered in'';

■ b. In paragraphs (c), (d)(2)(ii), (e), and (f)(1), removing the word ''shall'' each time that it appears and adding in its place the word ''must'';

■ c. In paragraphs (c), (d)(1), (d)(2)(i), (d)(2)(v), and (d)(4), removing the word ''applicant'' each time that it appears and adding in its place the word ''filer'';

■ d. In paragraph (c), removing the phrase ''Federal Deposit Insurance Corporation (FDIC)'' and adding in its place the word ''FDIC'';

■ e. Removing paragraph (d)(2)(ii)(A), redesignating paragraphs (d)(2)(ii)(B) through (J) as paragraphs (d)(2)(ii)(A) through (I), respectively and adding new paragraphs (d)(2)(ii)(K) and (d)(2)(ii)(L);

■ f. In newly redesignated paragraphs (d)(2)(ii)(D) and (d)(2)(ii)(I), removing the word ''state'' and adding in its place the word ''State'';

■ g. In newly redesignated paragraph (d)(2)(ii)(G), removing the comma after the phrase ''engages in'';

■ h. In newly redesignated paragraph (d)(2)(ii)(I), removing the word ''and'' after the phrase ''after conversion;'';

■ i. In newly redesignated paragraph (d)(2)(ii)(J), removing the period after the phrase ''from the OCC'' and adding in its place a semicolon;

■ j. In paragraph (d)(2)(iii), removing the word ''HOLA'' and adding in its place ''Home Owners' Loan Act (12 U.S.C. 1464(c))'';

■ k. Redesignating paragraphs (d)(2)(iv) through (v) as paragraphs (d)(2)(v) through (vi) and adding a new paragraph (d)(2)(iv);

■ l. Revising paragraph (d)(4); and

■ m. In paragraph (e), removing the phrase ''an applicant'' and adding in its place the phrase ''a filer'';

■ n. In paragraph (f)(1), removing the word ''state'' and adding in its place the word ''State''; and

■ o. In paragraph (g) removing the phrase ''shall continue'' and adding in its place the word ''continues'' and removing the phrase ''shall be'' and adding in its place the word ''is''.

The additions and revision read as follows.

§ 5.23 Conversion to become a Federal savings association.

* * * * *

(d) * * *

(2) * * *

(ii) * * *

(K) Include a list of directors and senior executive officers, as defined in § 5.51, of the converting institution; and

(L) Include a list of individuals, directors, and shareholders who directly or indirectly, or acting in concert with one or more persons or companies, or together with members of their immediate family, do or will own, control, or hold 10 percent or more of the institution's voting stock.

* * * * *

(iv) The OCC may require directors and senior executive officers of the converting institution to submit the Interagency Biographical and Financial Report, available at *www.occ.gov,* and legible fingerprints.

* * * * *

(4) *Expedited review.* An application by an eligible bank to convert to a Federal savings association charter is deemed approved by the OCC as of the 45th day after the filing is received by the OCC, unless the OCC notifies the filer prior to that date that the filing has been removed from expedited review, or the expedited review process is extended, under § 5.13(a)(2).

* * * * *

■ 17. Amend § 5.24 by:

■ a. In paragraphs (b), (c)(1), (c)(2), (d), (e)(2) introductory text, and (e)(3), removing the word ''state'' each time that it appears and adding in its place the word ''State'';

■ b. In paragraphs (b), (e)(2) introductory text, and (f), removing the word ''shall'' each time that it appears and adding in its place the word ''must'';

■ c. In paragraph (c)(2), removing the word ''*state*'' and adding in its place the word ''*State*'';

■ d. In paragraphs (d), (e)(1), and (h), removing the word ''applicant'' each time that it appears and adding in its place the word ''filer'';

■ e. Removing paragraph (e)(2)(i) and redesignating paragraphs (e)(2)(ii) through (x) as paragraphs (e)(2)(i) through (ix), respectively, and adding paragraphs (e)(2)(x) through (xi);

■ f. In newly redesignated paragraphs (e)(2)(iv) and (e)(2)(ix), removing the word ''state'' each time that it appears and adding in its place the word ''State'';

■ g. At the end of newly redesignated paragraph (e)(2)(viii), removing the word ''and'';

■ h. At the end of newly redesignated paragraph (e)(2)(ix), removing the period and adding in its place a semicolon;

■ i. Redesignating paragraphs (e)(4) through (5) as paragraphs (e)(5) through (6), respectively, and adding a new paragraph (e)(4);

■ j. In newly redesignated paragraph (e)(6), removing the word ''applicant'' and adding the word ''filer'' in its place;

■ k. Revising paragraph (h); and

■ l. In paragraph (i):

■ i. In the first sentence, removing the phrase ''shall continue'' and adding in its place the word ''continues''; and

■ ii. In the second sentence, removing the phrase ''shall be'' and adding in its place the word ''is''.

The additions and revisions read as follows.

§ 5.24 Conversion to become a national bank.

* * * * *

(e) * * *

(2) * * *

(x) Include a list of directors and senior executive officers, as defined in § 5.51, of the converting institution; and

(xi) Include a list of individuals, directors, and shareholders who directly or indirectly, or acting in concert with one or more persons or companies, or together with members of their immediate family, do or will own, control, or hold 10 percent or more of the institution's voting stock.

* * * * *

(4) The OCC may require directors and senior executive officers of the converting institution to submit the Interagency Biographical and Financial Report, available at *www.occ.gov,* and legible fingerprints.

* * * * *

(h) *Expedited review.* An application by an eligible savings association to convert to a national bank charter is deemed approved by the OCC as of the 45th day after the filing is received by the OCC, unless the OCC notifies the filer prior to that date that the filing has been removed from expedited review, or the expedited review process is extended, under § 5.13(a)(2).

* * * * *

§ 5.25 [Amended]

■ 18. Amend § 5.25 by:

■ a. In the section heading and in paragraphs (b), (c), (d)(1), (d)(2), (d)(3)(i), and (d)(4), removing the word ''state'' each time that it appears and adding in its place the word ''State'';

■ b. In paragraphs (b), (d)(3)(i), and (d)(3)(ii), removing the word ''shall'' each time it appears and adding in its place the word ''must''; and

■ c. In paragraphs (d)(1) and (d)(3)(i), removing the phrase ''defined in 214(a)'' each time in appears and adding in its place the phrase ''defined in 12 U.S.C. 214(a)''.

■ 19. Amend § 5.26 by:

■ a. In paragraph (a), removing the phrase ''12 U.S.C. 92a and'' and adding in its place the phrase ''12 U.S.C. 92a,'';

■ b. In paragraphs (b)(2) and (b)(4), removing the phrase ''Office of Thrift Supervision'' each time in appears and adding in its place the word ''OTS'';

■ c. In paragraphs (b)(3), (b)(4), (e)(1)(ii), (e)(1)(iii), (e)(2)(i)(B), (e)(2)(i)(E), and (e)(2)(iii)(B), removing the word ''state'' each time it appears and adding in its place the word ''State''; and

■ d. In paragraph (e)(2)(i) introductory text, removing the word ''shall'' and adding in its place the word ''must'';

■ e. Revising paragraph (e)(2)(i)(C);

■ f. In paragraph (e)(2)(ii), removing the word ''applicant'' and adding in its place the word ''filer''; and

■ g. Revising paragraphs (e)(3) and (6).

The revisions read as follows.

§ 5.26 Fiduciary powers of national banks and Federal savings associations.

* * * * *

(e) * * *

(2) * * *

(i) * * *

(C) Sufficient biographical information on proposed senior trust management personnel, as identified by the OCC, to enable the OCC to assess their qualifications, including, if requested by the OCC, legible fingerprints and the Interagency Biographical and Financial Report, available at *www.occ.gov*;

* * * * *

(3) *Expedited review.* An application by an eligible bank or eligible savings association to exercise fiduciary powers is deemed approved by the OCC as of the 30th day after the application is received by the OCC, unless the OCC notifies the bank or savings association prior to that date that the filing has been removed from expedited review, or the expedited review process is extended, under § 5.13(a)(2).

* * * * *

(6) *Notice of fiduciary activities in additional States.* (i) Except as provided in paragraphs (e)(6)(iii)–(iv) of this section, a national bank or Federal savings association with existing OCC approval to exercise fiduciary powers must provide written notice to the OCC

no later than 10 days after it begins to engage in any of the activities specified in § 9.7(d) of this chapter in a State in addition to the State or States described in the application for fiduciary powers that the OCC has approved.

(ii) A notice submitted pursuant to paragraph (e)(6)(i) of this section must identify the new State or States involved, identify the fiduciary activities to be conducted, and describe the extent to which the activities differ materially from the fiduciary activities the national bank or Federal savings association previously conducted.

(iii) No notice under paragraph (e)(6)(i) of this section is required if the national bank or Federal savings association provides the information required by paragraph (e)(6)(ii) of this section through other means, such as a merger application.

(iv) No notice is required if the national bank or Federal savings association is conducting only activities ancillary to its fiduciary business through a trust representative office or otherwise.

* * * * *

■ 20. Amend § 5.30 by:

■ a. Removing the word ''shall'' each time it appears and adding in its place the word ''must'' in paragraphs (b), (f)(1), (f)(4), (g), (h)(1), and (j);

■ b. Revising paragraphs (d)(1)(i) and (iii)

■ c. In paragraph (d)(2), removing the word ''*state*'' and adding in its place the word ''*State*'';

■ d. In paragraphs (d)(2), (d)(3), (g), and (h)(4), removing the word ''state'' each time it appears and adding in its place the word ''State'';

■ e. In paragraph (f)(1), removing the phrase ''paragraph (f)(2)'' and adding in its place the phrase ''paragraphs (f)(2) or (f)(3)''; and

■ f. In paragraph (f)(6), removing the phrase ''is not eligible for expedited review, or the expedited review process is extended, under § 5.13(a)(2)'' and adding in its place the phrase ''has been removed from expedited review, or the expedited review process is extended, under § 5.13(a)(2)''.

The revisions read as follows.

§ 5.30 Establishment, acquisition, and relocation of a branch of a national bank.

* * * * *

(d) * * *

(1) * * *

(i) A branch established by a national bank includes a seasonal agency described in 12 U.S.C. 36(c), a mobile facility, a temporary facility, an intermittent facility, or a drop box.

* * * * *

(iii) A branch does not include a remote service unit (RSU) as described in 12 CFR 7.4003. This encompasses RSUs that are automated teller machines (ATMs), including interactive ATMs. A branch also does not include a loan production office, a deposit production office, a trust office, an administrative office, a data processing office, or any other office that does not engage in at least one of the activities in paragraph (d)(1) of this section.

* * * * *

■ 21. Amend § 5.31 by:

■ a. In paragraph (a) removing the period after ''1464'' and adding in its place a comma; and adding a comma after ''2907'';

■ b. In paragraphs (b), (f)(1)(i), (f)(3), (i), (k)(2)(ii), and (j)(2), removing the word ''shall'' and adding in its place the word ''must'' each time it appears;

■ c. In paragraphs (c)(3) and (j)(1), removing the word ''HOLA'' and adding in its place the phrase ''Home Owners' Loan Act'';

■ d. In paragraph (d)(1), removing the word ''*office*'';

■ e. In paragraph (d)(2), removing the word ''*state*'' and adding in its place the word ''*State*'';

■ f. In paragraphs (d)(2), (g)(2), and (j)(2), removing the word ''state'' and adding in its place the word ''State'' each time in appears;

■ g. In paragraph (f)(1)(iii), removing the word ''Federal'' and removing the phrase ''is not eligible for expedited review, or the expedited review process is extended, under § 5.13(a)(2)'' and adding in its place the phrase ''has been removed from expedited review, or the expedited review process is extended, under § 5.13(a)(2)'';

■ h. In paragraph (f)(2)(ii), removing the word ''§ 5.3(l)'' and adding its place the word ''§ 5.3'';

■ i. In paragraph (f)(2)(iii) introductory text, removing the word ''§ 5.3(g)'' and adding its place ''§ 5.3'';

■ j. In paragraph (j) introductory text, removing the word ''*HOLA*'' and adding in its place ''*Home Owners' Loan Act*''; and

■ k. Adding paragraph (j)(3).

The addition reads as follows.

§ 5.31 Establishment, acquisition, and relocation of a branch and establishment of an agency office of a Federal savings association.

* * * * *

(j) * * *

(3) For purposes of 12 U.S.C. 1464(m)(1), a branch in the District of Columbia includes any location at which accounts are opened, payments are received, or withdrawals are made. This includes an Automated Teller Machine that performs one or more of these functions.

* * * * *

§ 5.32 [Amended]

■ 22. Amend § 5.32 by:

■ a. In paragraphs (c), (f), (h)(1), and (h)(2), removing the word ''shall'' and adding in its place the word ''must'' each time it appears;

■ b. In paragraph (d)(1), removing the phrase ''shall be'' and adding in its place the word ''is'';

■ c. In paragraph (d)(2)(i), removing the word ''shall'' and adding in its place the word ''will'';

■ d. In paragraph (e), removing the phrase ''his or her'' and adding in its place the word ''their'';

■ e. In paragraph (f), removing the word ''Applicant'' and adding in its place the word ''Filers''; and

■ f. In paragraph (h)(1), removing the phrase ''An applicant'' and adding in its place the phrase ''A filer''; and

■ g. In paragraph (h)(2), removing the word ''applicant'' and adding in its place the word ''filer''.

■ 23. Revise § 5.33 to read as follows:

§ 5.33 Business combinations involving a national bank or Federal savings association.

(a) *Authority.* 12 U.S.C. 24(Seventh), 93a, 181, 214a, 214b, 215, 215a, 215a–1, 215a–3, 215b, 215c, 1462a, 1463, 1464, 1467a, 1828(c), 1831u, 2903, and 5412(b)(2)(B).

(b) *Scope.* This section sets forth the provisions governing business combinations and the standards for:

(1) OCC review and approval of an application by a national bank or a Federal savings association for a business combination resulting in a national bank or Federal savings association; and

(2) Requirements of notices and other procedures for national banks and Federal savings associations involved in other combinations in which a national bank or Federal savings association is not the resulting institution.

(c) *Licensing requirements.* As prescribed by this section, a national bank or Federal savings association must submit an application and obtain prior OCC approval for a business combination when the resulting institution is a national bank or Federal savings association. As prescribed by this section, a national bank or Federal savings association must give notice to the OCC prior to engaging in any other combination where the resulting institution will not be a national bank or Federal savings association.[26] A

[26] Other combinations, as defined in paragraph (d)(10) of this section, do not require an application

national bank must submit an application and obtain prior OCC approval for any merger between the national bank and one or more of its nonbank affiliates.

(d) *Definitions.* For purposes of this section:

(1) *Bank* means any national bank or any State bank.

(2) *Business combination* means:

(i) Any merger or consolidation between a national bank or a Federal savings association and one or more depository institutions or State trust companies, in which the resulting institution is a national bank or Federal savings association;

(ii) In the case of a Federal savings association, any merger or consolidation with a credit union in which the resulting institution is a Federal savings association;

(iii) In the case of a national bank, any merger between a national bank and one or more of its nonbank affiliates;

(iv) The acquisition by a national bank or a Federal savings association of all, or substantially all, of the assets of another depository institution; or

(v) The assumption by a national bank or a Federal savings association of any deposit liabilities of another insured depository institution or any deposit accounts or other liabilities of a credit union or any other institution that will become deposits at the national bank or Federal savings association.

(3) *Business reorganization* means either:

(i) A business combination between eligible banks and eligible savings associations, or between an eligible bank or an eligible savings association and an eligible depository institution, that are controlled by the same holding company or that will be controlled by the same holding company prior to the combination; or

(ii) A business combination between an eligible bank or an eligible savings association and an interim national bank or interim Federal savings association chartered in a transaction in which a person or group of persons exchanges its shares of the eligible bank or eligible savings association for shares of a newly formed holding company and receives after the transaction substantially the same proportional share interest in the holding company as it held in the eligible bank or eligible savings association (except for changes in interests resulting from the exercise of dissenters' rights), and the reorganization involves no other transactions involving the bank or savings association.

(4) *Company* means a corporation, limited liability company, partnership, business trust, association, or similar organization.

(5) For business combinations under paragraphs (g)(4) and (5) of this section, a company or shareholder is deemed to *control* another company if:

(i) Such company or shareholder, directly or indirectly, or acting through one or more other persons owns, controls, or has power to vote 25 percent or more of any class of voting securities of the other company; or

(ii) Such company or shareholder controls in any manner the election of a majority of the directors or trustees of the other company. No company is deemed to own or control another company by virtue of its ownership or control of shares in a fiduciary capacity.

(6) *Credit union* means a financial institution subject to examination by the National Credit Union Administration Board.

(7) *Home State* means, with respect to a national bank, the State in which the main office of the national bank is located and, with respect to a State bank, the State by which the bank is chartered.

(8) *Interim national bank or interim Federal savings association* means a national bank or Federal savings association that does not operate independently but exists solely as a vehicle to accomplish a business combination.

(9) *Nonbank affiliate* of a national bank means any company (other than a bank or Federal savings association) that controls, is controlled by, or is under common control with the national bank.

(10) *Other combination* means:

(i) Any merger or consolidation between a national bank or a Federal savings association and one or more depository institutions or State trust companies, in which the resulting institution is not a national bank or Federal savings association;

(ii) In the case of a Federal stock savings association, any merger or consolidation with a credit union in which the resulting institution is a credit union;

(iii) The transfer by a national bank or a Federal savings association of any deposit liabilities to another insured depository institution, a credit union or any other institution; or

(iv) The acquisition by a national bank or a Federal savings association of all, or substantially all, of the assets, or the assumption of all or substantially all of the liabilities, of any company other than a depository institution.

(11) *Savings association* and *State savings association* have the meaning set forth in section 3(b) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(b).

(12) *State trust company* means a trust company organized under State law that is not engaged in the business of receiving deposits, other than trust funds.

(e) *Policy*—(1) *Factors*—(i) *In general.* When the OCC evaluates any application for a business combination, the OCC considers the following factors:

(A) The capital level of any resulting national bank or Federal savings association

(B) The conformity of the transaction to applicable law, regulation, and supervisory policies;

(C) The purpose of the transaction;

(D) The impact of the transaction on safety and soundness of the national bank or Federal savings association; and

(E) The effect of the transaction on the national bank's or Federal savings association's shareholders (or members in the case of a mutual savings association), depositors, other creditors, and customers.

(ii) *Bank Merger Act.* When the OCC evaluates an application for a business combination under the Bank Merger Act, the OCC also considers the following factors:

(A) *Competition.* (*1*) The OCC considers the effect of a proposed business combination on competition. The filer must provide a competitive analysis of the transaction, including a definition of the relevant geographic market or markets. A filer may refer to the Comptroller's Licensing Manual for procedures to expedite its competitive analysis.

(*2*) The OCC will deny an application for a business combination if the combination would result in a monopoly or would be in furtherance of any combination or conspiracy to monopolize or attempt to monopolize the business of banking in any part of the United States. The OCC also will deny any proposed business combination whose effect in any section of the United States may be substantially to lessen competition, or tend to create a monopoly, or which in any other manner would be in restraint of trade, unless the probable effects of the transaction in meeting the convenience and needs of the community clearly outweigh the anticompetitive effects of the transaction. For purposes of weighing against anticompetitive effects, a business combination may have favorable effects in meeting the convenience and needs of the community if the depository institution being acquired has limited long-term

under this section. However, some may require an application under 12 CFR 5.53.

prospects, or if the resulting national bank or Federal savings association will provide significantly improved, additional, or less costly services to the community.

(B) *Financial and managerial resources and future prospects.* The OCC considers the financial and managerial resources and future prospects of the existing or proposed institutions.

(C) *Convenience and needs of community.* The OCC considers the probable effects of the business combination on the convenience and needs of the community served. The filer must describe these effects in its application, including any planned office closings or reductions in services following the business combination and the likely impact on the community. The OCC also considers additional relevant factors, including the resulting national bank's or Federal savings association's ability and plans to provide expanded or less costly services to the community.

(D) *Money laundering.* The OCC considers the effectiveness of any insured depository institution involved in the business combination in combating money laundering activities, including in overseas branches.

(E) *Financial stability.* The OCC considers the risk to the stability of the United States banking and financial system.

(F) *Deposit concentration limit.* The OCC will not approve a transaction that would violate the deposit concentration limit in 12 U.S.C. 1828(c)(13) for interstate merger transactions, as defined in 12 U.S.C. 1828(c)(13)(C)(i).

(iii) *Community Reinvestment Act*—(A) *In General.* The OCC takes into account the filer's Community Reinvestment Act (CRA) record of performance in considering an application for a business combination. The OCC's conclusion of whether the CRA performance is or is not consistent with approval of an application is considered in conjunction with the other factors of this section.

(B) *Interstate mergers under 12 U.S.C. 1831u.* The OCC considers the CRA record of performance of the filer and its resulting bank affiliates and the filer's record of compliance with applicable State community reinvestment laws when required by 12 U.S.C. 1831u(b)(3).

(C) *CRA Sunshine.* A filer must disclose whether it has entered into and disclosed a covered agreement, as defined in 12 CFR 35.2, in accordance with 12 CFR 35.6 and 35.

(iv) *Interstate mergers under 12 U.S.C. 1831u.* The OCC considers the standards and requirements contained in 12 U.S.C. 1831u for interstate merger transactions between insured banks, when applicable.

(2) *Acquisition and retention of branches.* A filer must disclose the location of any branch it will acquire and retain in a business combination, including approved but unopened branches. The OCC considers the acquisition and retention of a branch under the standards set out in § 5.30 or § 5.31, as applicable, but it does not require a separate application.

(3) *Subsidiaries.* (i) A filer must identify any subsidiary, financial subsidiary investment, bank service company investment, service corporation investment, or other equity investment to be acquired in a business combination and state the activities of each subsidiary or other company in which the filer would be acquiring an investment. The OCC does not require a separate application or notice under §§ 5.34, 5.35, 5.36, 5.38, 5.39, 5.58, and 5.59.

(ii) An national bank filer proposing to acquire, through a business combination, a subsidiary, financial subsidiary investment, bank service company investment, service corporation investment, or other equity investment of any entity other than a national bank must provide the same information and analysis of the subsidiary's activities, or of the investment, that would be required if the filer were establishing the subsidiary, or making such investment, pursuant to §§ 5.34, 5.35, 5.36, or 5.39.

(iii) A Federal savings association filer proposing to acquire, through a business combination, a subsidiary, bank service company investment, service corporation investment, or other equity investment of any entity other than a Federal savings association must provide the same information and analysis of the subsidiary's activities, or of the investment, that would be required if the filer were establishing the subsidiary, or making such investment, pursuant to §§ 5.35, 5.38, 5.58, or 5.59.

(4) *Interim national bank or interim Federal savings association*—(i) *Application.* A filer for a business combination that plans to use an interim national bank or interim Federal savings association to accomplish the transaction must file an application to organize an interim national bank or interim Federal savings association as part of the application for the related business combination.

(ii) *Conditional approval.* The OCC grants conditional preliminary approval to form an interim national bank or interim Federal savings association when it acknowledges receipt of the application for the related business combination.

(iii) *Corporate status.* An interim national bank or interim Federal savings association becomes a legal entity and may enter into legally valid agreements when it has filed, and the OCC has accepted, the interim national bank's duly executed articles of association and organization certificate or the Federal savings association's charter and bylaws. OCC acceptance occurs:

(A) On the date the OCC advises the interim national bank that its articles of association and organization certificate are acceptable or advises the interim Federal savings association that its charter and bylaws are acceptable; or

(B) On the date the interim national bank files articles of association and an organization certificate that conform to the form for those documents provided by the OCC in the Comptroller's Licensing Manual or the date the interim Federal savings association files a charter and bylaws that conform to the requirements set out in this part 5.

(iv) *Other corporate procedures.* A filer should consult the Comptroller's Licensing Manual to determine what other information is necessary to complete the chartering of the interim national bank as a national bank or the interim Federal savings association as a Federal savings association.

(5) *Nonconforming assets.* (i) A filer must identify any nonconforming activities and assets, including nonconforming subsidiaries, of other institutions involved in the business combination that will not be disposed of or discontinued prior to consummation of the transaction. The OCC generally requires a national bank or Federal savings association to divest or conform nonconforming assets, or discontinue nonconforming activities, within a reasonable time following the business combination.

(ii) Any resulting Federal savings association must conform to the requirements of sections 5(c) and 10(m) of the Home Owners' Loan Act (12 U.S.C. 1464(c) and 1467a(m)) within the time period prescribed by the OCC.

(6) *Fiduciary powers.* (i) A filer must state whether the resulting national bank or Federal savings association intends to exercise fiduciary powers pursuant to § 5.26(b).

(ii) If a filer intends to exercise fiduciary powers after the combination and requires OCC approval for such powers, the filer must include the information required under § 5.26(e)(2).

(7) *Expiration of approval.* Approval of a business combination, and conditional approval to form an interim

national bank or interim Federal savings association, if applicable, expires if the business combination is not consummated within six months after the date of OCC approval, unless the OCC grants an extension of time.

(8) *Adequacy of disclosure.* (i) A filer must inform shareholders of all material aspects of a business combination and must comply with any applicable requirements of the Federal securities laws and securities regulations of the OCC. Accordingly, a filer must ensure that all proxy and information statements prepared in connection with a business combination do not contain any untrue or misleading statement of a material fact, or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

(ii) A national bank or Federal savings association filer with one or more classes of securities subject to the registration provisions of section 12(b) or (g) of the Securities Exchange Act of 1934, 15 U.S.C. 78 l(b) or 78 l(g), must file preliminary proxy material or information statements for review with the Director, Bank Advisory, OCC, Washington, DC 20219. Any other filer must submit the proxy materials or information statements it uses in connection with the combination to the appropriate OCC licensing office no later than when the materials are sent to the shareholders.

(f) *Exceptions to rules of general applicability*—(1) *National bank or Federal savings association filer*—(i) *In general.* Sections 5.8, 5.10, and 5.11 do not apply to this section. However, if the OCC concludes that an application presents significant or novel policy, supervisory, or legal issues, the OCC may determine that some or all provisions in §§ 5.8, 5.10 and 5.11 apply.

(ii) *Statutory notice.* If an application is subject to the Bank Merger Act or to another statute that requires notice to the public, a national bank or Federal savings association filer must follow the public notice requirements contained in 12 U.S.C. 1828(c)(3) or the other statute and §§ 5.8(b) through 5.8(e), 5.10, and 5.11.

(2) *Interim national bank or interim Federal savings association.* Sections 5.8, 5.10, and 5.11 do not apply to an application to organize an interim national bank or interim Federal savings association. However, if the OCC concludes that an application presents significant or novel policy, supervisory, or legal issues, the OCC may determine that any or all parts of §§ 5.8, 5.10, and 5.11 apply. The OCC treats an application to organize an interim national bank or interim Federal savings association as part of the related application to engage in a business combination and does not require a separate public notice and public comment process.

(3) *State bank, or State savings association, State trust company, or credit union as resulting institution.* Sections 5.7 through 5.13 do not apply to transactions covered by paragraphs (g)(6) or (g)(7) of this section.

(g) *Provisions governing consolidations and mergers with different types of entities*—(1) *Consolidations and mergers under 12 U.S.C. 215 or 215a of a national bank with other national banks and State banks as defined in 12 U.S.C. 215b(1) resulting in a national bank.* A national bank entering into a consolidation or merger authorized pursuant to 12 U.S.C. 215 or 215a, respectively, is subject to the approval procedures and requirements with respect to treatment of dissenting shareholders set forth in those provisions.

(2) *Interstate consolidations and mergers under 12 U.S.C. 215a–1 resulting in a national bank*—(i) With the approval of the OCC, an insured national bank may consolidate or merge with an insured out-of-State bank, as defined in 12 U.S.C. 1831u(g)(8), with the national bank as the resulting institution.

(ii) Unless it has elected to follow the procedures set out in paragraph (h) of this section, the resulting national bank entering into the consolidation or merger must comply with the procedures of 12 U.S.C. 215 or 215a, as applicable.

(iii) Unless it has elected to follow the procedures applicable to State bank under paragraph (h)(1)(i), any national bank that will not be the resulting bank in a consolidation or merger pursuant to 12 U.S.C. 215a–1 must comply with the procedures of 12 U.S.C. 215 or 215a, as applicable.

(iv) *Corporate existence.* The corporate existence of each bank participating in a consolidation or merger continues in the resulting national bank, and all the rights, franchises, property, appointments, liabilities, and other interests of the participating bank are transferred to the resulting national bank, as set forth in 12 U.S.C. 215(b), (e) and (f) or 12 U.S.C. 215a(a), (e), and (f), as applicable.

(3) *Consolidations and mergers of a national bank with Federal savings associations under 12 U.S.C. 215c resulting in a national bank.* (i) With the approval of the OCC, any national bank and any Federal savings association may consolidate or merge with a national bank as the resulting institution by complying with the following procedures:

(A) Unless it has elected to follow the procedures set out in paragraph (h) of this section, a national bank entering into the consolidation or merger must follow the procedures of 12 U.S.C. 215 or 215a, respectively, as if the Federal savings association were a national bank.

(B)(*1*) A Federal savings association entering into the consolidation or merger must comply with the requirements of paragraph (n) of this section and follow the procedures set out in paragraph (o) of this section.

(*2*) For purposes of this paragraph (g)(3), a combination in which a national bank acquires all or substantially all of the assets, or assumes all or substantially all of the liabilities, of a Federal savings association will be treated as a consolidation for the Federal savings association.

(ii)(A) Unless the national bank has elected to follow the procedures set out in paragraph (h) of this section, national bank shareholders who dissent from a plan to consolidate may receive in cash the value of their national bank shares if they comply with the requirements of 12 U.S.C. 215 as if the Federal savings association were a national bank.

(B) Unless the Federal savings association has elected to follow the procedures applicable to State savings associations pursuant to paragraph (o)(1)(i)(A) of this section, Federal savings association shareholders who dissent from a plan to consolidate or merge may receive in cash the value of their Federal savings association shares if they comply with the requirements of 12 U.S.C. 215 or 215a as if the Federal savings association were a national bank.

(C) Unless the national bank or Federal savings association has elected to follow the procedures applicable to State banks or State savings associations, respectively, pursuant to paragraph (h)(1)(i) or (o)(1)(i)(A) of this section, respectively, the OCC will conduct an appraisal or reappraisal of the value of a national bank or Federal savings association held by dissenting shareholders in accordance with the provisions of 12 U.S.C. 215 or 215a, as applicable, except that the costs and expenses of any appraisal or reappraisal may be apportioned and assessed by the Comptroller as he or she may deem equitable against all or some of the parties. In making this determination the Comptroller will consider whether any party has acted arbitrarily or not in

good faith in respect to the rights provided by this paragraph.

(iii) The consolidation or merger agreement must address the effect upon, and the terms of the assumption of, any liquidation account of any participating institution by the resulting institution.

(4) *Mergers of a national bank with its nonbank affiliates under 12 U.S.C. 215a–3 resulting in a national bank.* (i) With the approval of the OCC, a national bank may merge with one or more of its nonbank affiliates, with the national bank as the resulting institution, in accordance with the provisions of this paragraph, provided that the law of the State or other jurisdiction under which the nonbank affiliate is organized allows the nonbank affiliate to engage in such mergers. If the national bank is an insured bank, the transaction is also subject to approval by the FDIC under the Bank Merger Act, 12 U.S.C. 1828(c).

(ii) Unless it has elected to follow the procedures set out in paragraph (h) of this section, a national bank entering into the merger must follow the procedures of 12 U.S.C. 215a as if the nonbank affiliate were a State bank, except as otherwise provided herein.

(iii) A nonbank affiliate entering into the merger must follow the procedures for such mergers set out in the law of the State or other jurisdiction under which the nonbank affiliate is organized.

(iv) The rights of dissenting shareholders and appraisal of dissenters' shares of stock in the nonbank affiliate entering into the merger must be determined in the manner prescribed by the law of the State or other jurisdiction under which the nonbank affiliate is organized.

(v) The corporate existence of each institution participating in the merger continues in the resulting national bank, and all the rights, franchises, property, appointments, liabilities, and other interests of the participating institutions are transferred to the resulting national bank, as set forth in 12 U.S.C. 215a(a), (e), and (f) in the same manner and to the same extent as in a merger between a national bank and a State bank under 12 U.S.C. 215a(a), as if the nonbank affiliate were a State bank.

(5) *Mergers of an uninsured national bank with its nonbank affiliates under 12 U.S.C. 215a–3 resulting in a nonbank affiliate.* (i) With the approval of the OCC, a national bank that is not an insured bank as defined in 12 U.S.C. 1813(h) may merge with one or more of its nonbank affiliates, with the nonbank affiliate as the resulting entity, in accordance with the provisions of this paragraph, provided that the law of the State or other jurisdiction under which the nonbank affiliate is organized allows the nonbank affiliate to engage in such mergers.

(ii) Unless it has elected to follow the procedures applicable to State banks under paragraph (h)(1)(i) of this section, a national bank entering into the merger must follow the procedures of 12 U.S.C. 214a, as if the nonbank affiliate were a State bank, except as otherwise provided in this section.

(iii) A nonbank affiliate entering into the merger must follow the procedures for such mergers set out in the law of the State or other jurisdiction under which the nonbank affiliate is organized.

(iv)(A) National bank shareholders who dissent from an approved plan to merge may receive in cash the value of their national bank shares if they comply with the requirements of 12 U.S.C. 214a as if the nonbank affiliate were a State bank. The OCC may conduct an appraisal or reappraisal of dissenters' shares of stock in a national bank involved in the merger if all parties agree that the determination is final and binding on each party and agree on how the total expenses of the OCC in making the appraisal will be divided among the parties and paid to the OCC.

(B) The rights of dissenting shareholders and appraisal of dissenters' shares of stock in the nonbank affiliate involved in the merger must be determined in the manner prescribed by the law of the State or other jurisdiction under which the nonbank affiliate is organized.

(v) The corporate existence of each entity participating in the merger continues in the resulting nonbank affiliate, and all the rights, franchises, property, appointments, liabilities, and other interests of the participating national bank are transferred to the resulting nonbank affiliate as set forth in 12 U.S.C. 214b, in the same manner and to the same extent as in a merger between a national bank and a State bank under 12 U.S.C. 214a, as if the nonbank affiliate were a State bank.

(6) *Consolidation or merger of a Federal savings association with another Federal savings association, a national bank, a State bank, a State savings bank, a State savings association, a State trust company, or a credit union resulting in a Federal savings association.* (i) With the approval of the OCC, a Federal savings association may consolidate or merge with another Federal savings association, a national bank, a State bank, a State savings association, a State trust company, or a credit union with the Federal savings association as the resulting institution by complying with the following procedures:

(A)(*1*) The filer Federal savings association must comply with the requirements of paragraph (n) of this section and follow the procedures set out in paragraph (o) of this section.

(*2*) For purposes of this paragraph (g)(3), a combination in which a Federal savings association acquires all or substantially all of the assets, or assumes all or substantially all of the liabilities, of another other participating institution will be treated as a consolidation for the acquiring Federal savings association and as a consolidation by a Federal savings association whose assets are acquired, if any.

(B)(*1*) Unless it has elected to follow the procedures applicable to State banks under paragraph (h)(1)(i) of this section, a national bank entering into a merger or consolidation with a Federal savings association when the resulting institution will be a Federal savings association must comply with the requirements of 12 U.S.C. 214a and 12 U.S.C. 214c as if the Federal savings association were a State bank. However, for these purposes the references in 12 U.S.C. 214c to ''law of the State in which such national banking association is located'' and ''any State authority'' mean ''laws and regulations governing Federal savings associations'' and ''Office of the Comptroller of the Currency'' respectively.

(*2*) Unless the national bank has elected to follow the procedures applicable to State banks under paragraph (h)(1)(i) of this section, national bank shareholders who dissent from a plan to merge or consolidate may receive in cash the value of their national bank shares if they comply with the requirements of 12 U.S.C. 214a as if the Federal savings association were a State bank. The OCC will conduct an appraisal or reappraisal of the value of the national bank shares held by dissenting shareholders in accordance with the provisions of 12 U.S.C. 214a, except that the costs and expenses of any appraisal or reappraisal may be apportioned and assessed by the Comptroller as he or she may deem equitable against all or some of the parties. In making this determination the Comptroller will consider whether any party has acted arbitrarily or not in good faith in respect to the rights provided by this paragraph.

(C)(*1*) A Federal savings association entering into a merger or consolidation with another Federal savings association when the resulting institution will be the other Federal savings association

must comply with the requirements of paragraph (n) of this section and the procedures of paragraph (o) of this section.

(*2*) Unless the Federal savings association has elected to follow the procedures applicable to State savings associations under paragraph (o)(1)(i)(A), Federal savings association shareholders who dissent from a plan to merge or consolidate may receive in cash the value of their Federal savings association shares if they comply with the requirements of 12 U.S.C. 214a as if the other Federal savings association were a State bank. The OCC will conduct an appraisal or reappraisal of the value of the Federal savings association shares held by dissenting shareholders in accordance with the provisions of 12 U.S.C. 214a, except that the costs and expenses of any appraisal or reappraisal may be apportioned and assessed by the Comptroller as he or she may deem equitable against all or some of the parties. In making this determination the Comptroller will consider whether any party has acted arbitrarily or not in good faith in respect to the rights provided by this paragraph.

(*3*) Unless the Federal savings association has elected to follow the procedures applicable to State savings associations under paragraph (o)(1)(i)(A), the plan of merger or consolidation must provide the manner of disposing of the shares of the resulting Federal savings association not taken by the dissenting shareholders of the Federal savings association.

(D)(*1*) A State bank, State savings association, State trust company, or credit union entering into a consolidation or merger with a Federal savings association when the resulting institution will be a Federal savings association must follow the procedures for such consolidations or mergers set out in the law of the State or other jurisdiction under which the State bank, State savings association, State trust company, or credit union is organized.

(*2*) The rights of dissenting shareholders and appraisal of dissenters' shares of stock in the State bank, State savings association, or State trust company, entering into the consolidation or merger will be determined in the manner prescribed by the law of the State or other jurisdiction under which the State bank, State savings association, or State trust company is organized.

(ii) The consolidation or merger agreement must address the effect upon, and the terms of the assumption of, any liquidation account of any participating institution by the resulting institution.

(7) *Consolidation or merger under 12 U.S.C. 214a of a national bank with a State bank resulting in a State bank as defined in 12 U.S.C. 214(a)*—(i) *In general.* Prior OCC approval is not required for the merger or consolidation of a national bank with a State bank as defined in 12 U.S.C. 214(a). Termination of a national bank's existence and status as a national banking association is automatic, and its charter cancelled, upon completion of the statutory and regulatory requirements for engaging in the consolidation or merger and consummation of the consolidation or merger.

(ii) *Procedures.* A national bank desiring to merge or consolidate with a State bank as defined in 12 U.S.C. 214(a) when the resulting institution will be a State bank must comply with the requirements and follow the procedures of 12 U.S.C. 214a and 214c and must provide notice to the OCC under paragraph (k) of this section.

(iii) *Dissenters' rights and appraisal procedures.* National bank shareholders who dissent from a plan to merge or consolidate may receive in cash the value of their national bank shares if they comply with the requirements of 12 U.S.C. 214a. The OCC conducts an appraisal or reappraisal of the value of the national bank shares held by dissenting shareholders as provided for in 12 U.S.C. 214a.

(iv) *Liquidation account.* The consolidation or merger agreement must address the effect upon, and the terms of the assumption of, any liquidation account of any participating institution by the resulting institution.

(8) *Interstate consolidations and mergers between an insured national bank and an insured State bank resulting in a State bank.*—(i) *In general.* Prior OCC approval is not required for the merger or consolidation of an insured national bank with an insured out-of-state State bank, as defined in 12 U.S.C. 1831u(g)(8), with the State bank as the resulting institution, that has been approved by the appropriate Federal banking agency for the State bank. Termination of a national bank's existence and status as a national banking association is automatic, and its charter cancelled, upon completion of the statutory and regulatory requirements for engaging in the consolidation or merger and consummation of the consolidation or merger.

(ii) *Procedures.* Unless it has elected to follow the procedures applicable to State banks under paragraph (h)(1)(i) of this section, the national bank entering into the consolidation or merger must comply with the procedures of 12 U.S.C. 214a, as applicable.

(iii) *Notice.* The national bank must provide a notice to the OCC under paragraph (k) of this section.

(9) *Consolidation or merger of a Federal savings association with a State bank, State savings bank, State savings association, State trust company, or credit union resulting in a State bank, State savings bank, State savings association, State trust company, or credit union*—(i) *Policy.* Prior OCC approval is not required for the merger or consolidation of a Federal savings association with a State bank, State savings bank, State savings association, State trust company, or credit union when the resulting institution will be a State institution or credit union. Termination of a national bank's or Federal savings association's existence and status as a national banking association or Federal savings association is automatic, and its charter cancelled, upon completion of the statutory and regulatory requirements for engaging in the consolidation or merger and consummation of the consolidation or merger.

(ii) *Procedures.* (A) A Federal savings association desiring to merge or consolidate with a State bank, State savings bank, State savings association, State trust company, or credit union when the resulting institution will be a State institution or credit union must comply with the requirements of paragraph (n) of this section and the procedures of paragraph (o) of this section and must provide notice to the OCC under paragraph (k) of this section.

(B) For purposes of this paragraph (g)(9), a combination in which a State bank, State savings bank, State savings association, State trust company, or credit union acquires all or substantially all of the assets, or assumes all or substantially all of the liabilities, of a Federal savings association must be treated as a consolidation by the Federal savings association.

(iii) *Dissenters' rights and appraisal procedures.* (A) Unless the Federal savings association has elected to follow the procedures applicable to State savings associations under paragraph (o)(1)(i)(A), Federal savings association shareholders who dissent from a plan to merge or consolidate may receive in cash the value of their Federal savings association shares if they comply with the requirements of 12 U.S.C. 214a as if the Federal savings association were a national bank. The OCC conducts an appraisal or reappraisal of the value of the Federal savings association shares held by dissenting shareholders only if all parties agree that the determination

will be final and binding. The parties also must agree on how the total expenses of the OCC in making the appraisal will be divided among the parties and paid to the OCC.

(B) Unless the Federal savings association has elected to follow the procedures applicable to State savings associations under paragraph (o)(1)(i)(A), the plan of merger or consolidation must provide the manner of disposing of the shares of the resulting State institution not taken by the dissenting shareholders of the Federal savings association.

(iv) *Liquidation account.* The consolidation or merger agreement must address the effect upon, and the terms of the assumption of, any liquidation account of any participating institution by the resulting institution.

(h) *Procedural requirements for national bank combinations*—(1) *Permissible elections.* A national bank participating in a combination pursuant to paragraph (g)(2), (g)(3), (g)(4), (g)(5), (g)(6), or (g)(8) of this section may elect to follow with respect to the combination:

(i) The procedures applicable to a State bank chartered by the State where the national bank's main office is located; or

(ii) Paragraph (p) of this section, if applicable.

(2) *Rules of Construction.* For purposes of paragraph (h)(1) of this section:

(i) Any references to a State agency in the applicable State procedures should be read as referring to the OCC; and

(ii) Unless otherwise specified in Federal law, all filings required by the applicable State procedures must be made to the OCC.

(i) *Expedited review for business reorganizations and streamlined applications.* A filing that qualifies as a business reorganization as defined in paragraph (d)(3) of this section, or a filing that qualifies as a streamlined application as described in paragraph (j) of this section, is deemed approved by the OCC as of the 15th day after the close of the comment period, unless the OCC notifies the filer that the filing is not eligible for expedited review, or the expedited review process is extended, under § 5.13(a)(2). An application under this paragraph must contain all necessary information for the OCC to determine if it qualifies as a business reorganization or streamlined application.

(j) *Streamlined applications.* (1) A filer may qualify for a streamlined business combination application in the following situations:

(i) At least one party to the transaction is an eligible bank or eligible savings association, and all other parties to the transaction are eligible banks, eligible savings associations, or eligible depository institutions, the resulting national bank or resulting Federal savings association will be well capitalized immediately following consummation of the transaction, and the total assets of the target institution are no more than 50 percent of the total assets of the acquiring bank or Federal savings association, as reported in each institution's Consolidated Report of Condition and Income filed for the quarter immediately preceding the filing of the application;

(ii) The acquiring bank or Federal savings association is an eligible bank or eligible savings association, the target bank or savings association is not an eligible bank, eligible savings association, or an eligible depository institution, the resulting national bank or resulting Federal savings association will be well capitalized immediately following consummation of the transaction, and the filers in a prefiling communication request and obtain approval from the appropriate OCC licensing office to use the streamlined application;

(iii) The acquiring bank or Federal savings association is an eligible bank or eligible savings association, the target bank or savings association is not an eligible bank, eligible savings association, or an eligible depository institution, the resulting bank or resulting Federal savings association will be well capitalized immediately following consummation of the transaction, and the total assets acquired do not exceed 10 percent of the total assets of the acquiring national bank or acquiring Federal savings association, as reported in each institution's Consolidated Report of Condition and Income filed for the quarter immediately preceding the filing of the application; or

(iv) In the case of a transaction under paragraph (g)(4) of this section, the acquiring bank is an eligible bank, the resulting national bank will be well capitalized immediately following consummation of the transaction, the filers in a prefiling communication request and obtain approval from the appropriate OCC licensing office to use the streamlined application, and the total assets acquired do not exceed 10 percent of the total assets of the acquiring national bank, as reported in the bank's Consolidated Report of Condition and Income filed for the quarter immediately preceding the filing of the application.

(2) Notwithstanding paragraph (j)(1) of this section, a filer does not qualify for a streamlined business combination application if the transaction is part of a conversion under part 192 of this chapter.

(3) When a business combination qualifies for a streamlined application, the filer should consult the Comptroller's Licensing Manual to determine the abbreviated application information required by the OCC. The OCC encourages prefiling communications between the filers and the appropriate OCC licensing office before filing under paragraph (j) of this section.

(k) *Exit notice to OCC*—(1) *Notice required.* As provided in paragraphs (g)(7)(ii), (g)(8)(iii), and (g)(9)(ii) of this section, a national bank or Federal savings association engaging in a consolidation or merger in which it is not the filer and the resulting institution must file a notice rather than an application to the appropriate OCC licensing office advising of its intention.

(2) *Timing of notice.* The national bank or Federal savings association must submit the notice at the time the application to merge or consolidate is filed with the responsible agency under the Bank Merger Act, 12 U.S.C. 1828(c), or if there is no such filing then no later than 30 days prior to the effective date of the merger or consolidation.

(3) *Content of notice.* The notice must include the following: (i)(A) A short description of the material features of the transaction, the identity of the acquiring institution, the identity of the State or Federal regulator to whom the application was made, and the date of the application; or

(B) A copy of a filing made with another Federal or State regulatory agency seeking approval from that agency for the transaction under the Bank Merger Act or other applicable statute;

(ii) The planned consummation date for the transaction;

(iii) Information to demonstrate compliance by the national bank or Federal savings association with applicable requirements to engage in the transactions (*e.g.,* board approval or shareholder or accountholder requirements); and

(iv) If the national bank or Federal savings association submitting the notice maintains a liquidation account established pursuant to part 192 of this chapter, the notice must state that the resulting institution will assume such liquidation account.

(4) *Termination of status.* The national bank or Federal savings association must advise the OCC when

the transaction is about to be consummated. Termination of a national bank's or Federal savings association's existence and status as a national banking association or Federal savings association is automatic, and its charter cancelled, upon completion of the statutory and regulatory requirements and consummation of the consolidation or merger. When the national bank or Federal savings association files the notice under paragraph (k)(2) of this section, the OCC provides instructions to the national bank or Federal savings association for terminating its status as a national bank or Federal savings, including surrendering its charter to the OCC immediately after consummation of the transaction.

(5) *Expiration.* If the action contemplated by the notice is not completed within six months after the OCC's receipt of the notice, a new notice must be submitted to the OCC, unless the OCC grants an extension of time.

(l) *Mergers and consolidations; transfer of assets and liabilities to the resulting institution.* (1) In any consolidation or merger in which the resulting institution is a national bank or Federal savings association, on the effective date of the merger or consolidation, all assets and property (real, personal and mixed, tangible and intangible, choses in action, rights, and credits) then owned by each participating institution or which would inure to any of them, immediately by operation of law and without any conveyance, transfer, or further action, become the property of the resulting national bank or Federal savings association. The resulting national bank or Federal savings association is deemed to be a continuation of the entity of each participating institution, and will succeed to such rights and obligations of each participating institution and the duties and liabilities connected therewith.

(2) The authority in paragraph (l)(1) of this section is in addition to any authority granted by applicable statutes for specific transactions and is subject to the National Bank Act, the Home Owners' Loan Act, and other applicable statutes.

(m) *Certification of combination; effective date.* (1) When a national bank or Federal savings association is the filer and will be the resulting entity in a consolidation or merger, after receiving approval from the OCC, it must complete any remaining steps needed to complete the transaction, provide the OCC with a certification that all other required regulatory or shareholder approvals have been obtained, and inform the OCC of the planned consummation date.

(2) When the transaction is consummated, the filer must notify the OCC of the consummation date. The OCC will issue a letter certifying that the combination was effective on the date specified in the filer's notice.

(n) *Authority for and certain limits on business combinations and other transactions by Federal savings associations.* (1) Federal savings associations may enter into business combinations only in accordance with this section, the Bank Merger Act, and sections 5(d)(3)(A) and 10(s) of the Home Owners' Loan Act.

(2) A Federal savings association may consolidate or merge with another depository institution, a State trust company or a credit union, may engage in another business combination listed in paragraphs (d)(2)(iv) and (v) of this section, or may engage in any other combination listed in paragraph (d)(10), provided that:

(i) The combination is in compliance with, and receives all approvals required under, any applicable statutes and regulations;

(ii) Any resulting Federal savings association meets the requirements for insurance of accounts; and

(iii) A consolidation or merger involving a mutual savings association or the transfer of all or substantially all of the deposits of a mutual savings association must result in a mutually held depository institution that is insured by the FDIC, unless:

(A) The transaction is approved under part 192 governing mutual to stock conversions;

(B) The transaction involves a mutual holding company reorganization under 12 U.S.C. 1467a(o) or a similar transaction under State law; or

(C) The transaction is part of a voluntary liquidation for which the OCC has provided non-objection under § 5.48.

(3) Where the resulting institution is a Federal mutual savings association, the OCC may approve a temporary increase in the number of directors of the resulting institution provided that the association submits a plan for bringing the board of directors into compliance with the requirements of § 5.21(e) within a reasonable period of time.

(4)(i) The Federal savings associations described in paragraph (n)(4)(ii) of this section below must provide affected accountholders with a notice of a proposed account transfer and an option of retaining the account in the transferring Federal savings association. The notice must allow affected accountholders at least 30 days to consider whether to retain their accounts in the transferring Federal savings association.

(ii) The following savings associations must provide the notices:

(A) A Federal mutual savings association transferring account liabilities to an institution the accounts of which are not insured by the Deposit Insurance Fund or the National Credit Union Share Insurance Fund; and

(B) Any Federal mutual savings association transferring account liabilities to a stock form depository institution.

(o) *Procedural requirements for Federal savings association approval of combinations*—(1) *In general*—(i) *Permissible elections.* A Federal savings association participating in a combination may elect to follow the applicable procedures with respect to the combination:

(A) The procedures applicable to a State savings association chartered by the State where the Federal savings association's home office is located: or

(B) The standard procedures provided in paragraph (o)(2) of this section.

(ii) *Rules of Construction.* For purposes of paragraph (o)(1)(i) of this section:

(A) Any references to a State agency in the applicable State procedures should be read as referring to the OCC; and

(B) Unless otherwise specified in Federal law, all filings required by the applicable State procedures must be made to the OCC.

(2) *Standard procedures*—(i) *Board approval.* Before a Federal savings association files a notice or application for any consolidation or merger, the combination and combination agreement must be approved by majority vote of the entire board of each constituent Federal savings association in the case of Federal stock savings associations or a two-thirds vote of the entire board of each constituent Federal savings association in the case of Federal mutual savings associations.

(ii) *Shareholder vote*—(A) *General rule.* Except as otherwise provided in this paragraph (o)(2)(ii), an affirmative vote of two-thirds of the outstanding voting stock of any constituent Federal stock savings association is required for approval of a consolidation or merger. If any class of shares is entitled to vote as a class pursuant to § 5.22, an affirmative vote of a majority of the shares of each voting class and two-thirds of the total voting shares is required. The required vote must be taken at a meeting of the savings association.

(B) *General exception.* Stockholders of the resulting Federal stock savings association need not authorize a consolidation or merger if the transaction meets the requirements of paragraph (p) of this section.

(C) *Exceptions for certain combinations involving an interim association.* Stockholders of a Federal stock savings association need not authorize by a two-thirds affirmative vote consolidations or mergers involving an interim Federal savings association or interim State savings association when the resulting Federal stock savings association is acquired pursuant to the regulations of the Board of Governors of the Federal Reserve System at 12 CFR 238.15(e) (relating to the creation of a savings and loan holding company by a savings association). In those cases, an affirmative vote of 50 percent of the shares of the outstanding voting stock of the Federal stock savings association plus one affirmative vote is required. If any class of shares is entitled to vote as a class pursuant to § 5.22(g), an affirmative vote of 50 percent of the shares of each voting class plus one affirmative vote is required. The required votes must be taken at a meeting of the association.

(3) *Change of name or home office.* If the name of the resulting Federal savings association or the location of the home office of the resulting Federal savings association will change as a result of the business combination, the resulting Federal savings association must amend its charter accordingly.

(4) *Mutual member vote.* Notwithstanding any other provision of this section, the OCC may require that a consolidation, merger or other business combination be submitted to the voting members of any mutual savings association participating in the proposed transaction at duly called meetings and that the transaction, to be effective, must be approved by such voting members.

(p) *Exception to voting requirements.* Shareholders of a resulting national bank or Federal stock savings association need not authorize a consolidation or merger if:

(1) Either:

(i) The transaction does not involve an interim bank or an interim savings association; or

(ii) The transaction involves an interim bank or an interim savings association and the existing shareholders of the national bank or Federal stock savings association will directly hold the shares of the resulting national bank or Federal stock savings association;

(2) The national bank's articles of association or the Federal stock savings association's charter, as applicable, is not changed;

(3) Each share of stock outstanding immediately prior to the effective date of the consolidation or merger is to be an identical outstanding share or a treasury share of the resulting national bank or Federal stock savings association after such effective date; and

(4) Either:

(i) No shares of voting stock of the resulting national bank or Federal stock savings association and no securities convertible into such stock are to be issued or delivered under the plan of combination; or

(ii) The authorized unissued shares or the treasury shares of voting stock of the resulting national bank or Federal stock savings association to be issued or delivered under the plan of merger or consolidation, plus those initially issuable upon conversion of any securities to be issued or delivered under such plan, do not exceed 20 percent of the total shares of voting stock of such national bank or Federal stock savings association outstanding immediately prior to the effective date of the consolidation or merger.

■ 24. Amend § 5.34 by:

■ a. In paragraph (a), removing ''3101 *et seq.*'' and adding in its place ''3102(b)'';

■ b. In paragraph (c), removing the phrase ''(e)(5)(i)(B) of this section shall apply'' and adding in its place the phrase ''(f)(1)(ii) of this section applies'';

■ c. Revising paragraph (d);

■ d. In paragraphs (e)(1)(i)(B), (e)(3), and (e)(4)(ii), removing the word ''state'' and adding in its place the word ''State'' each time it;

■ e. Revising paragraph (e)(2)(i)(A);

■ f. In paragraph (e)(2)(i)(C), removing the phrase ''generally accepted accounting principles (GAAP)'' and adding in its place the word ''GAAP'';

■ g. In paragraph (e)(2)(ii) introductory text, removing the word ''subsidiaries'' and adding in its place the word ''entities'';

■ h. Removing the word ''and'' in paragraph (e)(2)(ii)(A);

■ i. Removing the period and adding in its place ''; and'' in paragraph (e)(2)(ii)(B);

■ j. Adding paragraph (e)(2)(ii)(C);

■ k. In paragraph (e)(2)(iii)(B), removing the word ''shall'' and adding in its place the word ''may'';

■ l. In paragraphs (e)(4)(i) and (e)(4)(ii), removing the word ''shall'' and adding in its place the word ''will'';

■ m. Removing paragraph (e)(7);

■ n. Redesignating paragraphs (e)(5) and (e)(6) as paragraphs (f) and (g), respectively ; and

■ o. Revising newly redesignated paragraph (f).

The addition and revisions read as follows.

§ 5.34 Operating subsidiaries of a national bank.

* * * * *

(d) *Definition.* For purposes of this section, *authorized product* means a product that would be defined as insurance under section 302(c) of the Gramm-Leach-Bliley Act (15 U.S.C. 6712) that, as of January 1, 1999, the OCC had determined in writing that national banks may provide as principal or national banks were in fact lawfully providing the product as principal, and as of that date no court of relevant jurisdiction had, by final judgment, overturned a determination by the OCC that national banks may provide the product as principal. An authorized product does not include title insurance, or an annuity contract the income of which is subject to treatment under section 72 of the Internal Revenue Code of 1986 (26 U.S.C. 72).

(e) * * *

(2) * * *

(i) * * *

(A) The bank has the ability to control the management and operations of the subsidiary, and no other person or entity has the ability to exercise effective control or influence over the management or operations of the subsidiary to an extent equal to or greater than that of the bank or an operating subsidiary thereof;

* * * * *

(ii) * * *

(C) A trust formed for purposes of securitizing assets held by the bank as part of its banking business.

* * * * *

(f) *Procedures*—(1) *Application required.* (i) Except for an operating subsidiary that qualifies for the notice procedures in paragraph (f)(2) of this section or is exempt from application or notice requirements under paragraph (f)(6) of this section, a national bank must first submit an application to, and receive prior approval from, the OCC to establish or acquire an operating subsidiary or to perform a new activity in an existing operating subsidiary.

(ii) The application must explain, as appropriate, how the bank ''controls'' the enterprise, describing in full detail structural arrangements where control is based on factors other than bank ownership of more than 50 percent of the voting interest of the subsidiary and the ability to control the management and operations of the subsidiary by holding voting interests sufficient to select the number of directors needed to

control the subsidiary's board and to select and terminate senior management. In the case of a limited partnership or limited liability company that does not qualify for the notice procedures set forth in paragraph (f)(2) of this section, the bank must provide a statement explaining why it is not eligible. The application also must include a complete description of the bank's investment in the subsidiary, the proposed activities of the subsidiary, the organizational structure and management of the subsidiary, the relations between the bank and the subsidiary, and other information necessary to adequately describe the proposal. To the extent that the application relates to the initial affiliation of the bank with a company engaged in insurance activities, the bank must describe the type of insurance activity in which the company is engaged and has present plans to conduct. The bank must also list for each State the lines of business for which the company holds, or will hold, an insurance license, indicating the State where the company holds a resident license or charter, as applicable. The application must state whether the operating subsidiary will conduct any activity at a location other than the main office or a previously approved branch of the bank. The OCC may require a filer to submit a legal analysis if the proposal is novel, unusually complex, or raises substantial unresolved legal issues. In these cases, the OCC encourages filers to have a prefiling meeting with the OCC. Any bank receiving approval under this paragraph is deemed to have agreed that the subsidiary will conduct the activity in a manner consistent with published OCC guidance.

(2) *Notice process only for certain qualifying filings.* (i) Except for an operating subsidiary that is exempt from application or notice procedures under paragraph (f)(6) of this section, a national bank that is well capitalized and well managed, as defined in § 5.3, may establish or acquire an operating subsidiary, or perform a new activity in an existing operating subsidiary, by providing the appropriate OCC licensing office written notice prior to, or within 10 days after, acquiring or establishing the subsidiary, or commencing the new activity, if:

(A) The activity is listed in paragraph (f)(5) of this section or, except as provided in paragraph (f)(2)(ii) of this section, the activity is substantively the same as a previously approved activity, as defined in § 5.3, and the activity will be conducted in accordance with the same terms and conditions applicable to the previously approved activity;

(B) The entity is a corporation, limited liability company, limited partnership, or trust; and

(C) The bank or an operating subsidiary thereof:

(*1*) Has the ability to control the management and operations of the subsidiary and no other person or entity has the ability to exercise effective control or influence over the management or operations of the subsidiary to an extent equal to or greater than that of the bank or an operating subsidiary thereof. The ability to control the management and operations means:

(*i*) In the case of a subsidiary that is a corporation, the bank or an operating subsidiary thereof holds voting interests sufficient to select the number of directors needed to control the subsidiary's board and to select and terminate senior management;

(*ii*) In the case of a subsidiary that is a limited partnership, the bank or an operating subsidiary thereof has the ability to control the management and operations of the subsidiary by controlling the selection and termination of senior management;

(*iii*) In the case of a subsidiary that is a limited liability company, the bank or an operating subsidiary thereof has the ability to control the management and operations of the subsidiary by controlling the selection and termination of senior management; or

(*iv*) In the case of a subsidiary that is a trust, the bank or an operating subsidiary thereof has the ability to replace the trustee at will;

(*2*) Holds more than 50 percent of the voting, or equivalent, interests in the subsidiary and:

(*i*) In the case of a subsidiary that is a limited partnership, the bank or an operating subsidiary thereof is the sole general partner of the limited partnership, provided that under the partnership agreement, limited partners have no authority to bind the partnership by virtue solely of their status as limited partners;

(*ii*) In the case of a subsidiary that is a limited liability company, the bank or an operating subsidiary thereof is the sole managing member of the limited liability company, provided that under the limited liability company agreement, other limited liability company members have no authority to bind the limited liability company by virtue solely of their status as members; or

(*iii*) In the case of a subsidiary that is a trust, the bank or an operating subsidiary thereof is the sole beneficial owner of the trust; and

(*3*) Is required to consolidate its financial statements with those of the subsidiary under GAAP.

(ii) A national bank must file an application under paragraph (f)(1) of this section if a State has or will charter or license the proposed operating subsidiary as a bank, trust company, or savings association.

(iii) The written notice must include a complete description of the bank's investment in the subsidiary and of the activity conducted and a representation and undertaking that the activity will be conducted in accordance with OCC policies contained in guidance issued by the OCC regarding the activity. To the extent that the notice relates to the initial affiliation of the bank with a company engaged in insurance activities, the bank must describe the type of insurance activity in which the company is engaged and has present plans to conduct. The bank also must list for each State the lines of business for which the company holds, or will hold, an insurance license, indicating the State where the company holds a resident license or charter, as applicable. Any bank receiving approval under this paragraph is deemed to have agreed that the subsidiary will conduct the activity in a manner consistent with published OCC guidance.

(3) *Exceptions to rules of general applicability.* Sections 5.8, 5.10, and 5.11 do not apply to this section. However, if the OCC concludes that an application presents significant or novel policy, supervisory, or legal issues, the OCC may determine that some or all provisions in §§ 5.8, 5.10, and 5.11 apply.

(4) *OCC review and approval.* The OCC reviews a national bank's application to determine whether the proposed activities are legally permissible under Federal banking laws and to ensure that the proposal is consistent with safe and sound banking practices and OCC policy and does not endanger the safety or soundness of the parent national bank. As part of this process, the OCC may request additional information and analysis from the filer.

(5) *Activities eligible for notice.* The following activities qualify for the notice procedures in paragraph (f)(2) of this section, provided the activity is conducted pursuant to the same terms and conditions as would be applicable if the activity were conducted directly by a national bank:

(i) Holding and managing assets acquired by the parent bank or its operating subsidiaries, including investment assets and property acquired

by the bank through foreclosure or otherwise in good faith to compromise a doubtful claim, or in the ordinary course of collecting a debt previously contracted;

(ii) Providing services to or for the bank or its affiliates, including accounting, auditing, appraising, advertising and public relations, and financial advice and consulting;

(iii) Making loans or other extensions of credit, and selling money orders, savings bonds, and travelers checks;

(iv) Purchasing, selling, servicing, or warehousing loans or other extensions of credit, or interests therein;

(v) Providing courier services between financial institutions;

(vi) Providing management consulting, operational advice, and services for other financial institutions;

(vii) Providing check guaranty, verification and payment services;

(viii) Providing data processing, data warehousing and data transmission products, services, and related activities and facilities, including associated equipment and technology, for the bank or its affiliates;

(ix) Acting as investment adviser (including an adviser with investment discretion) or financial adviser or counselor to governmental entities or instrumentalities, businesses, or individuals, including advising registered investment companies and mortgage or real estate investment trusts, furnishing economic forecasts or other economic information, providing investment advice related to futures and options on futures, and providing consumer financial counseling;

(x) Providing tax planning and preparation services;

(xi) Providing financial and transactional advice and assistance, including advice and assistance for customers in structuring, arranging, and executing mergers and acquisitions, divestitures, joint ventures, leveraged buyouts, swaps, foreign exchange, derivative transactions, coin and bullion, and capital restructurings;

(xii) Underwriting and reinsuring credit related insurance to the extent permitted under section 302 of the Gramm-Leach-Bliley Act (15 U.S.C. 6712);

(xiii) Leasing of personal property and acting as an agent or adviser in leases for others;

(xiv) Providing securities brokerage or acting as a futures commission merchant, and providing related credit and other related services;

(xv) Underwriting and dealing, including making a market, in bank permissible securities and purchasing and selling as principal, asset backed obligations;

(xvi) Acting as an insurance agent or broker, including title insurance to the extent permitted under section 303 of the Gramm-Leach-Bliley Act (15 U.S.C. 6713);

(xvii) Reinsuring mortgage insurance on loans originated, purchased, or serviced by the bank, its subsidiaries, or its affiliates, provided that if the subsidiary enters into a quota share agreement, the subsidiary assumes less than 50 percent of the aggregate insured risk covered by the quota share agreement. A ''quota share agreement'' is an agreement under which the reinsurer is liable to the primary insurance underwriter for an agreed upon percentage of every claim arising out of the covered book of business ceded by the primary insurance underwriter to the reinsurer;

(xviii) Acting as a finder pursuant to 12 CFR 7.1002 to the extent permitted by published OCC precedent for national banks; [2]

(xix) Offering correspondent services to the extent permitted by published OCC precedent for national banks;

(xx) Acting as agent or broker in the sale of fixed or variable annuities;

(xxi) Offering debt cancellation or debt suspension agreements;

(xxii) Providing real estate settlement, closing, escrow, and related services; and real estate appraisal services for the subsidiary, parent bank, or other financial institutions;

(xxiii) Acting as a transfer or fiscal agent;

(xxiv) Acting as a digital certification authority to the extent permitted by published OCC precedent for national banks, subject to the terms and conditions contained in that precedent;

(xxv) Providing or selling public transportation tickets, event and attraction tickets, gift certificates, prepaid phone cards, promotional and advertising material, postage stamps, and Electronic Benefits Transfer (EBT) script, and similar media, to the extent permitted by published OCC precedent for national banks, subject to the terms and conditions contained in that precedent;

(xvi) Providing data processing, and data transmission services, facilities (including equipment, technology, and personnel), databases, advice and access to such services, facilities, databases and advice, for the parent bank and for others, pursuant to 12 CFR 7.5006 to the extent permitted by published OCC precedent for national banks;

(xxvii) Providing bill presentment, billing, collection, and claims-processing services;

(xxviii) Providing safekeeping for personal information or valuable confidential trade or business information, such as encryption keys, to the extent permitted by published OCC precedent for national banks;

(xxix) Providing payroll processing;

(xxx) Providing branch management services;

(xxxi) Providing merchant processing services except when the activity involves the use of third parties to solicit or underwrite merchants; and

(xxxii) Performing administrative tasks involved in benefits administration.

(6) *No application or notice required.* A national bank may acquire or establish an operating subsidiary, or perform a new activity in an existing operating subsidiary, without filing an application or providing notice to the OCC, if the bank is well managed and well capitalized and the:

(i) Activities of the new subsidiary are limited to those activities previously reported by the bank in connection with the establishment or acquisition of a prior operating subsidiary;

(ii) Activities in which the new subsidiary will engage continue to be legally permissible for the subsidiary;

(iii) Activities of the new subsidiary will be conducted in accordance with any conditions imposed by the OCC in approving the conduct of these activities for any prior operating subsidiary of the bank; and

(iv) The standards set forth in paragraphs (f)(2)(i)(B) and (C) of this section are satisfied.

(7) *Fiduciary powers.* (i) If an operating subsidiary proposes to accept fiduciary appointments for which fiduciary powers are required, such as acting as trustee or executor, then the national bank must have fiduciary powers under 12 U.S.C. 92a and the subsidiary also must have its own fiduciary powers under the law applicable to the subsidiary.

(ii) Unless the subsidiary is a registered investment adviser, if an operating subsidiary proposes to exercise investment discretion on behalf of customers or provide investment advice for a fee, the national bank must have prior OCC approval to exercise fiduciary powers pursuant to § 5.26 and 12 CFR part 9.

(8) *Expiration of approval.* Approval expires if the national bank has not established or acquired the operating subsidiary or commenced the new

[2] *See, e.g.,* the OCC's monthly publication ''Interpretations and Actions.'' Beginning with the May 1996 issue, electronic versions of ''Interpretations and Actions'' are available at *www.occ.gov.*

activity in an existing operating subsidiary within 12 months after the date of the approval, unless the OCC shortens or extends the time period.

* * * * *

■ 25. Amend § 5.35 by:

■ a. Revising the section heading;

■ b. In paragraphs (b) and (d)(6), removing the word ''shall'' and adding in its place the word ''must'' each time it appears;

■ c. In paragraphs (d)(2), (d)(3), (g)(2), and (g)(4), removing the word ''state'' and adding in its place the word ''State'' each time in appears;

■ d. In paragraph (d)(2) removing the phrase ''section 3 of the Federal Deposit Insurance Act'' and adding in its place the phrase ''section 3(a)(3) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(a)(3)'' ;

■ e. In paragraph (d)(3):

■ i. After the words ''an insured bank'', removing the phrase ''(section 3 of the Federal Deposit Insurance Act)'' and adding in its place the phrase ''(section 3(c) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(c))'' ;

■ ii. After the words ''a savings association'', removing the phrase ''(section 3 of the Federal Deposit Insurance Act)'' and adding in its place the phrase ''(section 3(b)(1) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(b)(1))'';

■ iiii. Removing the phrase ''Federal Deposit Insurance Corporation'' and adding in its place the word ''FDIC'';

■ f. In paragraph (d)(4), removing the phrase ''section 3 of the Federal Deposit Insurance Act'' and adding in its place the phrase ''section 3(c)(2) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(c)(2)'';

■ g. Revising paragraph (f)(2)(ii)(A);

■ h. In paragraph (f)(2)(ii)(B), removing the phrase ''§ 5.34(e)(5)(v) or § 5.38(e)(5)(v)'' and adding in its place the phrase ''§ 5.34(f)(5) or § 5.38(f)(5)''; and

■ i. Revising paragraph (i).

The revision and addition read as follows.

§ 5.35 Bank service company investments by a national bank or Federal savings association.

* * * * *

(f) * * *

(2) * * *

(ii) * * *

(A) The national bank or Federal savings association is well capitalized and well managed as defined in § 5.3; and

* * * * *

(i) *Investment limitations.* A national bank or Federal savings association must comply with the investment limitations specified in 12 U.S.C. 1862.

* * * * *

■ 26. Amend § 5.36 by:

■ a. In paragraph (a), removing the phrase ''and 93a'' and adding in its place the phrase ''93a, and 3101 *et seq.*'';

■ b. In paragraph (b), removing the phrase ''and 5.37'' and adding in its place the phrase ''5.37, and 5.39'';

■ c. Revising paragraph (c);

■ d. Revising paragraph (e) introductory text;

■ e. In paragraph (e)(1), removing the word ''state'' and adding in its place the word ''State'' each time it appears;

■ f. Revising paragraphs (e)(2) through (4)

■ g. Revising paragraph (f);

■ h. Redesignating paragraphs (g) through (i) as paragraph (h) through (j);

■ i. Adding new paragraph (g);

■ j. In newly redesignated paragraph (h)(1), adding the phrase '', as defined in § 5.3'' after the phrase ''well managed'';

■ k. Revising newly redesignated paragraphs (i) and (j).

The addition and revisions read as follows.

§ 5.36 Other equity investments by a national bank.

* * * * *

(c) *Definitions.* For purposes of this section:

(1) *Enterprise* means any corporation, limited liability company, partnership, trust, or similar business entity.

(2) *Non-controlling investment* means an equity investment made pursuant to 12 U.S.C. 24(Seventh) that is not governed by procedures prescribed by another OCC rule. A *non-controlling investment* does not include a national bank holding interests in a trust formed for the purposes of securitizing assets held by the bank as part of its banking business or for the purposes of holding multiple legal titles of motor vehicles or equipment in conjunction with lease financing transactions.

* * * * *

(e) *Non-controlling investments; notice procedure.* Except as provided in paragraphs (f), (g), and (h) of this section, a national bank may make a non-controlling investment, directly or through its operating subsidiary, in an enterprise that engages in an activity described in § 5.34(f)(5) or in an activity that is substantively the same as a previously approved activity, as defined in § 5.3, by filing a written notice. The bank must file this written notice with the appropriate OCC licensing office no later than 10 days after making the investment. The written notice must:

* * * * *

(2) State:

(i) Which paragraphs of § 5.34(f)(5) describe the activity; or

(ii) If the activity is substantively the same as a previously approved activity, as defined in § 5.3:

(A) How the activity is substantively the same as a previously approved activity;

(B) The citation to the applicable precedent; and

(C) That the activity will be conducted in accordance with the same terms and conditions applicable to the previously approved activity;

(3) Certify that the bank is well capitalized and well managed, as defined in § 5.3, at the time of the investment;

(4) Describe how the bank has the ability to prevent the enterprise from engaging in activities that are not set forth in § 5.34(f)(5) or not contained in published OCC precedent for previously approved activities, as defined in § 5.3, or how the bank otherwise has the ability to withdraw its investment;

* * * * *

(f) *Non-controlling investment; application procedure*—(1) *In general.* A national bank must file an application and obtain prior approval before making or acquiring, either directly or through an operating subsidiary, a non-controlling investment in an enterprise if the non-controlling investment does not qualify for the notice procedure set forth in paragraph (e) of this section because the bank is unable to make the representation required by paragraph (e)(2) or the certifications required by paragraphs (e)(3) or (e)(7) of this section. The application must include the information required in paragraphs (e)(1) and (e)(4) through (e)(6) of this section and the information required by paragraphs (e)(2), (e)(3), and (e)(7) of this section, if possible. If the bank is unable to make the representation set forth in paragraph (e)(2) of this section, the bank's application must explain why the activity in which the enterprise engages is a permissible activity for a national bank and why the filer should be permitted to hold a non-controlling investment in an enterprise engaged in that activity. A bank may not make a non-controlling investment if it is unable to make the representations and certifications specified in paragraphs (e)(1) and (e)(4) through (e)(6) of this section.

(2) *Expedited review.* An application submitted by a national bank is deemed approved by the OCC as of the 10th day

after the application is received by the OCC if:

(i) The national bank makes the representation required by paragraph (e)(2) and the certification required by paragraph (e)(3) of this section;

(ii) The book value of the national bank's non-controlling investment for which the application is being submitted is no more than 1% of the bank's capital and surplus;

(iii) No more than 50% of the enterprise is owned or controlled by banks or savings associations subject to examination by an appropriate Federal banking agency or credit unions insured by the National Credit Union Association; and

(iv) The OCC has not notified the national bank that the application has been removed from expedited review, or the expedited review process is extended, under § 5.13(a)(2).

(g) *Non-controlling investment; no application or notice required.* A national bank may make or acquire, either directly or through an operating subsidiary, a non-controlling investment in an enterprise without an application or notice to the OCC, if the:

(1) Activities of the enterprise are limited to those activities previously reported by the bank in connection with the making or acquiring of a non-controlling investment;

(2) Activities of the enterprise continue to be legally permissible for a national bank;

(3) The bank's non-controlling investment will be made in accordance with any conditions imposed by the OCC in approving any prior non-controlling investment in an enterprise conducting these same activities; and

(4) The bank is able to make the representations and certifications specified in paragraphs (e)(3) through (e)(7) of this section.

* * * * *

(i) *Non-controlling investments by Federal branches.* A Federal branch that is well capitalized and well managed, as defined in § 5.3, may make a non-controlling investment in accordance with paragraph (e) of this section in the same manner and subject to the same conditions and requirements as a national bank, and subject to any additional requirements that may apply under 12 CFR 28.10(c).

(j) *Exceptions to rules of general applicability.* Sections 5.8, 5.10, and 5.11 do not apply to this section. However, if the OCC concludes that an application presents significant or novel policy, supervisory, or legal issues, the OCC may determine that some or all provisions in §§ 5.8, 5.10, and 5.11 apply.

§ 5.37 [Amended]

27. Amend § 5.37 by:

■ a. In paragraph (a), removing ''317d'' and adding in its place ''371d'';

■ b. Removing paragraph (c)(3);

■ c. In paragraph (d)(1)(i) and (d)(3)(i), removing the word ''shall'' and adding in its place the word ''must'' each time it appears;

■ d. In paragraph (d)(1)(i), removing the phrase ''any corporation'' and adding in its place the phrase ''any corporation, partnership, or similar entity (*e.g.,* a limited liability company)'';

■ e. In paragraph (d)(3)(i), removing the phrase ''as defined in 12 CFR part 6'' and adding in its place the phrase ''as defined in § 5.3''; and

■ f. In paragraph (d)(5), adding '' 5.9,'' after ''5.8,'' each time it appears.

■ 28. Amend § 5.38 by:

■ a. In paragraph (a), adding the word ''and'' before ''5412(b)(2)(B)'';

■ b. In paragraph (b), adding ''(12 U.S.C. 1828(m))'' after the word ''Act'';

■ c. Removing and reserving paragraph (d);

■ d. Revising paragraph (e)(2)(i)(A);

■ e. In paragraph (e)(2)(i)(C), removing the phrase ''generally accepted accounting principles (GAAP)'' and adding in its place the word ''GAAP'';

■ f. In paragraph (e)(2)(iii) introductory text, removing the word ''subsidiaries'' and adding in its place the word ''entities'';

■ g. Removing the word ''and'' at the end of paragraph (e)(2)(iii)(A);

■ h. In paragraph (e)(2)(iii)(B), removing the period and adding in its place ''; and'';

■ i. Adding new paragraph (e)(2)(iii)(C);

■ j. In paragraph (e)(2)(iv)(B), removing the word ''shall'' and adding in its place the word ''may'';

■ k. In paragraph (e)(3), removing the word ''state'' and adding in its place the word ''State'';

■ l. In paragraph (e)(4), removing the word ''shall'' and adding in its place the word ''must'';

■ m. Redesignating paragraphs (e)(5) through (7) as paragraphs (f) through (h);

■ n. Revising newly redesignated paragraph (f); and

■ o. In newly redesignated paragraph (h), removing the word ''shall'' each time it appears and adding in its place the word ''may''.

The addition and revisions read as follows.

§ 5.38 Operating subsidiaries of a Federal savings association.

* * * * *

(e) * * *

(2) * * *

(i) * * *

(A) The savings association has the ability to control the management and operations of the subsidiary, and no other person or entity has the ability to exercise effective control or influence over the management or operations of the subsidiary to an extent equal to or greater than that of the savings association or an operating subsidiary thereof;

* * * * *

(iii) * * *

(C) A trust formed for purpose of securitizing assets held by the savings association as part of its business.

* * * * *

(f) *Procedures*—(1) *Application required.* (i) A Federal savings association must first submit an application to, and receive prior approval from, the OCC to establish or acquire an operating subsidiary, or to perform a new activity in an existing operating subsidiary.

(ii) The application must explain, as appropriate, how the savings association ''controls'' the enterprise, describing in full detail structural arrangements where control is based on factors other than savings association ownership of more than 50 percent of the voting interest of the subsidiary and the ability to control the management and operations of the subsidiary by holding voting interests sufficient to select the number of directors needed to control the subsidiary's board and to select and terminate senior management. In the case of a limited partnership or limited liability company that does not qualify for the expedited review procedure set forth in paragraph (f)(2) of this section, the savings association must provide a statement explaining why it is not eligible. The application also must include a complete description of the savings association's investment in the subsidiary, the proposed activities of the subsidiary, the organizational structure and management of the subsidiary, the relations between the savings association and the subsidiary, and other information necessary to adequately describe the proposal. To the extent that the application relates to the initial affiliation of the savings association with a company engaged in insurance activities, the savings association must describe the type of insurance activity in which the company is engaged and has present plans to conduct. The savings association must also list for each State the lines of business for which the company holds, or will hold, an insurance license, indicating the State where the company holds a resident license or charter, as applicable. The application must state whether the operating subsidiary will conduct any

activity at a location other than the home office or a previously approved branch of the savings association. The OCC may require a filer to submit a legal analysis if the proposal is novel, unusually complex, or raises substantial unresolved legal issues. In these cases, the OCC encourages filers to have a prefiling meeting with the OCC. Any savings association receiving approval under this paragraph is deemed to have agreed that the subsidiary will conduct the activity in a manner consistent with published OCC guidance.

(2) *Expedited review.* (i) An application to establish or acquire an operating subsidiary, or to perform a new activity in an existing operating subsidiary, that meets the requirements of this paragraph is deemed approved by the OCC as of the 30th day after the filing is received by the OCC, unless the OCC notifies the filer prior to that date that the filing has been removed from expedited review, or the expedited review process is extended under § 5.13(a)(2). Any savings association receiving approval under this paragraph is deemed to have agreed that the subsidiary will conduct the activity in a manner consistent with published OCC guidance.

(ii) An application is eligible for expedited review if all of the following requirements are met:

(A) The savings association is well capitalized and well managed, as defined in § 5.3;

(B) The activity is listed in paragraph (f)(5) this section or is substantively the same as a previously approved activity, as defined in § 5.3, and the activity will be conducted in accordance with the same terms and conditions applicable to the previously approved activity;

(C) The entity is a corporation, limited liability company, limited partnership or trust; and

(D) The savings association or an operating subsidiary thereof:

(*1*) Has the ability to control the management and operations of the subsidiary and no other person or entity has the ability to exercise effective control or influence over the management or operations of the subsidiary to an extent equal to or greater than that of the savings association or an operating subsidiary thereof. The ability to control the management and operations means:

(*i*) In the case of a subsidiary that is a corporation, the savings association or an operating subsidiary thereof holds voting interests sufficient to select the number of directors needed to control the subsidiary's board and to select and terminate senior management;

(*ii*) In the case of a subsidiary that is a limited partnership, the savings association or an operating subsidiary thereof has the ability to control the management and operations of the subsidiary by controlling the selection and termination of senior management;

(*iii*) In the case of a subsidiary that is a limited liability company, the savings association or an operating subsidiary thereof has the ability to control the management and operations of the subsidiary by controlling the selection and termination of senior management; or

(*iv*) In the case of a subsidiary that is a trust, the savings association or an operating subsidiary thereof has the ability to replace the trustee at will;

(*2*) Holds more than 50 percent of the voting, or equivalent, interests in the subsidiary, and:

(*i*) In the case of a subsidiary that is a limited partnership, the savings association or an operating subsidiary thereof is the sole general partner of the limited partnership, provided that under the partnership agreement, limited partners have no authority to bind the partnership by virtue solely of their status as limited partners;

(*ii*) In the case of a subsidiary that is a limited liability company, the savings association or an operating subsidiary thereof is the sole managing member of the limited liability company, provided that under the limited liability company agreement, other limited liability company members have no authority to bind the limited liability company by virtue solely of their status as members; or

(*iii*) In the case of a subsidiary that is a trust, the savings association or an operating subsidiary thereof is the sole beneficial owner of the trust; and

(*3*) Is required to consolidate its financial statements with those of the subsidiary under GAAP. A filer proposing to qualify for expedited review must include in the application all necessary information showing the application meets the requirements.

(3) *Exceptions to rules of general applicability.* Sections 5.8, 5.10, and 5.11 do not apply to this section. However, if the OCC concludes that an application presents significant or novel policy, supervisory, or legal issues, the OCC may determine that some or all provisions in §§ 5.8, 5.10, and 5.11 apply.

(4) *OCC review and approval.* The OCC reviews a Federal savings association's application to determine whether the proposed activities are legally permissible under Federal savings association law and to ensure that the proposal is consistent with safe and sound banking practices and OCC policy and does not endanger the safety or soundness of the parent Federal savings association. As part of this process, the OCC may request additional information and analysis from the filer.

(5) *Activities eligible for expedited review.* The following activities qualify for the expedited review procedures in paragraph (f)(2) of this section, provided the activity is conducted pursuant to the same terms and conditions as would be applicable if the activity were conducted directly by a Federal savings association:

(i) Holding and managing assets acquired by the parent savings association or its operating subsidiaries, including investment assets and property acquired by the savings association through foreclosure or otherwise in good faith to compromise a doubtful claim, or in the ordinary course of collecting a debt previously contracted;

(ii) Providing services to or for the savings association or its affiliates, including accounting, auditing, appraising, advertising and public relations, and financial advice and consulting;

(iii) Making loans or other extensions of credit, and selling money orders and travelers checks;

(iv) Purchasing, selling, servicing, or warehousing loans or other extensions of credit, or interests therein;

(v) Providing management consulting, operational advice, and services for other financial institutions;

(vi) Providing check payment services;

(vii) Acting as investment adviser (including an adviser with investment discretion) or financial adviser or counselor to governmental entities or instrumentalities, businesses, or individuals, including advising registered investment companies and mortgage or real estate investment trusts;

(viii) Providing financial and transactional advice and assistance, including advice and assistance for customers in structuring, arranging, and executing mergers and acquisitions, divestitures, joint ventures, leveraged buyouts, swaps, foreign exchange, derivative transactions, coin and bullion, and capital restructurings;

(ix) Underwriting and reinsuring credit life and disability insurance;

(x) Leasing of personal property;

(xi) Providing securities brokerage;

(xii) Underwriting and dealing, including making a market, in savings association permissible securities and purchasing and selling as principal, asset backed obligations;

(xiii) Acting as an insurance agent or broker for credit life, disability, and unemployment insurance; single property interest insurance; and title insurance;

(xiv) Offering correspondent services to the extent permitted by published OCC precedent for Federal savings associations;

(xv) Acting as agent or broker in the sale of fixed annuities;

(xvi) Offering debt cancellation or debt suspension agreements;

(xvii) Providing escrow services;

(xviii) Acting as a transfer agent; and

(xix) Providing or selling postage stamps.

(6) *Redesignation.* A Federal savings association that proposes to redesignate a service corporation as an operating subsidiary must submit a notification to the OCC at least 30 days prior to the redesignation date. The notification must include a description of how the redesignated service corporation meets all of the requirements of this section to be an operating subsidiary, a resolution of the savings association's board of directors approving the redesignation, and the proposed effective date of the redesignation. The savings association may effect the redesignation on the proposed date unless the OCC notifies the savings association otherwise prior to that date. The OCC may require an application if the redesignation presents policy, supervisory, or legal issues.

(7) *Fiduciary powers.* (i) If an operating subsidiary proposes to accept fiduciary appointments for which fiduciary powers are required, such as acting as trustee or executor, then the Federal savings association must have fiduciary powers under section 5(n) of the Home Owners' Loan Act, 12 U.S.C. 1464(n), and the subsidiary also must have its own fiduciary powers under the law applicable to the subsidiary.

(ii) Unless the subsidiary is a registered investment adviser, if an operating subsidiary proposes to exercise investment discretion on behalf of customers or provide investment advice for a fee, the Federal savings association must have prior OCC approval to exercise fiduciary powers pursuant to § 5.26 (or a predecessor provision) and 12 CFR part 150.

(8) *Expiration of approval.* Approval expires if the Federal savings association has not established or acquired the operating subsidiary, or commenced the new activity in an existing operating subsidiary within 12 months after the date of the approval, unless the OCC shortens or extends the time period.

■ 29. Amend § 5.39 by:

■ a. Revising paragraph (a);

■ b. In paragraph (b), removing the phrase ''a notice'' and adding in its place the phrase ''an application'', and removing ''§ 5.34(e)(5)'' and adding in its place ''§ 5.34(f)'';

■ c. In paragraphs (b), (h)(2), and (j)(1)(ii), removing the word ''shall'' and adding in its place the word ''must'' each time it appears;

■ d. In paragraph (d)(1), removing the phrase ''shall have'' and adding in its place the word ''has'';

■ e. Removing paragraphs (d)(2), (d)(11) and (d)(12) and redesignating paragraphs (d)(3) through (d)(10) as paragraphs (d)(2) through (d)(9);

■ f. In paragraphs (e)(1)(ii) and (j)(2), removing the word ''state'' and adding in its place the word ''State'' each time it appears;

■ g. In paragraph (f)(1), removing the phrase ''Gramm-Leach-Bliley Act (GLBA)), 113 Stat. 1407–1409, (15 U.S.C. 6712 or 15 U.S.C. 6713)'' and adding in its place the phrase ''Gramm-Leach-Bliley Act, (15 U.S.C. 6712 or 15 U.S.C. 6713))'';

■ h. In paragraph (f)(3), removing the phrase ''GLBA, 113 Stat. 1381'' and adding in its place the phrase ''Gramm-Leach-Bliley Act (12 U.S.C. 1843 note)'';

■ i. In paragraph (g)(1), adding the phrase '', as defined in § 5.3'' after ''well managed'';

■ j. In paragraph (h)(2), removing the phrase ''generally accepted accounting principles'' and adding in its place the word ''GAAP'';

■ k. Revising paragraph (h)(5)(i);

■ l. Removing and reserving paragraph (h)(5)(ii);

■ m. In paragraphs (h)(5)(vi), removing the word ''GLBA'' and adding in its place the phrase ''Gramm-Leach-Bliley Act'';

■ n. Removing the phrase ''shall be'' and adding in its place the word ''is'' in paragraph (h)(6);

■ o. Revising paragraph (i);

■ p. In paragraph (j)(1)(i), removing the phrase ''OCC shall'' and adding in its place the phrase ''OCC will'' and removing the phrase ''shall be'' and adding in its place the word ''is''; and

■ q. In paragraph (k), removing the word ''GLBA'' and adding in its place the phrase ''Gramm-Leach-Bliley Act''.

The revisions read as follows.

§ 5.39 Financial subsidiaries of a national bank.

(a) *Authority.* 12 U.S.C. 24a and 93a.

* * * * *

(h) * * *

(5) * * *

(i) A financial subsidiary is deemed to be an affiliate of the bank and is not deemed to be a subsidiary of the bank;

* * * * *

(i) *Procedures to engage in activities through a financial subsidiary.* A national bank that intends, directly or indirectly, to acquire control of, or hold an interest in, a financial subsidiary, or to commence a new activity in an existing financial subsidiary, must obtain OCC approval through the procedures set forth in paragraph (i)(1) or (i)(2) of this section.

(1) *Certification with subsequent application.* (i) At any time, a national bank may file a ''Financial Subsidiary Certification'' with the appropriate OCC licensing office listing the bank's depository institution affiliates and certifying that the bank and each of those affiliates is well capitalized and well managed.

(ii) Thereafter, at such time as the bank seeks OCC approval to acquire control of, or hold an interest in, a new financial subsidiary, or commence a new activity authorized under section 5136A(a)(2)(A)(i) of the Revised Statutes (12 U.S.C. 24a) in an existing subsidiary, the bank may file an application with the appropriate OCC licensing office at the time of acquiring control of, or holding an interest in, a financial subsidiary, or commencing such activity in an existing subsidiary. The application must be labeled ''Financial Subsidiary Application'' and must:

(A) State that the bank's Certification remains valid;

(B) Describe the activity or activities conducted by the financial subsidiary. To the extent the application relates to the initial affiliation of the bank with a company engaged in insurance activities, the bank should describe the type of insurance activity that the company is engaged in and has present plans to conduct. The bank must also list for each State the lines of business for which the company holds, or will hold, an insurance license, indicating the State where the company holds a resident license or charter, as applicable;

(C) Cite the specific authority permitting the activity to be conducted by the financial subsidiary. (Where the authority relied on is an agency order or interpretation under section 4(c)(8) or 4(c)(13), respectively, of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(c)(8) or (c)(13)), a copy of the order or interpretation should be attached);

(D) Certify that the bank will be well capitalized after making adjustments required by paragraph (h)(1) of this section;

(E) Demonstrate the aggregate consolidated total assets of all financial subsidiaries of the national bank do not exceed the lesser of 45 percent of the

bank's consolidated total assets or $50 billion (or the increased level established by the indexing mechanism); and

(F) If applicable, certify that the bank meets the eligible debt requirement in paragraph (g)(3) of this section.

(2) *Combined certification and application.* A national bank may file a combined certification and application with the appropriate OCC licensing office at least five business days prior to acquiring control of, or holding an interest in, a financial subsidiary, or commencing a new activity authorized pursuant to section 5136A(a)(2)(A)(i) of the Revised Statutes (12 U.S.C. 24a(a)(2)(A)(i)) in an existing subsidiary. The written application must be labeled ''Financial Subsidiary Certification and Application'' and must:

(i) List the bank's depository institution affiliates and certify that the bank and each depository institution affiliate of the bank is well capitalized and well managed;

(ii) Describe the activity or activities to be conducted in the financial subsidiary. To the extent the application relates to the initial affiliation of the bank with a company engaged in insurance activities, the bank should describe the type of insurance activity that the company is engaged in and has present plans to conduct. The bank must also list for each State the lines of business for which the company holds, or will hold, an insurance license, indicating the State where the company holds a resident license or charter, as applicable;

(iii) Cite the specific authority permitting the activity to be conducted by the financial subsidiary. (Where the authority relied on is an agency order or interpretation under section 4(c)(8) or 4(c)(13), respectively, of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(c)(8) or (c)(13)), a copy of the order or interpretation should be attached);

(iv) Certify that the bank will remain well capitalized after making the adjustments required by paragraph (h)(1) of this section;

(v) Demonstrate the aggregate consolidated total assets of all financial subsidiaries of the national bank do not exceed the lesser of 45% of the bank's consolidated total assets or $50 billion (or the increased level established by the indexing mechanism); and

(vi) If applicable, certify that the bank meets the eligible debt requirement in paragraph (g)(3) of this section.

(3) *Approval.* An application is deemed approved upon filing the information required by paragraphs (i)(1) or (i)(2) of this section within the time frames provided therein.

(4) *Exceptions to rules of general applicability.* Sections 5.8, 5.10, 5.11, and 5.13 do not apply to activities authorized under this section.

(5) *Community Reinvestment Act (CRA).* A national bank may not apply under this paragraph (i) to commence a new activity authorized under section 5136A(a)(2)(A)(i) of the Revised Statutes (12 U.S.C. 24a), or directly or indirectly acquire control of a company engaged in any such activity, if the bank or any of its insured depository institution affiliates received a CRA rating of less than ''satisfactory record of meeting community credit needs'' on its most recent CRA examination prior to when the bank would file an application under this section.

* * * * *

§ 5.40 [Amended]

■ 30. Amend § 5.40 by:

■ a. Removing the word ''shall'' and adding in its place the word ''must'' each time it appears in paragraphs (b), (c)(1), (c)(2)(i), (c)(2)(ii), and (c)(3); and

■ b. In paragraph (c)(4), removing the phrase ''national bank'' and adding in its place the word ''bank'', removing the phrase ''Federal savings association'' and adding in its place the phrase ''savings association'', and removing the phrase ''is not eligible for'' and adding in its place the phrase ''has been removed from''.

■ 31. Section 5.42 is amended by:

■ a. In paragraphs (d)(1) and (d)(2), removing the word ''shall'' and adding in its place the word ''must'' each time it appears;

■ b. Revising paragraph (d)(3);

■ c. In paragraph (d)(4), removing ''5.13(a)'' and adding in its place ''5.13'' each time it appears and removing the word ''application'' and adding in its place the word ''notice''.

The revision reads as follows.

§ 5.42 Corporate title of a national bank or Federal savings association.

* * * * *

(d) * * *

(3) *Amendment to charter.* A Federal savings association must amend its charter in accordance with 12 CFR 5.21 or 5.22, as applicable, to change its title.

* * * * *

■ 32. Section 5.43 is added to read as follows:

§ 5.43 National bank director residency and citizenship waivers.

(a) *Authority.* 12 U.S.C. 72 and 93a.

(b) *Scope.* This section describes the procedures for the OCC to waive the residency and citizenship requirements for national bank directors set forth at 12 U.S.C. 72.

(c) *Application Procedures*—(1) *Residency.* A national bank may request a waiver of the residency requirement for any number of directors by filing a written application with the OCC. The OCC may grant a waiver on an individual basis or for any number of director positions.

(2) *Citizenship.* A national bank may request a waiver of the citizenship requirements for individuals who comprise up to a minority of the total number of directors by filing a written application with the OCC. The OCC may grant a waiver on an individual basis. A citizenship waiver is valid until the individual no longer serves on the board or the OCC revokes the waiver in accordance with paragraph (d) of this section.

(3) *Biographical and Financial Reports.* (i) Each subject of a citizenship waiver application must submit to the appropriate OCC licensing office the information prescribed in the Interagency Biographical and Financial Report, available at *www.occ.gov.*

(ii) The OCC may require additional information about any subject of a citizenship waiver application, including legible fingerprints, if appropriate. The OCC may waive any of the information requirements of this paragraph if the OCC determines that doing so is in the public interest.

(4) *Exceptions to rules of general applicability.* Sections 5.8, 5.9, 5.10, and 5.11 do not apply to this section.

(d) *Revocation of waiver*—(1) *Procedure.* The OCC may revoke a residency or citizenship waiver. Before revocation, the OCC will provide written notice to the national bank and affected director(s) of its intention to revoke a residency or citizenship waiver and the basis for its intention. The bank and affected director(s) may respond in writing to the OCC within 10 calendar days, unless the OCC determines that a shorter period is appropriate in light of relevant circumstances. The OCC will consider the written responses of the bank and affected director(s), if any, prior to deciding whether or not to revoke a residency or citizenship waiver. The OCC will notify the national bank and the director of the OCC's decision to revoke a residency or citizenship waiver in writing.

(2) *Effective date.* The OCC's decision to revoke a residency or citizenship waiver is effective:

(i) If the director appeals pursuant to paragraph (e) of this section, upon the director's receipt of the decision of the Comptroller, an authorized delegate, or the appellate official, to uphold the

initial decision to revoke the residency or citizenship waiver; or

(ii) If the director does not appeal pursuant to paragraph (e) of this section, upon the expiration of the period to appeal.

(e) *Appeal.* (1) A director may seek review by appealing the OCC's decision to revoke a residency or citizenship waiver to the Comptroller, or an authorized delegate, within 15 days of the receipt of the OCC's written decision to revoke. The director may appeal on the grounds that the reasons for revocation are contrary to fact or arbitrary and capricious. The appellant must submit all documents and written arguments that the appellant wishes to be considered in support of the appeal.

(2) The Comptroller, or an authorized delegate, may designate an appellate official who was not previously involved in the decision leading to the appeal at issue. The Comptroller, an authorized delegate, or the appellate official considers all information submitted with the original application for the residency or citizenship waiver, the material before the OCC official who made the initial decision, and any information submitted by the appellant at the time of appeal.

(3) The Comptroller, an authorized delegate, or the appellate official will independently determine whether the reasons given for the initial decision to revoke are contrary to fact or arbitrary and capricious. If they determine either to be the case, the Comptroller, an authorized delegate, or the appellate official may reverse the initial decision to revoke the waiver.

(4) Upon completion of the review, the Comptroller, an authorized delegate, or the appellate official will notify the appellant in writing of the decision. If the initial decision is upheld, the decision to revoke the waiver is effective pursuant to paragraph (d)(2)(ii) of this section.

(f) *Prior waivers.* Notwithstanding paragraph (c)(2) of this section, any waiver granted by the OCC before [EFFECTIVE DATE OF THE FINAL RULE] remains in effect unless revoked pursuant to paragraph (d) of this section.

§ 5.45 [Amended]

■ 33. Amend § 5.45 by:

■ a. In paragraphs (b), (e)(1), and (g)(5), removing the phrase ''Federal savings association'' and adding in its place ''Federal stock savings association'' each time it appears;

■ b. In paragraph (f)(3), removing the phrase ''savings association's'' and adding in its place ''Federal stock savings association's'';

■ c. In paragraphs (g)(1) introductory text and (g)(4)(i) introductory text and in paragraphs (g)(2)(iii), (g)(4)(i)(C), (h), and (i), removing the phrase ''savings association'' and adding in its place ''Federal stock savings association'' each time it appears;

■ d. In paragraph (g)(4)(i) introductory text and paragraphs (h) and (i), removing the word ''shall'' and adding in its place the word ''must''; and

■ e. In paragraph (h), removing the number ''197'' and adding in its place ''16''.

■ 34. Amend § 5.46 by:

■ a. In paragraph (b), removing the word ''shall'' and adding in its place the word ''must'' in the first sentence and removing the word ''shall'' and adding in its place the word ''may'' in the second sentence;

■ b. Revising paragraph (g)(1)(ii);

■ c. In paragraphs (g)(2), (i)(1) introductory text, (i)(3)(i) introductory text, (i)(4), (j), and (k), removing the word ''shall'' and adding in its place the word ''must'' each time it appears;

■ d. In paragraph (g)(2), removing the word ''applicant'' and adding in its place the word ''filer'';

■ e. Revising paragraphs (h) and (i)(2);

■ f. In paragraph (i)(5), adding the phrase '', unless the OCC specifies a longer period'' after the word ''approval'';

■ g. In paragraph (i)(6)(i), removing the phrase ''U.S. generally accepted accounting principles'' and adding in its place the word ''GAAP''; and

■ h. In paragraph (i)(6)(ii), removing the word ''U.S.''.

The additions and revisions read as follows.

§ 5.46 Changes in permanent capital of a national bank.

* * * * *

(g) * * *

(1) * * *

(ii) *Prior approval required.* In addition to a notice of capital increase under paragraph (i)(3) of this section, a national bank must submit an application under paragraph (i)(1) or (i)(2) of this section and obtain prior OCC approval to increase its permanent capital if the bank is:

(A) Required to receive OCC approval pursuant to letter, order, directive, written agreement, or otherwise;

(B) Selling common or preferred stock for consideration other than cash; or

(C) Receiving a material noncash contribution to capital surplus.

* * * * *

(h) *Decreases in permanent capital.* A national bank must submit an application and obtain prior approval under paragraph (i)(1) or (i)(2) of this section for any reduction of its permanent capital. A national bank may request approval for a reduction in capital for multiple quarters. The request need only specify a total dollar amount for the requested period and need not specify amounts for each quarter.

(i) * * *

(2) *Expedited review.* An eligible bank's application is deemed approved by the OCC 15 days after the date the OCC receives the application described in paragraph (i)(1) of this section, unless the OCC notifies the bank prior to that date that the application has been removed from expedited review, or the expedited review process is extended, under § 5.13(a)(2). An eligible bank seeking to decrease its capital may request OCC approval for up to four consecutive quarters. The request need only specify a total dollar amount for the four-quarter period and need not specify amounts for each quarter. An eligible bank may decrease its capital pursuant to such a plan only if the bank maintains its eligible bank status before and after each decrease in its capital.

* * * * *

■ 35. Amend § 5.47 by:

■ a. In paragraph (b), removing the phrase ''debt notes'' and adding in its place the word ''debt'';

■ b. Revising paragraph (c);

■ c. In paragraph (d)(1)(ii), removing the phrase ''Federal Deposit Insurance Corporation (FDIC)'' and adding in its place the word ''FDIC'';

■ d. In paragraph (d)(1)(iv)(B), removing the word ''state'' and adding in its place the word ''State'';

■ e. In paragraph (d)(1)(vi), removing the word ''shall'' and adding in its place the word ''must'' the first time it appears;

■ f. In paragraphs (d)(1)(vi) and (vii), removing the word ''shall'' and adding in its place the word ''may'' the second time it appears;

■ g. In paragraph (d)(2) introductory text, removing the word ''note'' and adding in its place the word ''document'';

■ h. In paragraph (d)(3)(ii)(C), adding the phrase '', if applicable to the subordinated debt issuance'' after the word ''default'';

■ i. Adding paragraph (d)(3)(ii)(D);

■ j. In paragraph (e), removing the phrase '', including, for an advanced approaches national bank, the disclosure requirement in 12 CFR 3.20(d)(1)(xi)''; and

■ k. Revising paragraphs (f), (g) and (h).

The addition and revisions read as follows.

§ 5.47 Subordinated debt issued by a national bank.

* * * * *

(c) *Definitions.* The following definitions apply to this section:

(1) *Capital plan* means a plan describing the means and schedule by which a national bank will attain specified capital levels or ratios, including a capital restoration plan filed with the OCC under 12 U.S.C. 1831o and 12 CFR 6.5.

(2) *Original maturity* means the stated maturity of the subordinated debt note. If the subordinated debt note does not have a stated maturity, then original maturity means the earliest possible date the subordinated debt note may be redeemed, repurchased, prepaid, terminated, or otherwise retired by the national bank pursuant to the terms of the subordinated debt note.

(3) *Payment on subordinated debt* means principal and interest, and premium, if any.

(4) *Subordinated debt document* means any document pertaining to an issuance of subordinated debt, and any renewal, extension, amendment, modification, or replacement thereof, including the subordinated debt note, and any global note, pricing supplement, note agreement, trust indenture, paying agent agreement, or underwriting agreement.

(5) *Tier 2 capital* has the same meaning as set forth in 12 CFR 3.20(d).

* * * * *

(d) * * *

(3) * * *

(ii) * * *

(D) A statement that the obligation may be fully subordinated to interests held by the U.S. government in the event that the national bank enters into a receivership, insolvency, liquidation, or similar proceeding.* * * * *

(f) *Process and procedures*—(1) *Issuance of subordinated debt*—(i) *Approval*—(A) *Eligible bank.* An eligible bank is required to receive prior approval from the OCC to issue any subordinated debt, in accordance with paragraph (g)(1)(i) of this section, if:

(*1*) The national bank will not continue to be an eligible bank after the transaction;

(*2*) The OCC has previously notified the national bank that prior approval is required; or

(*3*) Prior approval is required by law.

(B) *National bank not an eligible bank.* A national bank that is not an eligible bank must receive prior OCC approval to issue any subordinated debt, in accordance with paragraph (g)(1)(i) of this section.

(ii) *Application to include subordinated debt in tier 2 capital.* A national bank that intends to include subordinated debt in tier 2 capital must submit an application to the OCC for approval, in accordance with paragraph (h) of this section, before or within ten days after issuing the subordinated debt. Where a national bank's application to issue subordinated debt has been deemed to be approved, in accordance with paragraph (g)(2)(i) of this section, and the national bank does not contemporaneously receive approval from the OCC to include the subordinated debt as tier 2 capital, the national bank must submit an application for approval to include subordinated debt in tier 2 capital, pursuant to paragraph (h) of this section, after issuance of the subordinated debt. A national bank may not include subordinated debt in tier 2 capital unless the national bank has filed the application with the OCC and received approval from the OCC that the subordinated debt issued by the national bank qualifies as tier 2 capital.

(2) *Prepayment of subordinated debt*—(i) *Subordinated debt not included in tier 2 capital*—(A) *Eligible bank.* An eligible bank is required to receive prior approval from the OCC to prepay any subordinated debt that is not included in tier 2 capital (including acceleration, repurchase, redemption prior to maturity, and exercising a call option), in accordance with paragraph (g)(1)(ii) of this section, only if:

(*1*) The national bank will not be an eligible bank after the transaction;

(*2*) The OCC has previously notified the national bank that prior approval is required;

(*3*) Prior approval is required by law; or

(*4*) The amount of the proposed prepayment is equal to or greater than one percent of the national bank's total capital, as defined in 12 CFR 3.2.

(B) *National bank not an eligible bank.* A national bank that is not an eligible bank must receive prior OCC approval to prepay any subordinated debt that is not included in tier 2 capital (including acceleration, repurchase, redemption prior to maturity, and exercising a call option), in accordance with paragraph (g)(1)(ii) of this section.

(ii) *Subordinated debt included in tier 2 capital.* All national banks must receive prior OCC approval to prepay subordinated debt included in tier 2 capital, in accordance with paragraph (g)(1)(ii) of this section.

(3) *Material changes to existing subordinated debt documents.* A national bank must receive prior approval from the OCC in accordance with paragraph (g)(1)(iii) of this section prior to making a material change to an existing subordinated debt document if the bank would have been required to receive OCC approval to issue the security under paragraph (f)(1)(i) of this section or to include it in tier 2 capital under paragraph (h) of this section.

(g) *Prior approval procedure*—(1) *Application*—(i) *Issuance of subordinated debt.* A national bank required to obtain OCC approval before issuing subordinated debt must submit an application to the appropriate OCC licensing office. The application must include:

(A) A description of the terms and amount of the proposed issuance;

(B) A statement of whether the national bank is subject to a capital plan or required to file a capital plan with the OCC and, if so, how the proposed change conforms to the capital plan;

(C) A copy of the proposed subordinated note and any other subordinated debt documents; and

(D) A statement that the subordinated debt issue complies with all applicable laws and regulations.

(ii) *Prepayment of subordinated debt.* A national bank required to obtain OCC approval before prepaying subordinated debt, pursuant to paragraph (f)(2) of this section, must submit an application to the appropriate OCC licensing office. The application must include:

(A) A description of the terms and amount of the proposed prepayment;

(B) A statement of whether the national bank is subject to a capital plan or required to file a capital plan with the OCC and, if so, how the proposed change conforms to the capital plan;

(C) A copy of the subordinated debt note the national bank is proposing to prepay and any other subordinated debt documents; and

(D) Either:

(*1*) A statement explaining why the national bank believes that following the proposed prepayment the national bank would continue to hold an amount of capital commensurate with its risk; or

(*2*) A description of the replacement capital instrument that meets the criteria for tier 1 or tier 2 capital under 12 CFR 3.20, including the amount of such instrument, and the time frame for issuance.

(iii) *Material changes to existing subordinated debt.* A national bank required to obtain OCC approval before making a material change to an existing subordinated debt document, pursuant to paragraph (f)(3) of this section, must submit an application to the appropriate OCC licensing office. The application must include:

(A) A description of all proposed changes;

(B) A statement of whether the national bank is subject to a capital plan or required to file a capital plan with the OCC and, if so, how the proposed change conforms to the capital plan;

(C) A copy of the revised subordinated debt documents reflecting all proposed changes; and

(D) A statement that the proposed changes to the subordinated debt documents complies with all applicable laws and regulations.

(iv) *Additional information.* The OCC reserves the right to request additional relevant information, as appropriate.

(2) *Approval*—(i) *General.* The application is deemed approved by the OCC as of the 30th day after the filing is received by the OCC, unless the OCC notifies the national bank prior to that date that the filing presents a significant supervisory, or compliance concern, or raises a significant legal or policy issue.

(ii) *Prepayment.* Notwithstanding this paragraph (g)(2)(i) of this section, if the application for prior approval is for prepayment, the national bank must receive affirmative approval from the OCC. If the OCC requires the national bank to replace the subordinated debt, the national bank must receive affirmative approval that the replacement capital instrument meets the criteria for tier 1 or tier 2 capital under 12 CFR 3.20 and must issue the replacement instrument prior to prepaying the subordinated debt, or immediately thereafter.[4]

(iii) *Tier 2 capital.* Following notification to the OCC pursuant to paragraph (f)(1)(ii) of this section that the national bank has issued the subordinated debt, the OCC will notify the national bank whether the subordinated debt qualifies as tier 2 capital.

(iv) *Expiration of approval.* Approval expires if a national bank does not complete the sale of the subordinated debt within one year of approval.

(h) *Application procedure for inclusion in tier 2 capital.* (1) A national bank must submit an application to the appropriate OCC licensing office in writing before or within ten days after issuing subordinated debt that it intends to include in tier 2 capital. A national bank may not include such subordinated debt in tier 2 capital unless the national bank has received approval from the OCC that the subordinated debt qualifies as tier 2 capital.

(2) The application must include:

(i) The terms of the issuance;

(ii) The amount or projected amount and date or projected date of receipt of funds;

(iii) The interest rate or expected calculation method for the interest rate;

(iv) Copies of the final subordinated debt documents; and

(v) A statement that the issuance complies with all applicable laws and regulations.

* * * * *

§ 5.48 [Amended]

■ 36. Amend § 5.48 in paragraphs (b), (e)(1), (e)(2)(i), (e)(3)(i) introductory text, (e)(3)(ii), (e)(3)(iii), (e)(4), (e)(5), (e)(6), and (f)(2)(ii) by removing the word ''shall'' and adding in its place the word ''must'' each time it appears.

■ 37. Section 5.50 is amended by:

■ a. In paragraphs (b), (c)(3)(v)(B), (f)(2)(i), (f)(2)(vii), (f)(3)(ii)(B), (f)(3)(ii)(C), (g)(1) introductory text, (h), (i)(1)(i), (i)(1)(ii), (i)(4)(ii), and (i)(5), removing the word ''shall'' and adding in its place the word ''must'' each time it appears;

■ b. In paragraph (c)(2)(iii), removing the word ''(HOLA)'';

■ c. In paragraph (d)(1)(ii), removing the phrase ''shall be'' and adding in its place the word ''is'';

■ d. In paragraph (d)(5), removing the word ''their'' and adding in its place the phrase ''his or her'';

■ e. Removing paragraph (d)(8);

■ f. Redesignating paragraphs (d)(6) through (7) as paragraphs (d)(7) through (8);

■ g. Adding new paragraph (d)(6);

■ h. In newly redesignated paragraph (d)(7), removing the word ''HOLA'' and adding in its place the phrase ''Home Owners' Loan Act, 12 U.S.C. 1464'';

■ i. In paragraph (f)(2)(ii), removing the phrase ''shall be'' and adding in its place the word ''are'';

■ j. In paragraph (f)(2)(ii)(E), removing the phrase ''defined in § 192.25 of this chapter shall'' and adding in its place the phrase ''defined in 12 CFR 192.25 is'';

■ k. In paragraph (f)(2)(viii), removing the word ''shall'' and adding in its place the word ''will'';

■ l. In paragraph (f)(3)(i)(A), removing the phrase ''on the OCC's internet web page,'' and adding in its place the word ''at'';

■ m. In paragraphs (f)(3)(ii)(A), (f)(3)(ii)(B), and (f)(3)(iii) introductory text, removing the word ''applicant'' and adding in its place the word ''filer'';

■ n. In paragraph (f)(3)(ii)(C), removing the phrase ''An applicant'' and adding in its place the phrase ''A filer'';

■ o. Removing paragraph (f)(3)(iv);

■ p. Removing the phrase ''*of notice*'' in the heading of paragraph (f)(5);

■ q. Revising paragraph (f)(6);

■ r. In paragraph (g)(1) introductory text, removing the word ''applicant'' and adding in its place the word ''filer''; and

■ s. Revising paragraph (g)(2)(i).

The addition and revisions read as follows.

§ 5.50 Change in control of a national bank or Federal savings association; reporting of stock loans.

* * * * *

(d) * * *

(6) Depository institution means a depository institution as defined in section 3(c)(1) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(c)(1).

* * * * *

(f) * * *

(6) *Notification of disapproval.* (i) *Written notice by OCC.* If the OCC disapproves a notice, it will notify the filer in writing within three days after the decision. The OCC's written disapproval will contain a statement of the basis for disapproval and indicate that the filer may request a hearing.

(ii) *Hearing Request.* The filer may request a hearing by the OCC within 10 days of receipt of disapproval, pursuant to the procedures in 12 CFR part 19, subpart H. Following final agency action under 12 CFR part 19, further review by the courts is available. (*See* 12 U.S.C. 1817(j)(5)).

(iii) *Failure to request a hearing.* If a filer fails to request a hearing with a timely request, the notice of disapproval constitutes a final and unappealable order.

* * * * *

(g) * * *

(2) * * *

(i) Upon the request of any person, the OCC releases the information provided in the public portion of the notice and makes it available for public inspection and copying as soon as possible after a notice has been filed. In certain circumstances the OCC may determine that the release of the information would not be in the public interest. In addition, the OCC makes the date that the notice is filed, the disposition of the notice and the date thereof, and the consummation date of the transaction, if applicable, publicly available in the OCC's ''Weekly Bulletin.''

* * * * *

■ 38. Amend § 5.51 by:

■ a. Revising paragraph (a);

■ b. In paragraph (c)(4), adding the phrase ''chief risk officer,'' after the phrase ''chief investment officer,''

■ c. In paragraph (c)(7)(ii), adding the phrase ''that requires action to improve the financial condition of the national

[4] A national bank may replace tier 2 capital instruments concurrent with the redemption of existing tier 2 capital instruments.

bank or Federal savings association'' after the word ''agreement'';

■ d. In paragraph (d) introductory text, and paragraphs (e)(1), (e)(6)(i)(C), (e)(6)(1)(D)(*2*), (e)(6)(i)(E), and (f)(1), removing the word ''shall'' and adding in its place the word ''must'' each time it appears;

■ e. In paragraph (e)(6)(i)(E), removing the phrase ''his or her'' and adding in its place the word ''their'';

■ f. In paragraph (e)(8), adding '', 5.9,'' after ''5.8''; and

■ g. In paragraphs (e)(8), (f)(3), and (f)(4), removing the word ''shall'' and adding in its place the word ''will''.

The revision reads as follows.

§ 5.51 Changes in directors and senior executive officers of a national bank or Federal savings association.

(a) *Authority.* 12 U.S.C. 1831i, 3102(b), and 5412(b)(2)(B).

* * * * *

§ 5.52 [Amended]

■ 39. Amend § 5.52 in paragraph (c)(1) by removing the word ''shall'' and adding in its place the word ''must''.

■ 40. Amend § 5.55 by:

■ a. In paragraph (b), removing the phrase ''or notice'';

■ b. Removing paragraph (d)(2) and redesignating paragraph (d)(3) as paragraph (d)(2);

■ c. Adding a new paragraph (d)(3); and

■ d. In paragraph (d)(4), removing the phrase ''generally accepted accounting principles (GAAP)'' and adding in its place the word ''GAAP'';

■ e. Revising paragraphs (e), (f), (g), and paragraph (h) introductory text;

■ f. Redesignating paragraphs (h)(1) through (h)(3) as paragraphs (h)(1)(i) through (h)(1)(iii);

■ g. Removing the last sentence of redesignated paragraph (h)(1)(iii); and

■ h. Adding new paragraph (h)(1) introductory text and paragraph (h)(2).

The additions and revisions read as follows:

§ 5.55 Capital distributions by Federal savings associations.

* * * * *

(d) * * *

(3) *Control* has the same meaning as in section 10(a)(2) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)(2)).

* * * * *

(e) *Filing requirements*—(1) *Application required.* A Federal savings association must file an application with the OCC before making a capital distribution if:

(i) The savings association would not be at least well capitalized, as set forth in 12 CFR 6.4, or would not otherwise remain an eligible savings association following the distribution;

(ii) The total amount of all of the savings association's capital distributions (including the proposed capital distribution) for the applicable calendar year exceeds its net income for that year to date plus retained net income for the preceding two years. If the capital distribution is from retained earnings, the aggregate limitation in this paragraph may be calculated in accordance with 12 CFR 5.64(c)(2), substituting ''capital distributions'' for ''dividends'' in that section;

(iii) The savings association's proposed capital distribution would reduce the amount of or retire any part of its common or preferred stock or retire any part of debt instruments such as notes or debentures included in capital under 12 CFR part 3 (other than regular payments required under a debt instrument approved under § 5.56);

(iv) The savings association's proposed capital distribution is payable in property other than cash;

(v) The savings association is a directly or indirectly controlled by a mutual savings and loan holding company or by a company that is not a savings and loan holding company; or

(vi) The savings association's proposed capital distribution would violate a prohibition contained in any applicable statute, regulation, or agreement between the savings association and the OCC or the OTS, or violate a condition imposed on the savings association in an application or notice approved by the OCC or the OTS.

(2) *No application required.* A Federal savings association may make a capital distribution without filing an application with the OCC if it does not meet the filing requirements in paragraph (e)(1) of this section.

(3) *Informational copy of Federal Reserve System notice required.* If the Federal savings association is a subsidiary of a savings and loan holding company that is filing a notice with the Board of Governors of the Federal Reserve System (Board) for a dividend solely under 12 U.S.C. 1467a(f) and not also under 12 U.S.C. 1467a(o)(11), and no application under paragraph (e)(1) of this section is required, then the savings association must provide an informational copy to the OCC of the notice filed with the Board, at the same time the notice is filed with the Board.

(f) *Application format*—(1) *Contents.* The application must:

(i) Be in narrative form;

(ii) Include all relevant information concerning the proposed capital distribution, including the amount, timing, and type of distribution; and

(iii) Demonstrate compliance with paragraph (h) of this section.

(2) *Schedules.* The application may include a schedule proposing capital distributions over a specified period.

(3) *Combined filings.* A Federal savings association may combine the application required under paragraph (e)(1) of this section with any other notice or application, if the capital distribution is a part of, or is proposed in connection with, another transaction requiring a notice or application under this chapter. If submitting a combined filing, the Federal savings association must state that the related notice or application is intended to serve as an application under this section.

(g) *Filing procedures*—(1) *Application.* When a Federal savings association is required to file an application under paragraph (e)(1) of this section, it must file the application at least 30 days before the proposed declaration of dividend or approval of the proposed capital distribution by its board of directors. Except as provided in paragraph (g)(2) of this section, the OCC is deemed to have approved an application from an eligible savings association upon the expiration of 30 days after the filing date of the application unless, before the expiration of that time period, the OCC notifies the Federal savings association that:

(i) Additional information is required to supplement the application;

(ii) The application has been removed from expedited review, or the expedited review process is extended, under 5.13(a)(2); or

(iii) The application is denied.

(2) *Applications not subject to expedited review.* An application is not subject to expedited review if:

(i) The Federal savings association is not an eligible savings association;

(ii) The total amount of all of the Federal savings association's capital distributions (including the proposed capital distribution) for the applicable calendar year exceeds its net income for that year to date plus retained net income for the preceding two years;

(iii) The Federal savings association would not be at least adequately capitalized, as set forth in 12 CFR 6.4, following the distribution; or

(iv) The Federal savings association's proposed capital distribution would violate a prohibition contained in any applicable statute, regulation, or agreement between the savings association and the OCC or the OTS, or violate a condition imposed on the savings association in an application or notice approved by the OCC or the OTS.

(3) *OCC filing office*—(i) *Appropriate licensing office.* Except as provided in paragraph (g)(3)(ii) of this section, a Federal savings association that is

required to file an application under paragraph (e)(1) of this section or an informational copy of a notice under paragraph (e)(3) of this section must submit the application or notice to the appropriate OCC licensing office.

(ii) *Appropriate supervisory office.* A Federal savings association that is required to file an application under paragraph (e)(1) of this section for capital distributions involving solely a cash dividend from retained earnings or involving a cash dividend from retained earnings and a concurrent cash distribution from permanent capital must submit the application to the appropriate OCC supervisory office.

(h) *OCC review of capital distributions.* After review of an application submitted pursuant to paragraph (e)(1) of this section:

(1) The OCC may deny the application in whole or in part, if it makes any of the following determinations:

* * * * *

(2) The OCC may approve the application in whole or in part. Notwithstanding paragraph (h)(1)(iii) of this section, the OCC may waive any waivable prohibition or condition to permit a distribution.

* * * * *

■ 41. Amend § 5.56 by:
■ a. Revising paragraph (b);
■ b. In paragraph (d)(1)(i)(F), removing the word ''and'';
■ c. In paragraph (d)(1)(i)(G), removing the period and adding in its place ''; and'';
■ d. Adding new paragraph (d)(1)(i)(H);
■ e. In paragraph (d)(2)(i), removing ''12 CFR 197.4'' and adding in its place ''12 CFR 16.7'' and removing the word ''shall'' and adding in its place the word ''may'';
■ f. In paragraph (e)(1) introductory text, removing the phrase ''notices and'';
■ g. In paragraphs (e)(2) and (i), removing the phrase ''or notice'' each time it appears; and
■ h. Revising paragraph (h).

The addition and revisions read as follows.

§ 5.56 Inclusion of subordinated debt securities and mandatorily redeemable preferred stock as Federal savings association supplementary (tier 2) capital.

* * * * *

(b) *Application procedures*—(1) *Application to include covered securities in tier 2 capital*—(i) *Application required.* A Federal savings association must file an application seeking the OCC's approval of the inclusion of covered securities in tier 2 capital. The savings association may file its application before or after it issues covered securities, but may not include covered securities in tier 2 capital until the OCC approves the application and the securities are issued.

(ii) *Expedited review.* The OCC is deemed to have approved an application from an eligible savings association to include covered securities in tier 2 capital upon the expiration of 30 days after the filing date of the application unless, before the expiration of that time period, the OCC notifies the Federal savings association that:

(A) Additional information is required to supplement the application;

(B) The application has been removed from expedited review, or the expedited review process is extended under § 5.13(a)(2); or

(C) The OCC denies the application.

(iii) *Securities offering rules.* A Federal savings association also must comply with the securities offering rules at 12 CFR part 16 by filing an offering circular for a proposed issuance of covered securities, unless the offering qualifies for an exemption under that part.

(2) *Application required to prepay covered securities included in tier 2 capital*—(i) *In general.* A Federal savings association must file an application to, and receive prior approval from, the OCC before prepaying covered securities included in tier 2 capital.

The application must include:

(A) A statement explaining why the Federal savings association believes that following the proposed prepayment the savings association would continue to hold an amount of capital commensurate with its risk; or

(B) A description of the replacement capital instrument that meets the criteria for tier 1 or tier 2 capital under 12 CFR 3.20, including the amount of such instrument, and the time frame for issuance.

(ii) *Replacement covered security.* If the OCC conditions approval of prepayment on a requirement that a Federal savings association must replace the covered security with a covered security of an equivalent amount that satisfies the requirements for tier 1 or tier 2 capital, the savings association must file an application to issue the replacement covered security and must receive prior OCC approval.

* * * * *

(d) * * *

(1) * * *

(i) * * *

(H) State that the security may be fully subordinated to interests held by the U.S. government in the event that the savings association enters into a receivership, insolvency, liquidation, or similar proceeding;

* * * * *

(h) *Issuance of a replacement regulatory capital instrument in connection with prepaying a covered security.* The OCC may require a Federal savings association seeking prior approval to prepay a covered security included in tier 2 capital to issue a replacement covered security of an equivalent amount that qualifies as tier 1 or tier 2 capital under 12 CFR 3.20. If the OCC imposes such a requirement, the savings association must complete the sale of such covered security prior to, or immediately after, the prepayment.[5]

* * * * *

■ 42. Amend § 5.58 by:
■ a. Revising paragraph (d);
■ b. Revising paragraph (e) introductory text;
■ c. In paragraph (e)(1), removing the word ''state'' each time it appears and adding in its place the word ''State'';
■ d. Revising paragraphs (e)(2), (e)(3), and (e)(4);
■ e. Revising paragraph (f)(1);
■ f. Redesignating paragraph (f)(2) as paragraph (f)(3);
■ g. Adding a new paragraph (f)(2);
■ h. In newly redesignated paragraph (f)(3), removing the word ''applicant'' and adding in its place the word ''filer'';
■ i. Redesignating paragraphs (g) through (i) as paragraphs (h) through (j), respectively and adding new paragraph (g);
■ j. In the heading of newly redesignated paragraph (h), removing the word ''*entities*'' and adding in its place the word ''*enterprises*'';
■ k. In paragraph (h) introductory text, removing the word ''entity'' and adding in its place the word ''enterprises'';
■ l. In newly redesignated paragraph (i)(3), removing the word ''non-controlling'' and adding in its place the word ''pass-through''; and
■ m. Revising newly redesignated paragraph (j).

The additions and revisions read as follows.

§ 5.58 Pass-through investments by a Federal savings association.

* * * * *

(d) *Definitions.* For purposes of this section:

(1) *Enterprise* means any corporation, limited liability company, partnership, trust, or similar business entity.

(2) *Pass-through investment* means an investment authorized under 12 CFR

[5] A Federal savings association may replace tier 2 capital instruments concurrent with the redemption of existing tier 2 capital instruments.

160.32(a). A *pass-through investment* does not include a Federal savings association holding interests in a trust formed for the purposes of securitizing assets held by the savings association as part of its business or for the purposes of holding multiple legal titles of motor vehicles or equipment in conjunction with lease financing transactions.

(e) *Pass-through investments; notice procedure.* Except as provided in paragraphs (f) through (i) of this section, a Federal savings association may make a pass-through investment, directly or through its operating subsidiary, in an enterprise that engages in an activity described in § 5.38(f)(5) or in an activity that is substantively the same as a previously approved activity, as defined in § 5.3, by filing a written notice. The Federal savings association must file this written notice with the appropriate OCC licensing office no later than 10 days after making the investment. The written notice must:

* * * * *

(2) State:

(i) Which paragraphs of § 5.38(f)(5) describe the activity; or

(ii) If the activity is substantively the same as a previously approved activity, as defined in § 5.3:

(A) How, the activity is substantively the same as a previously approved activity;

(B) The citation to the applicable precedent; and

(C) That the activity will be conducted in accordance with the same terms and conditions applicable to the previously approved activity;

(3) Certify that the Federal savings association is well capitalized and well managed, as defined in § 5.3, at the time of the investment;

(4) Describe how the Federal savings association has the ability to prevent the enterprise from engaging in an activity that is not set forth in § 5.38(f)(5) or not contained in published OCC (including published former OTS) precedent for previously approved activities, as defined in § 5.3; or how the savings association otherwise has the ability to withdraw its investment;

* * * * *

(f) * * * (1) *In general.* A Federal savings association must file an application and obtain prior approval before making or acquiring, either directly or through an operating subsidiary, a pass-through investment in an enterprise if the pass-through investment does not qualify for the notice procedure set forth in paragraph (e) of this section because the savings association is unable to make the representation required by paragraph (e)(2) or the certification required by paragraphs (e)(3) or (e)(7) of this section. The application must include the information required in paragraphs (e)(1) and (e)(4) through (e)(6) of this section and paragraphs (e)(2), (e)(3), and (e)(7) of this section, if possible. If the Federal savings association is unable to make the representation set forth in paragraph (e)(2) of this section, the savings association's application must explain why the activity in which the enterprise engages is a permissible activity for a Federal savings association and why the filer should be permitted to hold a pass-through investment in an enterprise engaged in that activity. A Federal savings association may not make a pass-through investment if it is unable to make the representations and certifications specified in paragraphs (e)(1) and (e)(4) through (e)(6) of this section.

(2) *Expedited review.* An application submitted by a Federal savings association is deemed approved by the OCC as of the 10th day after the application is received by the OCC if:

(A) The Federal savings association makes the representation required by paragraph (e)(2) and the certification required by paragraph (e)(3) of this section;

(B) The book value of the Federal savings association's pass-through investment for which the application is being submitted is no more than 1% of the savings association's capital and surplus;

(C) No more than 50% of the enterprise is owned or controlled by banks or savings associations subject to examination by an appropriate Federal banking agency or credit unions insured by the National Credit Union Association; and

(D) The OCC has not notified the Federal savings association that the application has been removed from expedited review, or the expedited review process is extended, under § 5.13(a)(2).

* * * * *

(g) *Pass-through investments; no application or notice required.* A Federal savings association may make or acquire, either directly or through an operating subsidiary, a pass-through investment in an enterprise, without an application or notice to the OCC, if:

(i) The activities of the enterprise are limited to those to activities previously reported by the savings association in connection with the making or acquiring of a pass-through investment;

(ii) The activities in the enterprise continue to be legally permissible for a Federal savings association;

(iii) The savings association's pass-through investment will be made in accordance with any conditions imposed by the OCC or OTS in approving any prior pass-through investment conducting these activities;

(iv) The savings association is able to make the representations and certifications specified in paragraphs (e)(3) through (e)(7) of this section; and

(v) The enterprise will not be a subsidiary for purposes of 12 U.S.C. 1828(m).

* * * * *

(j) *Exceptions to rules of general applicability.* Sections 5.8, 5.10, and 5.11 do not apply to this section. However, if the OCC concludes that an application presents significant or novel policy, supervisory, or legal issues, the OCC may determine that some or all provision in §§ 5.8, 5.10, and 5.11 apply.

* * * * *

■ 43. Amend § 5.59 by:

■ a. In paragraph (a), removing ''1464'' and adding in its place ''1464(c)(4)(B)'';

■ b. In paragraph (b) introductory text, adding ''(12 U.S.C. 1828(m))'' after the phrase ''Insurance Act'';

■ c. In paragraph (d)(2), removing the phrase ''generally accepted accounting principles (GAAP)'' and adding in its place the word ''GAAP'';

■ d. In paragraphs (e)(1), (e)(2), (f)(6)(i), and (h)(1)(ii), removing the word ''state'' and adding the word ''State'' each time it appears;

■ e. In paragraph (e)(4), removing the word ''HOLA'' and adding in its place the phrase ''Home Owners' Loan Act, 12 U.S.C. 1464(c)'';

■ f. In paragraph (e)(9), removing the word ''shall'' and adding in its place the word ''must'' each time it appears;

■ g. In paragraph (g)(1), removing the word ''HOLA'' and adding in its place the phrase ''Home Owners' Loan Act (12 U.S.C. 1464(c)(4)(B))'';

■ h. In paragraph (g)(1), removing ''§ 24.6'' and adding in its place ''12 CFR part 24'';

■ i. In paragraph (g)(2), removing the phrase ''HOLA and parts 5 and 160 of this chapter'' and adding in its place the phrase ''Home Owners' Loan Act (12 U.S.C. 1464(c)), this part 5, and 12 CFR part 160''; and

■ j. In paragraph (h)(1)(i) introductory text, adding the phrase ''(12 U.S.C. 1828(m))'' after the word ''Act'';

■ k. In paragraph (h)(1)(ii), removing the phrase ''an applicant'' and adding in its place the phrase ''a filer'', and removing the word ''applicants'' and adding in its place the word ''filers'';

■ l. In paragraphs (h)(2)(i) and (h)(3), removing the word ''applicant'' and

adding in its place the word ''filer'' each time it appears;

■ m. In paragraph (h)(2), removing the phrase ''is not eligible for expedited review under § 5.13(a)(2)'' and adding in its place the phrase ''has been removed from expedited review, or the expedited review period is extended, under § 5.13(a)(2)''; and

■ n. Revising paragraph (h)(2)(ii)(A).

The revision reads as follows:

§ 5.59 Service corporations of Federal savings associations.

* * * * *

(h) * * *

(2) * * *

(ii) * * *

(A) The savings association is well capitalized and well managed, as defined in § 5.3; and

* * * * *

§ 5.62 [Amended]

■ 44. Section 5.62 is amended by removing the word ''shall'' and adding in its place the word ''must''.

§ 5.64 [Amended]

■ 45. Section 5.64 is amended by:

■ a. In paragraph (c)(2)(i), removing the word ''shall'' and adding in its place the word ''does'';

■ b. In paragraph (c)(2)(iii), removing the phrase ''shall apply'' and adding in its place the word ''applies'';

■ c. In paragraph (c)(3), removing the word ''shall'' and adding in its place the word ''must''; and

■ d. Removing paragraph (d).

■ 46. Revise § 5.66 to read as follows.

§ 5.66 Dividends payable in property other than cash.

In addition to cash dividends, directors of a national bank may declare dividends payable in property, with the approval of the OCC. A national bank must submit a request for prior approval of a noncash dividend to the appropriate OCC licensing office. The dividend is equivalent to a cash dividend in an amount equal to the actual current value of the property, regardless of whether the book value is higher or lower under GAAP. Before the dividend is declared, the bank should show the difference between actual value and book value on the books of the national bank as a gain or loss, as applicable, and the dividend should then be declared in the amount of the actual current value of the property being distributed.

■ 47. Revise § 5.67 to read as follows.

§ 5.67 Fractional shares.

A national bank issuing additional stock may adopt arrangements to preclude the issuance of fractional shares. The bank may remit the cash equivalent of the fraction not being issued to those to whom fractional shares would otherwise be issued. The cash equivalent is based on the market value of the stock, if there is an established and active market in the national bank's stock. In the absence of such a market, the cash equivalent is based on a reliable and disinterested determination as to the fair market value of the stock if such stock is available. The bank may propose an alternate method in the application for the stock issuance filed with the OCC.

■ 48. Amend § 5.70 by:

■ a. In paragraphs (c)(1)(iv) and (c)(1)(v), removing the word ''state'' and adding in its place the word ''State'' each time it appears;

■ b. In paragraph (d)(1) and paragraph (d)(2) introductory text, removing the word ''shall'' and adding in its place the word ''must'' each time it appears; and

■ c. Adding new paragraph (d)(3).

The addition reads as follows.

§ 5.70 Federal branches and agencies.

* * * * *

(d) * * *

(3) *Biographical and Financial Reports.* The OCC may require any senior executive officer of a Federal branch or agency submitting a filing to submit an Interagency Biographical and Financial Report, available at *www.occ.gov,* and legible fingerprints.

* * * * *

Dated: March 5, 2020.

Joseph M. Otting,

Comptroller of the Currency.

[FR Doc. 2020–04938 Filed 4–1–20; 8:45 am]

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Part V

Department of Energy

Federal Energy Regulatory Commission

18 CFR Part 35

Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act; Proposed Rule

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM20–10–000]

Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Energy Regulatory Commission proposes to revise its existing regulations that implemented section 219 of the Federal Power Act in light of the changes in transmission development and planning over the last few years.

DATES: Comments are due July 1, 2020.

ADDRESSES: Comments, identified by docket number, may be filed electronically at *http://www.ferc.gov* in acceptable native applications and print-to-PDF, but not in scanned or picture format. For those unable to file electronically, comments may be filed by mail or hand-delivery to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426. The Comment Procedures Section of this document contains more detailed filing procedures.

FOR FURTHER INFORMATION CONTACT:

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I. Introduction

1. In this notice of proposed rulemaking (NOPR), the Federal Energy Regulatory Commission (Commission) proposes to revise its existing transmission incentives policy and corresponding regulations (Transmission Incentives Regulations) [1] in light of changes in transmission development and planning in the last few years. After the enactment of the Energy Policy Act of 2005,[2] which added section 219 to the Federal Power Act (FPA),[3] the Commission promulgated Order No. 679 [4] pursuant to FPA section 219.

2. After Order No. 679, the Commission last reviewed its transmission incentives policy in its 2012 Policy Statement.[5] Even since then, the energy industry has undergone a transformation. The landscape for planning, developing, operating, and maintaining transmission infrastructure has changed considerably. Those changes include an evolution in the resource mix and an increase in the number of new resources seeking transmission service, shifts in load patterns, the impact of the implementation of the Commission's major rulemaking on transmission planning and cost allocation (Order No. 1000),[6] and new challenges to maintaining the reliability of transmission infrastructure. As a result of these changes and the Commission's greater experience evaluating transmission incentive applications made pursuant to Order No. 679 and their relationship to the objectives of FPA section 219, we now propose to revise our transmission incentives policy to more closely align it with the statutory language of FPA section 219.

3. First, we propose to depart from the risks and challenges approach used to evaluate requests for transmission incentives adopted in Order No. 679 and instead focus on granting incentives based on the benefits to consumers of transmission infrastructure investment identified by Congress in FPA section 219: Ensuring reliability and reducing the cost of delivered power by reducing transmission congestion. As described in the next two paragraphs, a

4. Second, we propose to offer public utilities an ROE incentive for transmission projects that provide sufficient economic benefits, as measured by the degree to which such benefits exceed related transmission project costs. Specifically, we propose to offer 50 basis points of ROE incentives for transmission projects that meet an economic benefit-to-cost ratio in the top 75th percentile of transmission projects examined over a sample period. We propose to offer 50 additional basis points of ROE incentives for transmission projects that demonstrate ex-post cost savings that fall in the 90th percentile of transmission projects studied over the same sample period, as measured at the end of construction.

5. Third, we propose to offer public utilities an ROE incentive for transmission projects that provide significant and demonstrable reliability benefits. Specifically, we propose to offer up to 50 basis points of ROE incentives for transmission projects that can demonstrate potential reliability benefits by providing quantitative analysis, where possible, as well as qualitative analysis. Cybersecurity is an important part of reliability and we will address cybersecurity incentives independently in a separate, future proceeding.

6. Fourth, we propose to modify the incentive allowing public utilities to recover 100 percent of prudently incurred costs of transmission facilities that are cancelled or abandoned due to factors that are beyond the control of the applicant (Abandoned Plant Incentive). Specifically, we propose to allow public utilities with transmission projects that are selected in a regional transmission planning process for the purposes of cost allocation to recover 100 percent of abandoned plant costs from the date that such transmission projects are selected in a regional transmission planning process for the purposes of cost allocation, rather than from the date the Commission issues an order granting such recovery.

7. Fifth, we propose to revise our regulations to eliminate the ROE incentive and related acquisition adjustment incentive available to stand-alone transmission companies (Transcos).[7]

8. Sixth, consistent with the statutory language in FPA section 219, we propose to modify the ROE incentive available to transmitting utilities or electric utilities that join and/or continue to be a member of an Independent System Operator (ISO), Regional Transmission Organization (RTO), or other Commission approved Transmission Organization [8] (RTO-Participation Incentive) so that it is available regardless of whether the transmitting utility's or electric utility's participation in the ISO, RTO, or Transmission Organization is voluntary. The proposed RTO-Participation Incentive will be a uniform 100-basis-point increase to ROE for transmitting utilities that turn over their wholesale facilities to the Transmission Organization.

9. Seventh, we propose to offer public utilities incentives for transmission technologies that, as deployed in certain circumstances, enhance reliability, efficiency, and capacity, and improve the operation of new or existing transmission facilities. We propose that these technologies will be eligible for both: (1) A stand-alone, 100-basis-point ROE incentive on the costs of the specified transmission technology project; and (2) specialized regulatory asset treatment. Further, we propose to give pilot programs a rebuttable presumption of eligibility for these incentives.

10. Eighth, we propose to establish a 250-basis-point cap on total ROE incentives granted to a public utility in place of the current policy of limiting ROE incentives to the public utility's zone of reasonableness.

11. Ninth, we propose to reform the information collected from transmission incentive applicants in FERC–730, Report of Transmission Investment Activity (Form 730), by obtaining this information on a project-by-project basis and to expand some of the information collected.[9] We also propose to update the data reporting process.

[1] 18 CFR 35.35.

[2] Energy Policy Act of 2005, Public Law 109–58, sec. 1241, 119 Stat. 594 (2005).

[3] 16 U.S.C. 824s.

[4] *Promoting Transmission Investment through Pricing Reform,* Order No. 679, 116 FERC ¶ 61,057, *order on reh'g,* Order No. 679–A, 117 FERC ¶ 61,345 (2006), *order on reh'g* 119 FERC ¶ 61,062 (2007).

[5] *Promoting Transmission Investment through Pricing Reform,* 141 FERC ¶ 61,129 (2012) (2012 Policy Statement).

[6] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities,* Order No. 1000, 136 FERC ¶ 61,051 (2011), *order on reh'g,* Order No. 1000–A, 139 FERC ¶ 61,132, *order on reh'g and clarification,* Order No. 1000–B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth.* v. *FERC,* 762 F.3d 41 (D.C. Cir. 2014).

[7] The Commission defines a Transco as a stand-alone transmission company that has been approved by the Commission and that sells transmission service at wholesale and/or on an unbundled retail basis, regardless of whether it is affiliated with another public utility. 18 CFR 35.35(b)(1); Order No. 679, 116 FERC ¶ 61,057 at P 201.

[8] A Transmission Organization is defined as an RTO, ISO, independent transmission provider, or other organization finally approved by the Commission for the operation of transmission facilities. 16 U.S.C. 796(29); 18 CFR 35.35(b)(2). The Commission is proposing to move the definition of Transmission Organization from § 35.35(b)(2) of its regulations to § 35.35(f) of the revised Transmission Incentives Regulations.

[9] Concurrent with this NOPR, the Commission is issuing an instant final rule clarifying the filing instructions for the current Form 730 at the request

Continued

II. Background

A. FPA Section 219

12. Prior to 2005, the Commission considered requests for certain transmission incentives pursuant to FPA section 205.[10] In 2005, Congress amended the FPA to, as relevant here, add a new section 219.[11] FPA section 219(a) directed the Commission to promulgate a rule providing incentive-based rates for electric transmission for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion. FPA section 219(b) included a number of specific directives in the required rulemaking, including that the rule shall:

- Promote reliable and economically efficient transmission and generation of electricity by promoting capital investment in the enlargement, improvement, maintenance, and operation of all facilities for the transmission of electric energy in interstate commerce, regardless of the ownership of the facilities; [12]
- Provide a return on equity that attracts new investment in transmission facilities, including related transmission technologies; [13]
- Encourage deployment of transmission technologies and other measures to increase the capacity and efficiency of existing transmission facilities and improve the operation of the facilities; [14] and
- Allow the recovery of all prudently incurred costs necessary to comply with mandatory reliability standards issued pursuant to FPA section 215,[15] and all prudently incurred costs related to transmission infrastructure development pursuant to FPA section 216.[16]

13. FPA section 219(c) states that the Commission shall, to the extent within its jurisdiction, provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization and ensure that any costs recoverable pursuant to this subsection may be recovered by such transmitting utility or electric utility through the transmission rates charged by such transmitting utility or electric utility or through the transmission rates charged by the Transmission Organization that provides transmission service to such transmitting utility or electric utility.[17]

14. Finally, FPA section 219(d) provides that rates approved pursuant to a rulemaking adopted pursuant to section 219 are subject to the requirements in FPA sections 205 and 206 [18] that all rates, charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential.

B. Order Nos. 679 and 679–A

15. On July 20, 2006, the Commission issued Order No. 679, adding § 35.35 to the Commission's regulations to implement transmission incentives, and thereby fulfilling the rulemaking requirement in FPA section 219(a). The Commission explained that, to receive an incentive, an applicant must satisfy the statutory threshold set forth in FPA section 219(a) by demonstrating that the transmission facilities for which it seeks incentives either ensure reliability or reduce the cost of delivered power by reducing transmission congestion. If the applicant satisfies that threshold, it must then demonstrate that there is a nexus between the incentive sought and the investment being made. The Commission stated that it would apply the FPA section 219(a) threshold and the nexus test on a case-by-case basis.[19]

16. The Commission also described a variety of incentives that would potentially be available, including:

- Increases above the base ROE: (1) To compensate for the risks and challenges of a specific transmission project (ROE incentive for risks and challenges); (2) for forming a Transco (Transco ROE Incentive); (3) for joining a RTO or ISO (RTO-Participation Incentive); or (4) for use of an advanced transmission technology;
- The Abandoned Plant Incentive, which is, as explained above, the ability to request 100 percent of prudently incurred costs associated with abandoned transmission projects to be included in transmission rates if such abandonment is outside the applicant's control;
- Inclusion of 100 percent of construction work in progress in rate base (CWIP Incentive);
- Hypothetical capital structures;
- Accelerated depreciation for rate recovery; and
- Recovery of prudently incurred pre-commercial operations costs as an expense or through a regulatory asset (Regulatory Asset Incentive).

17. On December 22, 2006, in Order No. 679–A, the Commission granted rehearing in part and denied rehearing in part of Order No. 679.[20] The Commission largely affirmed the conclusions discussed in the previous paragraphs while refining certain other aspects of Order No. 679. In its subsequent discussion of the nexus test, the Commission reaffirmed that the ''most compelling'' candidates for incentives are ''new projects that present special risks or challenges, not routine investments made in the ordinary course of expanding the system to provide safe and reliable transmission service.'' [21]

C. Order No. 1000

18. In 2011, the Commission issued Order No. 1000, which instituted certain transmission planning and cost allocation reforms for public utility transmission providers.[22] Notably, Order No. 1000 requires: (1) That each public utility transmission provider participate in a regional transmission planning process that produces a regional transmission plan; (2) that local and regional transmission planning processes must provide an opportunity to identify and evaluate transmission needs driven by public policy requirements established by state or federal laws or regulations; (3) improved coordination between neighboring transmission planning regions for new interregional transmission facilities; and (4) the removal from Commission-approved tariffs and agreements of a federal right of first refusal.[23]

19. Order No. 1000 also requires that each public utility transmission provider must participate in a regional transmission planning process that has: (1) A regional cost allocation method for the cost of new transmission facilities selected in a regional transmission plan for purposes of cost allocation; and (2) an interregional cost allocation method for the cost of new transmission facilities that are located in two neighboring transmission planning regions and are jointly evaluated by the two regions in the interregional transmission coordination process.[24]

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of the Office of Management and Budget (OMB). *Reporting of Transmission Investments,* Order No. 869, 170 FERC ¶ 61,219 (2020). Those changes are reflected into the Form 730 as proposed in this NOPR.

[10] 16 U.S.C. 824d; *see also Me. Pub. Utils. Comm'n* v. *FERC,* 454 F.3d 278, 287 (D.C. Cir. 2006).

[11] Energy Policy Act of 2005, Pub. L. 109–58, sec. 1241.

[12] 16 U.S.C. 824s(b)(1).

[13] *Id.* at 824s(b)(2).

[14] *Id.* at 824s(b)(3).

[15] FPA section 215 addresses the Commission's role in ensuring electric reliability of the bulk power system. *Id.* at 824o.

[16] *Id.* at 824s(b)(4). FPA section 216 addresses designation of and siting of transmission facilities within National Interest Electric Transmission Corridors. *Id.* at 824p.

[17] *Id.* at 824s(c).

[18] *Id.* at 824e.

[19] Order No. 679, 116 FERC ¶ 61,057 at PP 22, 24.

[20] Order No. 679–A, 117 FERC ¶ 61,345 at P 1.

[21] *Id.* PP 23, 60.

[22] Order No. 1000, 136 FERC ¶ 61,051.

[23] *See* Order No. 1000–A, 139 FERC ¶ 61,132 at P 1.

[24] Order No. 1000, 136 FERC ¶ 61,051 at P 9.

Although Order No. 1000 does not directly address the Commission's obligations under FPA section 219, the aforementioned reforms have had certain implications for how regional transmission facilities are planned and developed.

D. 2012 Policy Statement

20. On November 15, 2012, the Commission issued a policy statement to provide additional guidance regarding its evaluation of applications for transmission incentives under FPA section 219 and Order No. 679. In particular, the Commission reframed the nexus test for applicants seeking the ROE incentive for risks and challenges and eliminated the stand-alone advanced transmission technology incentive.[25] The Commission stated that it would expect an applicant seeking an ROE incentive for risks and challenges to demonstrate that: (1) The proposed transmission project faces risks and challenges that were not either already accounted for in the applicant's base ROE or addressed through non-ROE incentives; (2) it is taking appropriate steps and using appropriate mechanisms to minimize its risk during transmission project development; (3) alternatives to the transmission project had been, or would be, considered in either a relevant transmission planning process or another appropriate forum; and (4) it commits to limiting the application of the ROE incentive to a cost estimate.[26]

21. The Commission provided several examples of categories of transmission projects that might satisfy the above-noted ''risks and challenges'' expectation, including transmission projects that would: (1) Relieve chronic or severe grid congestion that has had demonstrated cost impacts to consumers; (2) unlock location-constrained generation resources that previously had limited or no access to the wholesale electricity markets; or (3) apply new technologies to facilitate more efficient and reliable usage and operation of existing or new facilities.[27]

E. 2019 Notice of Inquiry

22. On March 21, 2019, the Commission issued a Notice of Inquiry seeking comment on the scope and implementation of its electric transmission incentives regulations and policy.[28] The 2019 Notice of Inquiry presented numerous questions regarding the Commission's approach to, and objectives of, its incentives policy; the mechanics and implementation of an incentives policy; and metrics for evaluating the effectiveness of incentives. The Commission received 67 initial comments and 47 reply comments.

F. Grid-Enhancing Technologies Workshop

23. On November 5 and 6, 2019, Commission staff led a workshop on grid-enhancing technologies (Grid-Enhancing Technologies Workshop).[29] Grid-Enhancing Technologies Workshop speakers identified several grid-enhancing technologies, including power flow control, transmission topology optimization, advanced line rating management, and storage as transmission. Speakers also discussed several methods to incentivize the deployment and implementation of grid-enhancing technologies, including a shared-savings approach. The Commission also issued a post-workshop notice seeking comment and received 19 comments.

III. Need for Reform

24. The reforms proposed to the Commission's transmission incentives policy will both help to reflect recent changes in the industry and transmission planning and more closely align with the statutory language of FPA section 219.

25. As part of ensuring that we continue to meet our statutory obligations, the Commission periodically reviews its existing policies and regulations. The Commission established its transmission incentives policy in Order No. 679 and clarified that policy six years later in the 2012 Policy Statement. In the nearly eight years since our last formal review of the Commission's transmission incentives policy, the landscape for planning, developing, operating, and maintaining transmission infrastructure has changed considerably. These changes include an evolution in the resource mix, an increase in the number of new resources seeking transmission service, shifts in load patterns, the Commission's implementation of Order No. 1000's reforms, and new challenges to maintaining the reliability of transmission infrastructure.

26. While transmission infrastructure development has remained generally robust at an aggregate level, the types of transmission projects that are needed, and the use of rate treatments to incent them, must evolve to reflect the changes in market fundamentals.

27. First, the nation's resource mix has evolved since the Commission's issuance of Order No. 679 in 2006, with rising use of natural gas and renewable resources and declining use of coal. In 2006, coal, natural gas, and nuclear made up nearly 88 percent of net electric generation in the United States, with coal contributing nearly 50 percent of total generation and natural gas contributing 20 percent of total generation, respectively.[30] By 2018, coal, natural gas, and nuclear still accounted for 82 percent of net electric generation; 27 percent of total generation was from coal and 36 percent from natural gas, respectively. Solar and wind increased from a collective one percent in 2006 to eight percent in 2018. These shifts create a need for more transmission infrastructure to bring generation to load. A survey of Edison Electric Institute (EEI) members shows that the need to integrate renewables and natural gas is one of the main drivers for expansion of the transmission system, as noted by U.S. Energy Information Administration (EIA).[31]

28. In addition to the changing mix of resources used to generate electricity, more types of resources are now participating in Commission-jurisdictional markets. Industry innovation and market reforms, demand-side resources, electric storage, distributed energy resources, and new technological innovations provide transmission operators with new opportunities as well as new challenges. There is a need for existing and new transmission facilities to help facilitate integration of these resources and a need to incent development and enhancement of transmission facilities so that they are effective in doing so.

29. Changes in load patterns are also driving new types of transmission investment. Despite low overall demand

[25] The Commission stated that, with respect to possible ROE incentives, it would prospectively consider advanced technologies only as part of an application for an ROE adder for risks and challenges. 2012 Policy Statement, 141 FERC ¶ 61,129 at P 23.

[26] *Id.* PP 20–28.

[27] *Id.* P 21. The Commission noted these examples of types of transmission projects that might qualify for an ROE adder for risks and challenges was not an exhaustive list. *Id.* P 22.

[28] *Inquiry Regarding the Commission's Electric Transmission Incentives Policy,* 84 FR 11759 (Mar. 28, 2019), 166 FERC 61,208 (2019) (2019 Notice of Inquiry).

[29] FERC, *Grid-Enhancing Technologies,* Notice of Workshop, Docket No. AD19–19–000 (Sept. 9, 2019).

[30] In 2006, coal represented 49 percent, natural gas 20 percent, and nuclear power 19 percent of net electric generation in the United States. U.S. Energy Info. Admin., *Total Energy Annual Energy Review, Electricity Net Generation: Total (All Sectors),* at 1 (January 2020), *https://www.eia.gov/totalenergy/data/monthly/pdf/sec7_5.pdf.*

[31] U.S. Energy Info. Admin., *Today in Energy* (Feb. 9, 2018), *https://www.eia.gov/todayinenergy/detail.php?id=34892.*

growth, electrification in industries such as transportation, heating, and agriculture are expected to contribute to peak load growth, requiring additional transmission investment to meet those needs.[32] Other shifts in load patterns are triggering targeted transmission investment, such as by Public Service Enterprise Group to meet urban area growth in Newark and Jersey City, New Jersey, or by Dominion Energy to meet the increased load needs of data centers in northern Virginia.[33] Another example of transmission being built to meet these various needs is the Energy Gateway Project, which EIA notes is being built to meet new demand patterns and provide greater access to new resources.[34] The Commission's incentives policy must be effective in incenting transmission projects that reflect existing, and can adapt rapidly to future, shifts in load growth patterns.

30. Additionally, transmission planning has evolved significantly. The 2012 Policy Statement was issued less than one month after transmission planning regions submitted their first round of Order No. 1000 regional compliance filings. All transmission planning regions have now conducted at least two iterations of their regional transmission planning process, with some having conducted as many as seven.[35] As part of such processes, the six RTOs/ISOs use sophisticated software modeling to identify the relative benefits and costs of proposed new transmission projects premised upon transmission projects' economic benefits. There is now an opportunity for the Commission to leverage the RTOs/ISOs' efforts to better target incentives at transmission projects that demonstrate sufficient economic benefits, as measured by the degree to which such benefits exceed related transmission project costs.

31. FPA section 219(a) requires that the Commission provide incentive-based rates for electric transmission for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion. While we are encouraged by the investment in transmission infrastructure to date, our evaluation of the Commission's incentives policy indicates that additional reform may be necessary to continue to satisfy our obligations under FPA section 219 in this new transmission planning landscape.

32. Further, in reviewing our incentives policy under Order No. 679, we have determined that our current policy may not fully accomplish the purposes of FPA section 219. Congress in FPA section 219 directed that the Commission shall establish, by rule, incentive-based (including performance-based) rate treatments for the transmission of electric energy in interstate commerce by public utilities *for the purpose of benefitting consumers* by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.[36] As discussed in more detail in the following section, we are proposing to revise our transmission incentives policy in order to more closely align with the statutory language and purpose of FPA section 219. By ensuring that our incentives policy better aligns with our statutory requirements, we aim to set clear expectations for how the Commission will analyze future applications for incentives treatment, as well as increased transparency for the regulated industry.

33. This analysis also should increase certainty for developers; better align incentives awarded with transmission project benefits and costs; increase the precision and transparency with which transmission project benefits are considered by the Commission; and increase the ability, over time, of the Commission to determine whether incentives are effective in spurring development of transmission projects with desirable benefits.

IV. Discussion

A. Shift From Risks and Challenges to Benefits

34. We propose to revise § 35.35 of the Transmission Incentives Regulations to incorporate a benefits test to receive transmission incentives and to remove the nexus test from § 35.35(c) of the currently effective regulations. FPA section 219(a) explicitly recognizes the benefits of transmission projects by directing that the Commission shall establish, by rule, incentive-based (including performance-based) rate treatments for the transmission of electric energy in interstate commerce by public utilities for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.[37]

35. Order Nos. 679 and 679–A implemented the provisions of FPA section 219 and established a ''nexus test,'' which required that applicants demonstrate a connection between the total package of incentives sought and the proposed investment, in light of the risks and challenges facing a transmission project seeking incentives under FPA section 219.[38] However, FPA section 219 neither includes this standard nor requires the Commission to find that the transmission project would otherwise not occur without the incentive.[39] The inclusion of this standard has focused applicants and the Commission on the risks and challenges of a transmission project rather than the purpose and language of FPA section 219, which is to benefit consumers by ensuring reliability and reducing the costs of delivered power by reducing transmission congestion, and ensuring that rates remain just and reasonable.

36. Based on experience to date with the application of Order No. 679, and in recognition of the changing landscape in the energy industry, we believe that refocusing our incentives program to more closely align with the statutory directive of FPA section 219 will allow the Commission to better fulfill its mandate. We therefore propose to

[32] *See* Brattle Group, *The Coming Electrification of the North American Economy,* at 7–12, 16–21 (Feb. 28, 2019), *https://wiresgroup.com/wp-content/uploads/2019/03/Electrification_BrattleReport_WIRES_FINAL_03062019.pdf.*

[33] Edison Electric Institute, *Smarter Energy Infrastructure: The Critical Role and Value of Electric Transmission,* at 7 (Mar. 2019), *https://www.eei.org/issuesandpolicy/transmission/Documents/2018%20Smarter%20Energy%20Infrastructure%20The%20Critical%20Role%20and%20Value%20of%20Electric%20Transmission.pdf.*

[34] U.S. Energy Information Administration, *Today in Energy* (Feb. 9, 2018), *https://www.eia.gov/todayinenergy/detail.php?id=34892.*

[35] *See* California Independent System Operator, Inc., *Transmission Planning for a Reliable, Economic and Open Grid, http://www.caiso.com/planning/Pages/TransmissionPlanning/Default.aspx;* WestConnect, *Regional Planning, http://regplanning.westconnect.com/regional_planning.htm.*

[36] 16 U.S.C. 824s(a) (emphasis added).

[37] *Id.*

[38] The applicant must demonstrate that the transmission facilities for which it seeks incentives either ensure reliability or reduce the cost of delivered power by reducing transmission congestion consistent the requirements of section 219, that the total package of incentives is tailored to address the risks and challenges faced by the applicant in undertaking the project, and that the resulting rates are just and reasonable. 18 CFR 35.35(d); *see also* Order No. 679, 116 FERC ¶ 61,057 at P 76.

[39] *See* Order No. 679, 116 FERC ¶ 61,057 at P 53 (stating that FPA section 219 provides a new directive to the Commission to permit greater incentives and does not on its face require an individual showing of need by incentive applicants)*; see also Conn. Dept. of Pub. Util. Control* v. *FERC,* 593 F.3d 30, 34 (D.C. Cir. 2010) (''nothing in the law or FERC's stated purpose required FERC to adduce evidence . . . 'that the adder would produce new transmission investment'''). When the Commission explained why it was not adopting a ''but for'' test in Order No. 679, it noted that the rule was ''based on a clear directive from Congress that does not require an applicant to show that it would not build the facilities but for the incentives.'' Order No. 679, 116 FERC ¶ 61,057 at P 48.

depart from the ''nexus test'' framework of Order No. 679, and instead focus our decision to grant incentives on the benefits to consumers of transmission infrastructure investment identified by Congress: ensuring reliability and reducing the cost of delivered power by reducing transmission congestion. Accordingly, we propose to revise § 35.35(c) of the proposed Transmission Incentives Regulations to remove the nexus test and to implement a benefits test.

37. As described in detail below, with respect to ROE incentives based upon transmission projects' economic and reliability benefits, we propose separate analyses to implement the revised § 35.35(c) of the Transmission Incentives Regulations, wherein an applicant must demonstrate that the incentives it seeks meet a specified benefit-to-costs threshold for an economic benefits showing or provide a significant and demonstrable reliability enhancement for a reliability benefits showing, with each of these showings determining eligibility for distinct ROE incentives. Consistent with Congressional directive in FPA section 219(d), all ROE incentives must be just and reasonable.

38. Although we propose a shift in the Commission's transmission incentive analysis to concentrate on the benefits presented by transmission investment, we propose to retain non-ROE incentives, including the abandoned plant incentive, CWIP Incentive, hypothetical capital structure, accelerated depreciation for rate recovery, and regulatory asset treatment.[40] These non-ROE incentives remain vital in facilitating the investment in and the development of transmission projects as they remove regulatory barriers and other impediments to investment. These incentives will continue to remain available to all transmission projects that meet the Commission's rebuttable presumptions for transmission projects that result from fair and open regional transmission planning, receive construction approval from an appropriate state commission or state siting authority, or otherwise demonstrate that they are needed to ensure reliability or reduce the cost of delivered power by reducing transmission congestion.[41] We propose only incremental reforms to some of these non-ROE incentives.[42] We continue to see transmission project-specific ROE incentives, for which we will require additional demonstration of benefits, as a supplement to these non-ROE incentives, as discussed further below.

39. We do not propose to require applicants for a transmission project-specific ROE incentive based upon transmission projects' economic or reliability benefits to demonstrate that base ROE or non-ROE incentives are insufficient to adequately address the needs of these transmission projects before seeking an ROE incentive, as is currently required for the ROE incentive for risks and challenges, which we propose to eliminate as we shift to a benefits-based approach for ROE incentives.

40. Furthermore, we propose no changes to the procedural flexibility offered to applicants seeking incentives, including applicants' ability to seek expedited declaratory orders on incentive proposals before submitting a filing for approval under FPA section 205 for inclusion of the incentives in rates.

B. Incentive ROE Reforms

41. FPA section 219 directed the Commission to provide a framework for granting incentives based on the benefits to consumers of transmission infrastructure investment that ensured reliability and reduced the cost of delivered power by reducing transmission congestion. We continue to believe that it is necessary to offer incentives under FPA section 219 to ensure an ROE that attracts new investment in transmission facilities and continues investment in beneficial transmission facilities.[43] Accordingly, we propose to offer a series of transmission ROE incentives designed to ensure that returns on equity attract investment in transmission infrastructure that has high economic benefits to consumers through congestion relief or that enhances reliability.

1. ROE Incentives

a. ROE Incentive for Economic Benefits

42. FPA section 219(a) directs the Commission to establish incentive-based rate treatments to benefit consumers by reducing the cost of delivered power by reducing transmission congestion, section 219(b)(1) directs the Commission to promote reliable and economically efficient transmission, and section 219(b)(2) directs the Commission to provide an ROE that attracts new investment in transmission facilities.[44] Accordingly, we propose to revise § 35.35(d) of our regulations to allow applicants to seek ROE incentives for transmission projects that provide sufficient economic benefits, as measured by the degree to which such benefits exceed related transmission project costs, as described further below.

43. We propose to grant ROE incentives to economic transmission projects based on economic benefit-to-cost tests, including a 50-basis-point ROE incentive for transmission projects that meet an ex-ante benefit-to-cost threshold, described below, and 50 additional basis points for transmission projects that demonstrate on an ex-post basis that they are able to satisfy a higher benefit-to-cost threshold when constructed. Regional[45] or local[46] transmission projects may be eligible for this incentive.

b. Adoption of a Benefit-to-Cost Test

44. We propose to adopt a benefit-to-cost ratio to determine the eligibility of economic transmission projects for ROE incentives to attract new investment in transmission facilities in order to implement our proposed revisions to § 35.35(d) of the revised Transmission Incentives Regulations. We believe that this approach is consistent with both a benefits-based approach and industry practice, as explained in greater detail below. Several RTOs/ISOs request that the Commission not impose a benefits-based incentives approach that would duplicate or interfere with their transmission planning efforts, cause inefficient use of RTO/ISO staff time, or engender contention and potential litigation.[47] With these concerns in mind, we propose an approach to economic benefits-based incentives that we believe is relatively simple, transparent, and yet is efficient in relying upon RTOs/ISOs' analyses of the economic benefits of transmission projects.

45. In Order No. 679, the Commission stated that it would not require applicants for incentive-based rate

[40] 2012 Policy Statement, 141 FERC ¶ 61,129 at PP 11–14.

[41] *See* proposed 18 CFR 35.35(e).

[42] *See* section II.D.

[43] 16 U.S.C. 824s(b)(2).

[44] *Id.* at 824s(a)–(b)(2).

[45] A regional transmission facility is a transmission facility located entirely in one region. Order No. 1000, 136 FERC ¶ 61,051 at n. 374.

[46] A local transmission facility is a transmission facility located solely within a public utility transmission provider's retail distribution service territory or footprint that is not selected in the regional transmission plan for purposes of cost allocation. *Id.* at P 63.

[47] California Independent System Operator Corporation Comments, Docket No. PL19–3–000, at 10 (filed June 26, 2019); Grid-Enhancing Technologies Workshop Transcript Day Two, Docket No. AD19–19–0000, at 286, 288, 296, 316, 325, 327, 334 (filed Jan. 6, 2020).

treatments to provide benefit-to-cost analyses.[48] Explaining why it was not requiring such showings, the Commission listed as considerations: (1) The Commission's authority to consider non-cost factors in awarding incentives; (2) that Congress's enactment of FPA section 219 reflected its determination that incentives generally can spur transmission investment which will, in turn, provide the benefits of a robust transmission system; and (3) the Commission's intent to consider the justness and reasonableness of any proposal for incentive rate treatment in individual proceedings.[49]

46. However, we believe that shifting from a risks and challenges based paradigm to a benefits-based paradigm, where incentives reward the most beneficial rather than most challenging transmission projects, supports using benefit-to-cost ratios to award economic incentives. Many transmission planning regions, including RTOs/ISOs, already identify beneficial transmission solutions and the heightened benefit-to-cost ratio thresholds we adopt below will ensure that we are providing incentives to highly beneficial transmission projects. Specifically, in many RTOs/ISOs, competing economic transmission projects are evaluated through a comparison of transmission projects' economic benefits with their costs, generating benefit-to-cost ratios that evaluate transmission projects by their net benefits.[50] In addition, many applications requesting ROE incentives for risks and challenges already include some analysis of benefits and costs.[51]

47. The widespread use of benefit-to-cost ratios for evaluating economic transmission projects in RTO/ISO transmission planning regions demonstrates the reasonableness of employing benefit-to-cost ratios to determine whether transmission projects merit ROE incentives premised upon economic benefits. The use of benefit-to-cost ratios for awarding ROE incentives will allow the Commission to set a clear expectation as to the level of benefits relative to costs required to receive an ROE incentive. We request comment on the merits of the use of benefit-to-cost ratios to determine eligibility of transmission projects, regardless of the type of transmission project, for ROE incentives based on their economic benefits.

c. Benefit-to-Cost Measurements

48. In calculating the economic benefits of a transmission project for which a public utility is requesting ROE incentives, we propose to limit measurement of economic benefits to adjusted production costs or similar measures of congestion reduction or certain other quantifiable benefits that are verifiable and not duplicative. With respect to transmission projects' economic benefits, transmission planning regions typically evaluate the economic efficiency of transmission projects through production cost modeling. This analysis seeks to minimize total system cost by evaluating the security constrained unit commitment and economic dispatch of the system over a given time horizon within a transmission planning region. A transmission project, whether regional or local, is classified as ''economic'' if it reduces the total system cost by an amount that justifies its cost, usually by establishing net positive benefits, and sometimes surpassing a defined benefit-to-cost threshold. In RTO/ISO regions, all regional transmission projects selected in a regional transmission plan for purposes of cost allocation, and sometimes other transmission projects premised primarily on their economic benefits, are evaluated through production cost or similar modeling.[52] Some of the non-RTO/ISO regions' transmission planning processes also include production cost modeling.[53]

49. In addition, many regions supplement adjusted production cost models with other economic benefit metrics. MISO, for example, has also proposed to examine reliability transmission project costs avoided by the construction of an economic transmission project, as well as the impacts on congestion of a settlement between MISO and Southwest Power Pool, Inc. (SPP),[54] and already considers the relative degree to which an economic transmission project will solve a congestion problem. In this example, MISO might choose an economic transmission project that completely resolves congestion in a particular location on the system over a transmission project with a higher benefit-to-cost ratio that relieves only a portion of the congestion.[55] Similarly, PJM's process allows for a holistic assessment of benefits and considers factors, such as constructability analysis, effects of transmission project combinations, and changes in load energy payments, in its overall consideration of transmission projects.[56] California Independent System Operator Corporation (CAISO) assesses on a case-by-case basis other economic opportunities that are not necessarily driven by congestion. Such economic opportunities may include local capacity benefits (*e.g.,* reducing the requirement for local generation capacity due to limited transmission capacity into an area).[57] In NYISO, the economic transmission planning process uses production cost savings as the primary metric in its initial phase; subsequently, NYISO considers additional metrics on a case-by-case basis, depending on the most useful ones for each economic planning cycle.[58] Commenters in other

[48] Order No. 679, 116 FERC ¶ 61,057 at P 65.

[49] *Id.*

[50] *See, e.g.,* MISO, *MTEP18 Transmission Expansion Plan,* at 100 (Sep. 18, 2018), *https://cdn.misoenergy.org/MTEP18%20Full%20Report264900.pdf* (presenting a comparison of benefit-to-cost ratios for potential transmission project for MISO's Dakotas/Minnesota region); PJM Interconnection, LLC, *Transmission Expansion Advisory Committee Market Efficiency Update,* at 7 (Dec. 3, 2015), *https://www.pjm.com/-/media/committees-groups/committees/teac/20151203/20151203-market-efficiency-update.ashx* (describing the reliability pricing model benefit component of the benefit/cost ratio).

[51] For example, New York Independent System Operator, Inc. (NYISO) found that the Empire Project proposed by NEET New York is expected to result in: (1) Production cost savings on the NYISO system of approximately $274 million to $338 million over a 20-year period, adjusted on a present value basis to 2017 dollars; and (2) demand congestion change savings on the NYISO system of $582 to $1.184 billion over a 20-year period, adjusted on a present value basis to 2017 dollars. *NextEra Energy Transmission N.Y., Inc.,* 162 FERC ¶ 61,196, at P 21 (2018).

[52] *See, e.g.,* California Independent System Operator, Inc., *2018–2019 Transmission Plan,* at sec. 4.4 (Mar. 29, 2019); Midcontinent Independent System Operator, Inc., *MISO Adjusted Production Cost Calculation White Paper* (Feb. 1, 2019); PJM Manual 14B, *PJM Regional Transmission Planning Process* (Aug. 28, 2019); New York Independent System Operator, Inc., Manual 35, *Economic Planning Process Manual-Congestion Assessment and Resource Integration Studies,* sec. 2.5 (Feb. 2016).

[53] *See, e.g.,* Northern Tier Transmission Group, *2018–2019 Biennial Transmission Plan,* at 10 (Dec. 31, 2019); WestConnect Business Practice Manual, section 4.2.1.1.

[54] Midcontinent Indep. Sys. Operator, Inc., Filing, Docket No. ER20–857–000, at 4 (Jan. 21, 2020)).

[55] *See* MISO, *MTEP 2018: Transmission Expansion Plan,* at 100 (declining to move a transmission solution forward in the study cycle because, ''[a]lthough it shows a good benefit-to-cost ratio, it leaves a significant amount of the congestion unaddressed and the upgrade will most likely not be enough given the future wind development in the Dakotas and Minnesota border area'').

[56] PJM, *Market Efficiency Study Process and RTEP Window Project Evaluation Training,* at 21 (Oct. 16, 2018); PJM, *2017 Regional Transmission Expansion Plan: Book 3 Studies and Results,* at 69 (Feb. 28, 2018).

[57] Other benefits include renewable integration benefit, resource adequacy benefit, and transmission loss benefits. CAISO, *Transmission Economic Assessment Methodology,* sec. 2.5 Additional Benefits of Economically Driven Transmission Expansion (Nov. 2, 2017).

[58] These other metrics include: Estimates of reductions in losses, locational based marginal pricing load costs, generator payments, installed capacity costs, ancillary services costs, emission

proceedings have also identified other potential economic benefits.[59]

50. While most RTOs/ISOs employ other economic benefit metrics in addition to adjusted production cost, we propose to limit our analysis of economic benefits to adjusted production cost, similar measures of congestion reduction, and certain other quantifiable benefits that are verifiable and not duplicative.[60] Although excluding factors beyond adjusted production cost or similar measures of congestion reduction and quantifiable economic benefits will reduce the comprehensiveness of the measurement of economic benefits, we believe that this is a reasonable tradeoff in the interest of an economic benefits test that is transparent and relatively straightforward for applicants to prepare and for the Commission to analyze. We also propose to provide a rebuttable presumption that economic benefits measured in benefit-to-cost ratios derived by RTOs/ISOs for transmission projects within their footprints should be included in the determination of an applicant's transmission project's benefits. Additionally, we propose that the appropriate benefit-to-cost ratio for purposes of the ex-ante evaluation is measured at the time the RTO/ISO finalizes its analysis of potential economic transmission projects within its region.

51. Although we believe that the use of adjusted production cost, similar congestion reduction measurements, and other quantifiable benefits strikes a reasonable balance for the purpose analyzing economic benefits, we request comment on whether additional types of economic benefit measures should be considered for purposes of an economic benefit ROE incentive. We also request comment on existing methods that are equivalent (or comparable) to adjusted production cost that might inform the range of benefits measures that could be utilized.

52. Although some RTOs/ISOs appear to provide stakeholders access to the results of their adjusted production cost models, it is unclear whether all RTOs/ISOs provide public utilities with the results of their adjusted production cost models, similar congestion reduction measurements, or other quantifiable benefits as economic benefits measures, and the resulting benefit-to-cost ratios in a manner that would allow the developer to use these results to seek an ROE incentive for economic benefits. For example, some RTOs/ISOs may require stakeholders to execute a non-disclosure agreement to gain access to study results. In addition, some RTOs/ISOs conduct multiple economic simulations for transmission projects, and it is not clear if these regions perform a single, final adjusted production cost or equivalent economic analysis that would allow for apples-to-apples comparisons of transmission projects. Further, some RTOs/ISOs may not conduct studies of the economic benefits of all transmission projects. We invite further comment on current RTO/ISO practices with regard to the dissemination of production cost modeling information and the derivation of benefit-to-cost ratios and whether these practices could hamper an applicant from using the RTO/ISO modeling results to seek an ROE incentive for economic benefits.

53. In addition, we recognize that public utilities outside of RTOs/ISOs may face challenges in using their transmission planning region's existing processes for analyzing the economic benefits of transmission projects to produce benefit-to-cost analyses for use in an ROE incentive application. Given non-RTO/ISO regions' lack of centrally-cleared markets that allow them to determine how a new transmission facility will change production costs or the price that load must pay at wholesale for electricity, their economic analyses vary greatly from those that RTO/ISO transmission planning regions conduct. Some of the non-RTO/ISO transmission planning regions—WestConnect, ColumbiaGrid, Northern Tier Transmission Group, and Florida Reliability Coordinating Council (FRCC)—consider some form of economic benefits as part of their regional cost allocation methods. For example, under WestConnect's regional cost allocation method for regional transmission projects driven by economic considerations, WestConnect identifies the benefits and beneficiaries of a proposed regional transmission facility by modeling the potential of that transmission facility to support more economic, bilateral transactions between generators and loads in the region.[61] FRCC's process includes a cost-benefit ratio calculation for transmission projects in consideration in its regional transmission plan based on avoided project cost benefits, alternative project cost benefits, and transmission line loss benefits.[62] Whereas, in SERTP, the process mainly focuses on a power flow analysis, and includes such metrics as avoided costs of displaced transmission, and thermal and voltage constraints.[63] We invite comment on the availability and accessibility of adjusted production cost and similar economic benefit measurement data that applicants could use to analyze the economic benefits of a transmission project for purposes of seeking an ROE incentive in non-RTO/ISO regions. We also seek comment on any economic calculations that entities in non-RTO/ISO regions perform in their transmission planning processes (whether economic calculations from transmission planning regions or by public utilities), and the extent to which it might be feasible to calculate benefit-to-cost ratios for any transmission projects for which these transmission projects' developers might consider seeking an economic benefit incentive.

54. Applicants, either in RTOs/ISOs or non-RTO/ISO transmission planning regions, seeking such incentives may produce their own benefit-to-cost study of economic benefits for their transmission projects for consideration by the Commission. Such studies may be prepared by applicants, third party consultants or, if offered, by transmission planning regions. These studies should include quantitative and qualitative description and analysis, including description of any cost or benefit analysis for the transmission project by transmission planning regions or the applicant in transmission planning regions, and detailed analysis and supporting testimony for the applicant's calculation of the transmission project's economic benefits, including major model assumptions, costs, and the resulting benefit-to-cost ratio. However, such non-RTO/ISO-performed studies will not receive a presumption that they are appropriately included in a determination of economic benefits. We invite comment on what supporting information and analysis an applicant's benefit-to-cost study should include.

55. More generally, we also seek comment on how measurement of economic benefits can be distinguished from measurement of other types of benefits considered for purposes of

costs, and transmission congestion contract payments. NYISO, NYISO Tariffs, NYISO OATT, att. Y Economic Planning Process, sec. 31.3.1.3.5 (11.0.0).

[59] *See* Johannes Pfeifenberger and Judy Chang, Comments, Docket No. AD16–18–000 (filed Oct. 3, 2016) (attaching multiple reports on transmission planning and the benefits of the transmission system).

[60] These might include (but are not limited to): Types of load cost savings, capacity benefits, and avoided local transmission project costs.

[61] *See* WestConnect, WestConnect Regional Planning Process Business Practice Manual, sec. 4.6.1.2.

[62] *See* FRCC regional transmission planning process, sec. 7.2.2.

[63] *See,* for example, SERTP 2019 Transmission Planning Analyses, Part II.

other incentives so that double counting of benefits does not occur.

d. Establishing a Benefit-to-Cost Threshold for Economic Incentives

56. We believe that transmission projects should offer substantially more economic net benefits than the average transmission project to be eligible for an incentive premised upon economic benefits. We also believe that it is reasonable to analyze transmission projects by size based on the cost of the transmission project. Thus, we propose to use $25 million, adjusted annually for inflation,[64] as a reasonable dividing line between small system modifications and significant transmission facility expansions. We find that these two categories merit separate benefit-to-cost thresholds. We propose to implement procedures that will provide for inputting and calculation of new national benefit and cost data and the resulting benefit-to-cost threshold between small system modifications and significant transmission facility additions at five-year intervals.

57. As a first step toward developing national benefit-to-cost ratios, we examined 41 economic transmission projects selected in the regional transmission plans of MISO,[65] CAISO,[66] and PJM[67] from 2013 through 2019.[68] Of these transmission projects, 11 cost more than $25 million and, for these transmission projects, the average benefit-to-cost ratio was 3.63. To be eligible for an ex-ante economic benefits ROE incentive, we propose that transmission projects must demonstrate net benefit ratios consistent with the 75th percentile of all transmission projects more than $25 million in these regional plans over the study period, which was 3.98. We note that consideration of benefit-to-cost ratios in other transmission planning regions would help to further support the thresholds for an economic benefits ROE incentive and we propose to expand the derivation of percentile thresholds through examination of benefit-to-cost ratios in other regions, if available, in any final rule. We seek comment on combining different RTO/ISO benefits measurement methodologies as part of an effort to derive a national benefit-to-cost threshold and the merits and downsides to doing so. Further, we encourage additional RTOs/ISOs to provide benefit-to-cost information to make these threshold figures more robust. Finally, we request comment on whether the benefit-to-cost ratio threshold calculations for the transmission projects should include the costs of ROE incentives.

58. For transmission projects that cost less than or equal to $25 million, the average benefit-to-cost ratio for the 30 qualifying transmission projects in MISO, CAISO, and PJM was 26.67, and the ratio for the 75th percentile transmission project was 33.91, which we propose to use as the threshold for an ex-ante economic benefit ROE incentive for these transmission projects.

59. We also propose to offer an additional 50-basis-point incentive for economic benefits as measured on an ex-post basis. To be eligible for an ex-post economic benefits incentive, a transmission project must exhibit a benefit-to-cost ratio in the top 10 percent of transmission projects at the time of transmission project completion based on applying their actual costs to the projected benefits. Like the ex-ante economic benefit ROE incentive, a successful applicant would start earning this incentive in the rate year in which the transmission facility is placed in service. We considered using ex-post benefits versus projected benefits in this analysis, but concluded that the burden of determining and measuring such benefits, and the potentially significant amount of potential changes in transmission project benefits for reasons outside of the control of developers, makes such ex-post review inappropriate. By contrast, application of actual cost information is relatively uncontroversial and straight-forward. For the study period, the 90th percentile for all transmission projects in the three regions greater than $25 million would be 5.17, and 77.04 for transmission projects equal to or less than $25 million.

60. We believe that providing an opportunity for an additional, ex-post incentive for an applicant would benefit customers by further incentivizing transmission project developers to meet a transmission project's projected benefit-to-cost estimates by completing their transmission projects at or below projected costs. We seek comment on whether the Commission should exclude costs resulting from factors beyond a developer's control from the ex-post analysis for an ex-post economic benefits ROE incentive. However, regardless of cost overruns, an applicant would remain eligible for the ex-ante economic benefit ROE incentive. Given that these ratios are significantly above the average of transmission projects premised upon economic benefits, we believe that these incentives are directed to transmission projects that are more beneficial than the average transmission project.

61. To further explain the economic benefits ROE incentive, assuming, for example, that a transmission project has estimated benefits of $400 million, ex-ante estimated costs of $100 million and ex-post, final actual costs of $75 million, such a transmission project could earn up to 50 basis points for demonstrating the 3.98 ex-ante threshold ($400M/$100M=4.00) and up to an additional 50 basis points for achieving the 5.17 ex-post threshold ($400M/$75M=5.33) after the transmission project is completed. We seek comment on this approach and, more generally, on the manner in which these thresholds are calculated.

62. We propose to establish a construct for the determination of applicable benefit-to-cost thresholds that would also provide for reevaluation of these thresholds every five years based upon a reexamination of transmission projects selected in transmission planning regions based upon their economic benefits. We also propose to update for inflation the dividing line between small and large transmission projects for the purpose of determining the respective thresholds for these transmission projects annually.

2. Reliability Benefits

63. FPA section 219(a) directs the Commission to establish incentive-based rate treatments to benefit consumers by ensuring reliability and FPA section 219(b)(1) directs the Commission to promote reliable and economically efficient transmission.[69] Although reliability is clearly delineated as a benefit to be promoted by incentives, we are cognizant of our differing but related mandates for promoting reliability under FPA sections 215 and 219.

64. Pursuant to FPA section 215, the Commission has approved a set of mandatory reliability standards developed by the North American Electric Reliability Corporation (NERC).

[64] We also propose a $25 million threshold for incentives for pilot programs discussed in section IV.G.3.b.

[65] MISO transmission projects included projects selected based upon their economic benefits as market efficiency projects and other economic projects. Multi-Value Projects were excluded because MISO's benefit-to-cost ratios do not differentiate between economic, reliability, and public policy requirement benefits.

[66] CAISO transmission projects considered are those coming out of CAISO's economic planning study of its Transmission Planning Process.

[67] PJM transmission project types studied included those designated by PJM as Market Efficiency Projects.

[68] Specifically, CAISO from 2013–2019; MISO and PJM from 2015–2019. These analyses, based upon publicly available data, are available in Appendix A.

[69] 16 U.S.C. 824s(a)–(b)(1).

The NERC reliability standards define the reliability requirements for the planning and operation of the bulk power system, including transmission facility planning, emergency preparedness, voltage and balancing, and interconnection, among others. Transmission projects required to comply with these standards are assured recovery of all prudently incurred costs pursuant to FPA section 219(b)(4)(A).[70] In accordance with the aim of FPA section 215, the NERC reliability standards provide for an adequate level of reliability.[71] In light of these mandatory reliability standards, and the guaranteed cost recovery pursuant to FPA section 219(b)(4)(A), additional transmission incentives are not necessary to maintain an adequate level of reliability. Nevertheless, as explained below, we believe that a changing electric grid presents reliability challenges that merit increased capital investment in transmission facilities. We therefore propose in § 35.35(d)(1)(iii) of the revised Transmission Incentives Regulations to provide an ROE incentive for certain transmission projects that produce significant and demonstrable reliability benefits above and beyond the requirements of the NERC reliability standards.

a. Reliability Incentive Proposal

65. We propose in § 35.35(b)(1)(iii) of the revised Transmission Incentives Regulations to offer a separate ROE incentive of up to 50 basis points for transmission projects that provide significant and demonstrable reliability benefits. At the outset, we acknowledge that reliability benefits are often more difficult to quantify than economic benefits. Nevertheless, FPA section 219(a) directs the Commission to establish incentive-based rate treatments for the purpose of benefiting consumers by ensuring reliability. Accordingly, to better align our incentives policy with the goals of FPA section 219, we propose to adopt an approach that quantitatively evaluates the reliability benefits of proposed transmission projects when feasible, but also recognizes the value of qualitative assessments of enhanced reliability. We plan to offer reliability benefit ROE incentives for all types of transmission projects within the Commission's jurisdiction that can demonstrate the showing described below.

66. Reliability benefits can take many forms. A transmission project may provide one exceptional reliability benefit or a portfolio of several reliability benefits. Each transmission project has unique attributes, so we propose to evaluate the merits of an application for a reliability ROE incentive based on the transmission project providing one or more significant and demonstrable reliability enhancements. The Commission will evaluate each application on a case-by-case basis.

67. We propose a nonexclusive set of examples and demonstrations that could form the basis of a showing of significant and demonstrable reliability benefits that a transmission project could provide. We note that, as this is not an exclusive list, there may be transmission projects with other significant and demonstrable reliability benefits that warrant incentives. Accordingly, we invite comment on other types of reliability benefits in addition to those discussed below.

68. A transmission project may demonstrate reliability benefits in any number of ways. First, transmission projects that significantly increase import or export capability between balancing authorities can provide significant and demonstrable reliability benefits. For example, increasing import capability can provide access to additional generation capacity which could be necessary to prevent load shedding or restore load generation balance in an emergency. In addition, creating additional transmission capability on frequently constrained interfaces can reduce the likelihood of a System Operating Limit exceedance that can damage equipment and disrupt system operations.

69. Second, transmission projects that result in an Interconnection Reliability Operating Limit (IROL) being downgraded to a routine System Operating Limit likely produce significant and demonstrable reliability benefits. The NERC reliability standards define IROLs as a sub-set of system operating limits that are more likely to result in severe cascading, instability, or uncontrolled separation if violated. Pursuant to the NERC standards, there are no limits on the number of IROLs an entity can have in its footprint, and, in fact, registered entities are required to designate new IROLs where applicable criteria are met. Similarly, transmission projects that are likely to reduce the frequency and/or duration of IROL exceedances can also provide significant and demonstrable reliability benefits.

70. Third, transmission projects that improve the bulk power system's ability to operate reliably during foreseen and unforeseen contingencies beyond the NERC transmission planning (TPL) requirements or other local planning criteria, can provide significant and demonstrable reliability benefits. For example, an applicant may demonstrate that its proposed transmission project improves system stability margins on transfer paths or in generation or load pockets in its request for a reliability ROE incentive. We propose that an applicant may demonstrate this type of reliability benefit in a variety of ways, including by showing reduced loss of load probability, reduced need for reliability unit commitments, or by reducing unserved energy under various contingencies.

71. Fourth, transmission projects that reduce the complexity of the transmission system by eliminating the need for one or more remedial action schemes[72] on the system can provide significant and demonstrable reliability benefits. We propose that an applicant can demonstrate that its proposed transmission project ensures reliability by the elimination of complex remedial action schemes, which can in turn lower the risk of misoperations due to design errors, relay failures, or communication failures.

72. Finally, transmission projects that use network management technologies, such as dynamic line ratings, power flow controls, or transmission topology optimization, can provide significant and demonstrable reliability benefits by giving operators better tools to address unforeseen system conditions. While these investments may not be required to meet reliability standards, they can expand the event response capabilities of the transmission system by enhancing situational awareness and facilitating faster response times to mitigate system disturbances, thus improving reliability. Accordingly, we propose that an applicant may demonstrate enhanced reliability through deployment of these technologies. Although we are proposing specific incentives to facilitate investment in transmission technologies,[73] we also propose to consider the reliability benefits offered by including these technologies in transmission projects to the extent that these technologies add to or improve the reliability of a transmission project as a whole. A transmission project may offer reliability benefits both because of, and independent of, the inclusion of transmission technologies.

[70] *Id.* at 824s(b)(4)(A).

[71] *Id.* at 824o(a)(3).

[72] NERC defines a remedial action scheme as a scheme designed to detect predetermined system conditions and automatically take corrective actions that may include, but are not limited to, adjusting or tripping generation, tripping load, or reconfiguring a system.

[73] *See infra* section IV.G.2.

73. In addition to the five examples of types of reliability transmission projects discussed above, which are likely to meet the Commission's test of providing significant and demonstrable reliability benefits, we encourage applicants to propose other transmission projects that they think provide significant and demonstrable reliability benefits. We recognize the importance of maintaining a transmission system that can withstand extreme environmental and other disruptive events and remain operational in the face of such challenges, which can vary based on geographic region and system topology. Accordingly, we will also consider transmission projects that improve resilience in awarding reliability incentives.[74] Transmission projects that provide resilience benefits in areas where they are needed could include the hardening of transmission assets against adverse weather events, fires, and geomagnetic disturbances, or event recovery investments such as transmission facilities related to blackstart facilities. Investments in transmission facilities for purposes of disaster recovery, such as transformers and circuit breakers, or other used and useful equipment for emergency response and recovery, also are potential investments that could be considered for a reliability incentive.

b. Proposed Showing and Commission Analysis

74. In order to provide incentives for increasing system reliability, we propose to award up to 50 basis points for a transmission project that provides one or more significant and demonstrable reliability benefits to address specific reliability needs. The reliability incentives will be added to the applicant's base ROE and will be subject to the 250-basis-point ROE incentives cap, as described below.[75] We propose that applicants should support their requests by providing a quantitative analysis of a transmission project's potential reliability benefits, where possible. Such analyses should include, for example, reduced loss of load probability, reduced unserved energy under various contingencies, reductions in reliability unit commitments, increases in import or export capability, and improvements in voltage stability. We would then review the potential reliability benefits to determine whether and how much of an ROE incentive the transmission project should be awarded. If an applicant is not able to provide a quantitative analysis, we also propose to consider qualitative demonstrations that a transmission project provides one or more significant and demonstrable reliability benefits to address specific reliability needs.

75. We seek comment as to whether there are different and/or additional elements that affect the reliability of the transmission system that we should consider in our analysis for reliability ROE incentives. If so, we request that commenters explain how a transmission project improves various elements of system reliability, how an applicant can demonstrate that a transmission project provides these benefits quantitatively or qualitatively in the absence of a quantitative analysis, and how we can measure or evaluate that demonstration.

C. Ensuring Reasonableness of ROE

76. In addition to ensuring an ROE that is sufficient to attract investment in transmission facilities, the Commission must also ensure that rates adopted under this policy remain just and reasonable and not unduly discriminatory or preferential under FPA sections 205 and 206.[76] In Order No. 679, the Commission required that any ROE incentives would be subject to the total ROE remaining within the zone of reasonableness and found that an ROE within the zone of reasonableness would be adequate to attract new investment.[77] Due to changing investment conditions, we propose to change the current policy of interpreting FPA section 219(d) to require that the ROE, inclusive of any incentives, remain within the zone of reasonableness. We propose to allow the ROE incentives to exceed the zone of reasonableness when added to the base ROE. However, we are proposing to modify § 35.35(b)(2) of the Transmission Incentives Regulations to cap ROE incentives, including incentives to attract new investment, for increasing reliability, for transmission technology investment, and for joining and remaining in a Transmission Organization, to a total of no more than 250 basis points, as explained further below. Consistent with Congressional directive in FPA section 219(d), all ROE incentives must be just and reasonable.

77. The Commission has previously recognized that its obligations under FPA sections 219 and 205 overlap in significant ways, and it may be difficult to meaningfully distinguish between an ROE that appropriately reflects a public utility's risk and an incentive ROE to attract new investment.[78] Nevertheless, the Commission is ''obligated to establish ROEs for public utilities that both reflect the financial and regulatory risks attendant to a particular transmission project and that are sufficient to actively promote capital investment.'' [79] Although the Commission previously harmonized these principles under the zone of reasonableness, we believe that a change in policy recognizing these differences is justified.

78. Our proposal recognizes that base ROE and transmission ROE incentives serve different functions. The Commission has found that base ''ROE 'should be commensurate with returns on investments in other enterprises having corresponding risks' and 'sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and attract capital.' '' [80] This is different from FPA section 219(b)(2), which provides that the Commission should offer a return on equity that attracts new investment in transmission facilities (including related transmission technologies). The Commission has explained that, ''[i]n contrast to a base-level ROE that reflects the financial and regulatory risks of an investment, an 'incentive' has been more typically associated with specific basis point additions to a base ROE to satisfy discrete policy objectives.'' [81] Therefore, the returns provided by base ROE serve a different purpose than the separate grant of authority in FPA section 219(b)(2) to provide a return on equity that attracts new investment in transmission facilities (including related transmission technologies). We find that the different purpose for an incentive ROE adder than for a base ROE provides that ROE incentives may be just and reasonable under different circumstances than base ROEs. Therefore, ROE incentives may meet a different test for just and reasonable

[74] *See Grid Reliability and Resilience Pricing and Grid Resilience in Regional Transmission Organizations and Independent System Operators,* 162 FERC ¶ 61,012, at P 23 (2018) (proposing to define ''resilience'' as ''the ability to withstand and reduce the magnitude and/or duration of disruptive events, which includes the capability to anticipate, absorb, adapt to, and/or rapidly recover from such an event'').

[75] *See infra* section IV.C.

[76] 16 U.S.C. 824s(d).

[77] Order No. 679, 116 FERC ¶ 61,057 at PP 2, 91–93. The Commission assembles and uses the zone of reasonableness in its evaluation of the justness and reasonableness of public utility ROEs in order to balance the interests of investors and consumers. *See Emera Maine* v. *FERC,* 854 F.3d 9, 20–21 (DC Cir. 2017) (*Emera Maine*).

[78] Order No. 679–A, 117 FERC ¶ 61,345 at P 15.

[79] *Id.*

[80] *Emera Maine,* 854 F.3d at 20 (citing *FPC* v. *Hope Nat. Gas Co.,* 320 U.S. 591, 603 (1944); *Bluefield Waterworks & Improvement Co.* v. *Pub. Serv. Comm'n of W. Va.,* 262 U.S. 679, 692–93 (1923)).

[81] Order No. 679–A, 117 FERC ¶ 61,345 at n.19.

rates than for a base ROE, and ROE incentives that are added to the base ROE are, therefore, not required to be bound by the zone of reasonableness in order to be just and reasonable and not unduly discriminatory.

79. In Order No. 679, the Commission found that allowing ROE incentives up to the upper end of the zone of reasonableness was consistent with FPA section 205 and was ''adequate to attract new investment and consistent with the intent of Congress in FPA section 219.'' [82] Nevertheless, given the Commission's experience with the transmission incentives policy under FPA section 219, we believe that this existing limit on ROE incentives may no longer be adequate to attract new investment in transmission facilities, as required by FPA section 219. For example, the traditional starting point for analyzing the base ROEs of a group of utilities with above average risk is the upper midpoint of the zone of reasonableness, but, if the Commission were to retain ROE incentive limits based on the upper end of the zone of reasonableness, the proximity of the base ROEs of such average utilities to that upper end may prevent them from receiving the incentives granted by the Commission under FPA section 219 in order to provide a rate of return that attracts new investment. Limiting ROE incentives to the zone of reasonableness may undermine the Commission's ability to recognize and address the separate need to attract new investment and exposes transmission investment receiving incentive rates to the additional risk that changes to the public utility's risk profile may lower the incentives granted by the Commission. We do not believe it was the intent of Congress to preclude utilities with above-average risk profiles from receiving ROE incentives. Therefore, we propose to remove this restriction and recognize that rates outside the zone of reasonableness can be just and reasonable, subject to the following restriction.

80. In place of limiting ROE incentives to the zone of reasonableness, we propose to establish a cap on total ROE incentives applicable to all public utilities regardless of their associated risk profiles. Since Order No. 679, the Commission has regularly reduced an applicant's requested ROE incentive when the cumulative number has appeared high based on the risks of the transmission project.[83] In order to provide applicants additional certainty on how the Commission will review requests for ROE incentives, we propose to adopt a 250-basis-point cap for all ROE incentives consistent with our precedent and propose that ROE incentives up to and including this cap will be just and reasonable as required by section 219(d). However, as discussed above, this cap would not be subject to the zone of reasonableness used to establish a public utility's base ROE.

81. We seek comment on this proposal, including on the level of the cap on the ROE incentives requested by applicants. In light of the changes in base ROE policy, we also seek comment on whether the Commission should allow applicants, on a case-by-case basis, to seek removal of the zone-of-reasonableness conditions placed on previously granted incentives and to replace those restrictions with a hard cap on the incentives they have been granted.

D. Non-ROE Incentives

82. We propose in § 35.35(d)(2)–(7) of the revised Transmission Incentives Regulations to continue to provide non-ROE incentives.[84] These incentives will be available to all transmission projects that demonstrate that they either ensure reliability or reduce the cost of delivered power by reducing transmission congestion. These incentives include: Abandoned Plant Incentive, CWIP Incentive, hypothetical capital structures, accelerated depreciation for rate recovery, and regulatory asset treatment.[85] These incentives facilitate the development of beneficial transmission and are consistent with a benefits-based approach. Applicants for these incentives will remain eligible for the rebuttable presumptions that transmission projects which are approved through regional transmission planning processes or state siting approvals ensure reliability or reduce the cost of delivered power by reducing congestion.[86]

83. We continue to believe that an overly rigid approach to hypothetical capital structures may discourage the development of transmission projects and recognize that the instances where hypothetical capital structure are and can be used reflect unique circumstances.[87] Accordingly, we propose in § 35.35(d)(4) of the revised Transmission Incentives Regulations to allow applicants to request a hypothetical capital structure and will continue to evaluate such requests on a case-by-case basis. An applicant must demonstrate that the proposed hypothetical capital structure is suited to the unique circumstances of its transmission project as part of its showing that the requested incentives are just and reasonable and not unduly discriminatory.

84. Additionally, we recognize that transmission planning and selection has changed significantly since the issuance of Order Nos. 679 and 679–A, particularly with the implementation of Order No. 1000. We believe that these changes should be reflected in our transmission incentives policy and, therefore, propose to revise § 35.35(j)(2) of the Transmission Incentives Regulations to change the start of the effective date for the Abandoned Plant Incentive from the date that the Commission issues an order granting 100 percent recovery of abandoned plant costs to the date that transmission projects are selected in a regional transmission planning process for the purposes of cost allocation. Starting the eligibility period for the Abandoned Plant Incentive at the date of approval by the Commission leads to the exclusion of costs incurred between approval of the transmission project by the regional transmission planning process and Commission approval of the incentive, and this delay is not warranted for purposes of cost control, because the transmission planner has made the decision to undertake the transmission project.[88] Under this proposal, in order to recover any costs under the Abandoned Plant Incentive, an applicant must continue to demonstrate in a FPA section 205 filing that the transmission projects were abandoned for reasons outside of its control and that the costs incurred were prudent.

[82] Order No. 679, 116 FERC ¶ 61,057 at P 93.

[83] *See, e.g., Atl. Grid Operations A LLC,* 135 FERC ¶ 61,144, at PP 7, 128 (2011) (reducing a requested 300 basis point ROE incentive to 250 basis points); *Primary Power, LLC,* 131 FERC ¶ 61,015, at PP 8, 152 (2010) (reducing a requested 300 basis point ROE incentive to 200 basis points), *order on reh'g,* 140 FERC ¶ 61,052 (2012), *pet. for review dismissed sub. nom, Public Service Elec. and Gas Co.* v. *FERC,* 783 F.3d 1270 (2015); *N.Y. Reg'l Interconnect, Inc.,* 124 FERC ¶ 61,259, at PP 2, 44 (2008) (reducing a requested 400 basis point ROE incentive to 275 basis points).

[84] These incentives are provided under § 35.35(d)(1)(ii)–(viii) of the currently effective Transmission Incentives Regulations.

[85] *See* 18 CFR 35.35(d)(1)(ii)–(viii).

[86] *Id.* at 35.35(i).

[87] *See* Order No. 679, 116 FERC ¶ 61,057 at PP 132, 134.

[88] *See, e.g.,* American Electric Power Company, Inc., Docket No. PL19–3–000, Comments, at 18 (filed June 26, 2019) (AEP Comments); Pacific Gas & Electric Company and San Diego Gas & Electric Company, Comments, Docket No. PL19–3–000, at 11–13 (filed June 26, 2019).

E. Incentives Available to Transcos

1. Background and Experience to Date

85. In Order No. 679, the Commission acknowledged the promise of Transcos in catalyzing needed investment in transmission facilities that further FPA section 219's policy objectives of ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.[89] The Commission stated that Transcos ''have demonstrated the capability to invest, on a timely basis, significant amounts of capital in transmission projects and in efforts to reduce congestion.'' [90] The Commission attributed the positive record of Transco investment in transmission facilities to the stand-alone nature of these entities, which the Commission believed: (1) Reduced the competition between generation and transmission functions within corporations; (2) produced incentives to better manage transmission assets and develop innovative services; (3) granted better access to capital markets given a more focused business model; and (4) enabled better responses to market signals that indicate when and where transmission investment is needed. The Commission also noted that, unlike many traditional public utilities, Transcos avoid potential uncertainty associated with the need for additional rate recovery approval from state regulators.[91]

86. In recognition of these beneficial attributes and a desire to promote and remove barriers to Transco formation, the Commission formalized two incentives available exclusively to Transcos: (1) An ROE incentive to be applied to an eligible Transco's entire rate base (Transco ROE Incentive),[92] and (2) an alternative ratemaking treatment that adjusts the book value of transmission assets being sold to a Transco to remove the disincentive associated with the impact of accelerated depreciation on federal capital gains tax liabilities (Transco ADIT Adjustment).[93] Regarding the Transco ROE Incentive, the Commission's policy requires that any incentive ROE awarded to Transcos both encourage their formation and be sufficient to attract investment after the Transco is formed.[94] Regarding the Transco ADIT Adjustment, the Commission indicated that it would continue to consider requests for that ratemaking treatment on a case-by-case basis when a Transco is purchasing existing transmission facilities.[95]

87. As discussed above, in the nearly 14 years since Order No. 679, there have been significant developments in how transmission is planned, developed, operated, and maintained. When the Commission adopted Order No. 679, there was a shortage of transmission investment and development. The Commission recognized the potential of Transcos to assist in addressing the lack of transmission development and formalized the Transco ROE Incentive to encourage these capabilities. However, we have not seen evidence of Transcos delivering the outcomes that the Commission had expected in establishing Transco incentives in Order No. 679.

88. For instance, in Order No. 679, the Commission articulated an expectation that Transcos would be uniquely positioned to build, on a timely basis, significant amounts of transmission assets to further the policy objectives of FPA section 219.[96] The Commission's expectation was based, in part, on observations of high levels of deployment of transmission plant among Transcos prior to Order No. 679.[97] However, with hindsight, we have found that those investment levels were transitory, and that Transcos are deploying capital to support transmission development in a manner that is comparable and not significantly greater than that of their traditional public utility counterparts.[98] Several commenters similarly note that Transcos have not exhibited the remarkable levels of transmission investment on which the Commission justified the Transco ROE Incentive.[99]

89. Additionally, in Order No. 679 the Commission found that concerns regarding high rates for Transco customers were speculative.[100] However, experience to date has shown those concerns to be valid. For example, the network rates for ITC Midwest, a subsidiary of ITC Holdings Corp., have been the highest in MISO since 2010, while network rates for its sister company Michigan Electric Transmission Company have exceeded the MISO median in all but one year since 2009.[101] Some commenters also echo concerns regarding elevated rates among Transcos.[102] Against this backdrop, we note that several commenters argue that increasingly robust transmission planning processes—in part because of the independent role of RTOs/ISOs and Commission reforms such as Order No. 1000—may have helped achieve investment outcomes comparable to those envisioned by the Commission in Order No. 679 when it established the Transco ROE Incentive.[103]

90. Furthermore, the Transco business model that the Commission envisioned in approving Transco incentives under FPA section 205 and then in Order No. 679 was one of robust independence.[104] However, currently, the majority of Transcos have started out as, or become, transmission affiliates of integrated utilities.[105] Such entities do not provide assurance of an absence of conflicts of interest with generation-owning affiliates or of a singular focus on transmission investment and operation. Further, the availability of these incentives for Transcos has not elicited the formation of many new Transcos. Since 2006, the Commission has granted the Transco ROE Incentive to 12 entities,[106] some of which never

[89] Order No. 679, 116 FERC ¶ 61,057 at P 206; *Promoting Transmission Investment through Pricing Reform,* Notice of Proposed Rulemaking, 113 FERC ¶ 61,182, at P 38 (2005) (2005 Transmission Incentives NOPR).

[90] 2005 Transmission Incentives NOPR, 113 FERC ¶ 61,182 at P 38.

[91] *Id.* P 39.

[92] 18 CFR 35.35(d)(2)(i); Order No. 679, 116 FERC ¶ 61,057 at P 221.

[93] 18 CFR 35.35(d)(2)(ii); Order No. 679, 116 FERC ¶ 61,057 at PP 247–248.

[94] 18 CFR 35.35(d)(2); Order No. 679, 116 FERC ¶ 61,057 at P 221.

[95] Order No. 679, 116 FERC ¶ 61,057 at P 248.

[96] *Id.* PP 225–226*; see also* 2005 Transmission Incentives NOPR, 113 FERC ¶ 61,182 at P 38.

[97] Order No. 679, 116 FERC ¶ 61,057 at P 222.

[98] For example, transmission plant growth rates for subsidiaries of ITC Holdings Corp., a large Transco holding company, are within the normal range of other transmission owners in MISO, where those subsidiaries operate.

[99] Aluminium Association, et al., Joint Comments, Docket No. PL19–3–000, at 67 (filed June 26, 2019) (Joint Commenters Comments); Resale Power Group of Iowa Comments, Docket No. PL19–3–000, at 22–23 (filed June 26, 2019) (Resale Power Comments); Transmission Access Policy Study Group Comments, Docket No. PL19–3–000, at 93 (filed June 26, 2019) (TAPS Comments).

[100] Order No. 679, 116 FERC ¶ 61,057 at P 228.

[101] This reflects our analysis of MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff Schedule 9 Network Rates posted on MISO's Open Access Same-Time Information System. *See* MISO, *Transmission Rate Information, https://www.oasis.oati.com/woa/docs/MISO/MISOdocs/Transmission_Rates.html.*

[102] Resale Power Comments at 26; Joint Commenters Comments at 68.

[103] Resale Power Comments at 21–22; TAPS Comments at 93; Joint Commenters Comments at 67; Oklahoma Corporation Commission Comments, Docket No. PL19–3–000, at 1 (filed June 27, 2019) (Oklahoma Commission Comments).

[104] *See* Order No. 679, 116 FERC ¶ 61,057 at P 202.

[105] The ITC companies were acquired by Fortis Inc., which owns multiple vertically integrated utilities. *See Fortis Inc.,* 156 FERC ¶ 61,219, at P 1 (2016), *order on clarification,* 158 FERC ¶ 61,019 (2017). NextEra Energy, which owns, NextEra Energy Transmission, also owns Florida Light and Power Company and a portfolio of generation resources across the country. *See NextEra Energy Transmission, LLC,* 166 FERC ¶ 61,188, at PP 3–6 (2019).

[106] The Commission granted a Transco ROE Incentive in the following 12 cases: *GridLiance West Transco LLC,* 164 FERC ¶ 61,049 (2018);

developed any transmission and several of which are affiliated with other Transcos. Meanwhile, transmission-only entities that may not qualify for, or have not requested, the Transco ROE Incentive have continued to invest in transmission and, notably, participate in competitive transmission solicitations.

2. Proposed Revisions to Transco Incentives

91. We acknowledge the role that individual Transcos have played, and continue to play, in deploying new transmission infrastructure; however, we believe that the Transco business model has not enhanced the deployment of transmission infrastructure sufficiently to justify incentives based on this business model beyond those incentives available to all public utilities. We find that the circumstances have changed significantly since Order No. 679 and that the key reasoning underpinning the Commission's policy for establishing a Transco ROE Incentive and a Transco ADIT Adjustment no longer apply. Accordingly, we propose to revise our regulations to eliminate both of those incentives prospectively by removing current sections 35.35(b)(1) and 35.35(d)(2) of the Transmission Incentives Regulations. Although we propose to eliminate those incentives exclusively available to Transcos, we do not revoke eligibility for Transcos to seek the incentives available to all public utilities as proposed in this NOPR. We view the suite of incentives for which Transcos (and all public utilities) remain eligible, in addition to those incentive proposals contemplated elsewhere in this NOPR, as sufficient to attract capital needed to achieve the transmission investment objectives articulated in FPA section 219. We invite comment on this proposal. We also seek comment regarding how the Commission should treat Transco ROE Incentives that were previously granted.

F. Incentives for RTO Participation

1. Background and Experience to Date

92. FPA section 219(c) requires the Commission to ''provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization.'' In Order No. 679, the Commission found that the RTO-Participation Incentive should be granted to utilities that ''join and/or continue to be a member of an ISO, RTO, or other Commission-approved Transmission Organization.'' [107] The Commission declined to make a finding on the appropriate size or duration of the RTO-Participation Incentive, but noted that the basis for providing the incentive to existing members ''is a recognition of the benefits that flow from membership in such organizations and the fact [that] continuing membership is generally voluntary.'' [108] The Commission also declined to create a generic ROE incentive for such membership, and instead decided that it would consider the appropriate ROE incentive when public utilities requested it on a case-by-case basis.[109] Although the Commission declined to make a finding on the appropriate size or duration of the incentive in Order No. 679, applicants have subsequently requested a uniform, 50-basis-point level for demonstrating they have joined an RTO or ISO, which the Commission has granted without modification.

93. The stated purpose of FPA section 219 is to provide incentive-based rate treatments that benefit consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion. We believe the RTO-Participation Incentive has not only encouraged the formation of and participation in RTOs/ISOs, but also has resulted in significant benefits for consumers. Specifically, PJM estimates that the total annual benefits and savings to PJM's customers in the 13 states and the District of Columbia in which it operates to be between $3.2 and $4 billion; [110] SPP estimates that savings from its markets and transmission planning services provide more than $2.2 billion annual benefits to its members at a benefit-to-cost ratio of 14-to-1; [111] and MISO estimates that MISO delivered between $3.2 billion and $3.9 billion in regional benefits in 2018.[112] Although RTO/ISO participation provides substantial benefits for customers, we agree with commenters that the RTO-Participation Incentive also compensates transmitting utilities for the ongoing duties and responsibilities of RTO/ISO membership.[113]

94. In Order No. 679, the Commission stated that the basis for the RTO-Participation Incentive is ''a recognition of the benefits that flow from membership in such organization and the fact [that] continuing membership is generally voluntary.'' [114] The RTO-Participation Incentive was not only intended to induce transmitting utilities to turn over operational control over their transmission facilities to Transmission Organizations, but also to recognize the benefit to consumers of RTO/ISO membership by ensuring reliability and reducing the cost of delivered power by reducing congestion. Experience to date has demonstrated that the benefits from membership in a Transmission Organization is significant regardless of the voluntariness of such membership. These benefits include access to large competitive markets, optimization of the transmission system, regional transmission planning that supports more efficient or cost-effective transmission development to meet regional transmission needs, reduction of the costs of carrying reserves through reserve sharing, and increased access to an expanded set of diverse resources. All of these attributes reduce the cost of delivered power by facilitating broader and more robust access to more sources of power, and to the lowest-cost source of power, over a wide geographic footprint. These benefits have increased over time. PJM notes that its value proposition for consumers has increased over the past 13 years to a current estimate of $3.2 to $4.0 billion,[115] an increase from an estimated $2.2 billion in 2011.[116]

95. FPA section 219(c) contains no requirement that participation in an RTO/ISO must be voluntary to merit the

NextEra Energy Transmission N.Y., Inc., 162 FERC ¶ 61,196 (2018); *Midcontinent Indep. Sys. Op., Inc.,* 150 FERC ¶ 61,252 (2015), *order on clarification and reh'g,* 154 FERC ¶ 61,004 (2016); *Desert Southwest Power, LLC,* 135 FERC ¶ 61,143 (2011); *Atl. Grid Operations A LLC,* 135 FERC ¶ 61,144; *Western Grid Development, LLC,* 130 FERC ¶ 61,056, *order on reh'g,* 133 FERC ¶ 61,029 (2010); *Primary Power,* 131 FERC ¶ 61,015; *Green Energy Express LLC,* 129 FERC ¶ 61,165 (2009), *order on reh'g,* 130 FERC ¶ 61,117 (2010); *Green Power Express LP,* 127 FERC ¶ 61,031 (2009), *order on reh'g,* 135 FERC ¶ 61,141 (2011); *ITC Great Plains, LLC,* 126 FERC ¶ 61,223 (2009), *order on reh'g,* 150 FERC ¶ 61,225 (2015); *N.Y. Reg'l Interconnect,* 124 FERC ¶ 61,259; *Startrans IO, L.L.C.,* 122 FERC ¶ 61,306 (2008), *order on reh'g,* 133 FERC ¶ 61,154 (2010).

[107] Order No. 679, 116 FERC ¶ 61,057 at P 326.

[108] *Id.* PP 327, 331.

[109] *Id.* P 327.

[110] *See* PJM Interconnection, L.L.C., Comments, Docket No. PL19–3–000, at 6–7 (filed June 26, 2019) (PJM Comments).

[111] *See* SPP, *14-to-1 The Value of Trust,* at 3 (May 29, 2019), *https://spp.org/documents/58916/14-to-1%20value%20of%20trust%2020190524%20web.pdf.*

[112] *See* MISO, *2019 Value Proposition,* at 5 (Feb. 7, 2020), *https://cdn.misoenergy.org/20200214%202019%20Value%20Proposition%20Presentation425712.pdf.*

[113] *See* Edison Electric Institute Comments, Docket No. PL19–3–000, at 23 (filed June 26, 2019) (EEI Comments); PJM Comments at 4–5.

[114] Order No. 679, 116 FERC ¶ 61,057 at P 331.

[115] PJM Comments at 7.

[116] *See* FERC, *2011 Report to Congress on Performance Metrics for Independent System Operators and Regional Transmission Organizations,* app. H at 313 (Apr. 2011), *https://www.ferc.gov/industries/electric/indus-act/rto/metrics/pjm-rto-metrics.pdf.*

incentive; rather, it states the Commission shall provide for incentives. Neither the benefits that customers receive from a transmitting utility's or electric utility's membership in an RTO/ISO, nor the burden imposed upon the transmitting utility or electric utility, are diminished if the transmitting utility or electric utility is required by law to join an RTO or ISO.

96. The duties and responsibilities associated with RTO/ISO membership have also increased since Order No. 679. These include: loss of operational control of transmission facilities to a third party; an obligation to build new transmission facilities at the direction of the RTO/ISO; diminished decision-making control over assets while retaining the responsibility of maintaining the system; meeting reliability standards; obligations to obey RTO/ISO rules; and an obligation to provide electric service even when foundational agreements can change, thereby changing the terms and conditions under which the transmitting utility initially agreed to participate in the RTO/ISO.[117] These responsibilities similarly persist regardless of the voluntariness of RTO/ISO membership.

2. RTO-Participation Incentive Proposal

97. We propose to combine and modify §§ 35.35(b)(2) and 35.35(e) of the existing Transmission Incentives Regulations in § 35.35(f) of the revised Transmission Incentives Regulations to provide transmitting utilities that turn over their wholesale transmission facilities to the RTO/ISO[118] a fixed 100-basis-point RTO-Participation Incentive, and modify its implementation, as discussed below. The benefits of having centralized electricity markets and regional transmission planning conducted by an RTO/ISO, combined with compensating RTO/ISO participants for their added responsibilities, support the Congressional mandate of an RTO-Participation Incentive to encourage transmitting utilities to turn planning and operational control over their transmission facilities to Transmission Organizations. Standardizing and increasing the level at which this incentive is awarded reasonably recognizes the increased customer value resulting from transmitting utilities joining and continuing to participate in an RTO/ISO since the issuance of Order No. 679. It also recognizes the increased duties and responsibilities associated with RTO/ISO membership since the issuance of Order No. 679, including, *inter alia,* the development of regional transmission planning processes. These additional roles and responsibilities of RTOs/ISOs and their transmission owners have benefited customers, as illustrated by the increased and substantial benefits demonstrated by RTOs/ISOs. For instance, as noted above, PJM has stated that its value proposition for consumers is $3.2 to $4.0 billion in annual savings, an increase from an estimated $2.2 billion in 2011. Additionally, from 2007 through 2019, the Value Proposition study revealed that MISO provided the region an estimated $26 billion in cumulative net benefits.[119] In order to address regulatory uncertainty and fulfill our directive to offer an incentive for RTO membership, we find that the RTO-Participation Incentive remains an effective incentive to recognize the benefits, risks, and associated obligations of RTO membership and meet the requirements of FPA section 219(c).

98. As noted by commenters to the 2019 Notice of Inquiry, permitting some RTO/ISO members to receive the RTO-Participation Incentive, while disallowing the RTO-Participation Incentive for entities that are required to join or remain in an RTO/ISO, would create an uneven playing field in the competition for investment capital.[120] Such an uneven playing field has the potential to distort investment decisions within interstate corporate families and within multistate RTOs/ISOs. Furthermore, FPA section 219 obligates the Commission to provide an incentive to each transmitting utility or electric utility that joins a Transmission Organization, independent of the obligation to do so.[121] We also note that the issue of whether RTO/ISO membership is voluntary for certain transmitting utilities within RTOs/ISOs has become subject to litigation and challenges at the Commission.[122] Accordingly, we propose that the RTO-Participation Incentive should be applied to transmitting utilities that join and remain enrolled in an RTO/ISO regardless of the voluntariness of their participation.

99. We propose to continue to permit transmitting utilities or electric utilities that join an RTO/ISO the ability to recover prudently incurred costs associated with joining the RTO/ISO in their jurisdictional rates. Additionally, we propose to standardize the RTO-Participation Incentive at a uniform level of 100 basis points to a transmitting utility that joins and continues to be a member of an RTO/ISO and turns over operational control of its wholesale transmission facilities to the RTO/ISO.[123] We propose that both transmitting utilities newly joining an RTO/ISO and those that already receive the current RTO-Participation Incentive would be eligible to seek the new 100-basis-point adder. We request comment on this proposal, including comment on what process the Commission should adopt to implement a 100basis point RTO-Participation Incentive for existing transmitting utility rates.

G. Incentives for Transmission Technologies

1. Background and Experience to Date

100. FPA section 219(b)(3) directs the Commission to encourage deployment of transmission technologies and other measures to increase the capacity and efficiency of existing transmission facilities and improve the operation of the transmission facilities.[124] Under the 2012 Policy Statement, the Commission considers the incorporation of advanced technologies to transmission projects as part of the risks and challenges that may

[117] *See, e.g.,* EEI Comments at 22; Ameren Services Company Comments, Docket No. PL19–3–000, at 24 (filed June 26, 2019); AEP Comments at 13.

[118] 16 U.S.C. §824s(c). While the rest of the proposals in this proposed rule apply to public utilities, the proposal in the section related to RTO participation apply to ''transmitting utility'' or ''electric utility'' as required by Congress in FPA section 219(c).

[119] MISO, *2019 Value Proposition,* at 3 (Feb. 7, 2020), *https://cdn.misoenergy.org/20200214%202019%20Value%20Proposition%20Presentation425712.pdf.*

[120] EEI Comments at 23–24.

[121] 16 U.S.C. 824s(c).

[122] *See Cal. Pub. Util. Comm'n* v. *FERC,* 879 F.3d 966, 980 (9th Cir. 2018) (remanding to the Commission the issue of whether PG&E was eligible for a 50-basis-point RTO-Participation Incentive for its continued participation in CAISO in light of protestors' arguments that PG&E's participation in CAISO is mandated by California state law); N.Y. State Dept. of Pub. Serv., Protest, Docket No. ER20–715–000, at 5 (filed Jan. 21, 2020) (protesting that Central Hudson Gas & Electric Corp. should not receive an RTO-Participation Incentive because it is already a member of NYISO).

[123] *See PPL Elec. Util. Corp.,* 123 FERC ¶ 61,068, at P 35 (2008) (finding that a ''50-basis-point adder is appropriate. The consumer benefits, including reliable grid operation, provided by such organizations are well documented and consistent with the purpose of [FPA] section 219. The best way to ensure these benefits is to provide member utilities of an RTO with incentives for joining and remaining a member.''); *Republic Transmission, LLC,* 161 FERC ¶ 61,036, at P 33 (2017) (approving 50-basis-point RTO-Participation Incentive ''based on Republic's commitment to become a member of MISO and transfer operational control of the Project to MISO once the Project has been placed in service''); *Pac. Gas & Elec. Co.,* 148 FERC ¶ 61,195, at P 16 (2014) (granting request for a 50-basis-point RTO-Participation Incentive ''based on [Pacific Gas and Electric Company's (PG&E)] commitment to remain a member of CAISO, and its commitment to transfer functional control of the Project to CAISO once the Project enters service'').

[124] 16 U.S.C. 824s(b)(3).

warrant an increase in the ROE. The Commission evaluates deployment of advanced technologies as part of the overall nexus analysis when an incentive ROE is sought; there is currently no standalone incentive for advanced technology. Additionally, the current framework does not provide a standalone incentive for technology improvements to existing transmission projects. Experience to date suggests that this approach to incentivizing transmission technologies has not been effective in encouraging deployment of such improvements. For example, many transmission technologies discussed at the November 5–6, 2019 Grid-Enhancing Technologies Workshop [125] are smaller in scale, and do not face the same challenges as large capital-intensive transmission projects, such as siting and regulatory approvals.[126] Furthermore, many of the costs of transmission technologies are not currently capitalized and hence do not benefit from ROE incentives.[127]

2. Proposed Incentives

101. To comply with the directives of FPA section 219(b)(3) and more effectively promote the deployment of transmission technologies, we propose to add § 35.35(e) of the revised Transmission Incentives Regulations to offer rate treatments for transmission technologies that, as deployed in certain circumstances, enhance reliability, efficiency, capacity, and improve the operation of new or existing transmission facilities. Examples of technology types that represent such technologies in certain deployments at this time include: (1) Advanced line rating management; (2) transmission topology optimization; and (3) power flow control. For purposes of these incentives, we will generally not consider eligible transmission technologies to include transmission system assets traditionally associated with the transportation of electric power, such as power lines, power poles, capacitors, and other substation equipment.

102. In order to encourage the development of the technology for particular needs identified in different transmission planning processes, we decline to list the types of technologies eligible for transmission technology incentives. Instead, we will make a case-by-case determination of eligibility based on the characteristics of the technology and the benefits that the technology offers.

103. We propose that each public utility seeking incentives under this section must demonstrate that the technology, as applied in a particular transmission project (or stand-alone transmission technology project as described below), meets the above criteria for eligible transmission technologies and that the transmission technology project meets the economic benefits ROE incentive benefit-to-cost threshold proposed in this NOPR.[128] Developers seeking to deploy a transmission technology that meets these requirements may apply for a 100-basis-point ROE incentive on the cost of the specified transmission technology project (Transmission Technology Incentive) and a two-year regulatory asset treatment for costs related to deploying and operating that technology (Deployment Incentive). While the two proposed incentives are intended to work in conjunction, to accommodate unique accounting practices and flexibility, each incentive may be sought individually.

104. Noting that in response to the 2019 Notice of Inquiry and the Grid-Enhancing Technologies Workshop, we received feedback on alternate incentive proposals for transmission technologies, we seek comment on the proposed Transmission Technology Incentive and Deployment Incentive to effectively promote the deployment of transmission technologies.

a. Transmission Technology Incentive

105. We propose to add § 35.35(e) of the revised Transmission Incentives Regulations so that a public utility seeking to deploy transmission technologies that enhance reliability, efficiency, capacity, and improve the operation of new or existing transmission facilities may seek a 100-basis-point ROE Transmission Technology Incentive on the cost of the specified transmission technology project. The Transmission Technology Incentive may be applied to deployment of such technologies on either a new or existing transmission facility and is subject to the overall 250-basis-point cap proposed in this NOPR.[129] Because the proposed Transmission Technology Incentive is only applicable to the costs of the particular transmission technology, inclusive of any costs awarded regulatory asset treatment (as discussed below), the amount included in the 250-basis-point limit for an applicant seeking transmission incentives on its transmission project will be calculated on a weighted average, based on the cost of the technology relative to the cost of the entire transmission project.

$$\frac{Cost\ of\ Transmission\ Technology(ies)^{130}}{Cost\ of\ Entire\ Transmission\ Project} = Weighted\ Cost\ (WC)$$

$$WC \times Transmission\ Technology\ Incentive\ (in\ basis\ points) = Contribution\ to\ ROE\ Adder\ Cap\ (in\ basis\ points)$$

106. For instance, a developer with a $100 million transmission project that is awarded the Transmission Technology Incentive on a $10 million transmission technology project sub-component, would contribute 10 basis points to its 250-basis-point cap. Conversely, if a transmission project developer is awarded the Transmission Technology Incentive for a stand-alone transmission technology project, the incentive would contribute 100 basis points to its 250-

[125] FERC, *Grid-Enhancing Technologies,* Notice of Workshop, Docket No. AD19–19–000 (Sept. 9, 2019).

[126] *See, e.g.,* Advanced Energy Economy, Comments, Docket No. PL19–3–000, at 20 (filed June 26, 2019) (Advanced Energy Economy Comments); Energy Storage Association, Comments, Docket No. PL19–3–000, at 4 (filed June 25, 2019); Public Interest Organizations, Comments, Docket No. PL19–3–000, at 35 (filed June 26, 2019); Oklahoma Commission Comments at 1; TAPS Comments at 101; National Grid USA, Comments, Docket No. PL19–3–000, at 42 (filed June 26, 2019).

[127] *See, e.g.,* Advanced Energy Economy Comments at 20; Oklahoma Commission Comments at 1; Working for Advanced Transmission Technologies, Comments, Docket No. PL19–3–000, at 4 (filed June 26, 2019).

[128] *See supra* section IV.B.1.d.

[129] *See supra* section IV.C.

[130] Inclusive of any costs awarded regulatory asset treatment under the Deployment Incentive described below. *See infra* section IV.G.2.b.

basis-point cap. For purposes of this incentive, a stand-alone transmission technology project is the addition of solely a transmission technology to an existing transmission facility, or a transmission technology that by itself constitutes a new transmission facility.

107. We propose this incentive mechanism to encourage the deployment of innovative and cost-effective technologies that will bring consumer saving through congestion relief and increased efficiency of the transmission system consistent with the goals of FPA section 219. We seek comment on this proposed incentive, including the amount of this incentive, its limitation to the cost of the specified transmission technology project only, and its inclusion in the 250-basis-point cap on a weighted average. We also seek comment on whether this proposed incentive is proportional to the benefits offered to consumers by eligible transmission technologies and if this incentive is sufficient to attract investment in such transmission technologies.

b. Deployment Incentive

108. There are significant upfront costs and obstacles to public utilities seeking to deploy transmission technologies that offer consumer benefits.[131] Many of these costs reflect significant changes to the transmission system, such as the increase of software and service-based costs in transmission operations that often require retraining of the workforce. To overcome these obstacles and encourage deployment of eligible transmission technologies that will lower the cost of delivered power and increase reliability, we propose to add § 35.35(e)(2) of the revised Transmission Incentives Regulations to allow certain initial costs related to deploying technologies that are traditionally expensed in the year incurred to be deferred as a regulatory asset and included in rate base for purposes of determining a public utility's return on equity. We propose to defer up to two years of specified initial costs for the installation and operation of the eligible transmission technology, that would otherwise be expensed in the year incurred, to be amortized over a five-year period. For purposes of this incentive, we propose that the two-year period of cost eligibility will begin at the procurement stage, exclusive of planning activities.

109. The Deployment Incentive is intended to ease the implementation burden for transmission technologies and incent developers to deploy them. As such, this incentive is only permitted one time per technology per applicant and will be limited to two years in duration. Allowing these costs in rate base prior to and during initial commercial operation provides a public utility with additional cash flow in the form of an immediate earned return. The financial benefit to public utilities is warranted by the increased efficiency and congestion savings these technologies offer to consumers.

110. In addition to inviting comment generally on this proposed rate treatment, we specifically request comment on: (1) The types of costs that are not currently capitalized (and not currently eligible for the recovery of prudently incurred pre-commercial operation costs under the regulatory asset incentive available under § 35.35(d)(1)(iii) of the existing Transmission Incentives Regulations) that should be eligible for regulatory asset treatment; (2) the duration of the regulatory asset treatment; (3) the total amount of costs for deploying certain eligible transmission technologies, including software; and (4) whether these proposed incentives are sufficient to overcome obstacles to the first deployment of an eligible transmission technology.

3. Eligibility and Requirements

a. Transmission Technology Statement

111. We propose to add § 35.35(e)(3) of the revised Transmission Incentives Regulations to require each public utility along with its application for the Transmission Technology Incentive or the Deployment Incentive, to submit a transmission technology statement that demonstrates: How the technology meets the transmission technology criteria above, the expected benefits of deployment, the cost of the transmission technology project, the cost of the overall transmission project if not a stand-alone transmission technology project, the expected useful life of the asset, and a demonstration that the transmission technology meets the economic benefits threshold provided in this NOPR.[132] We request comment on this proposal.

b. Pilot Programs

112. We propose to add § 35.35(e)(4) of the revised Transmission Incentives Regulations to allow pilot programs for eligible transmission technologies that meet the above criteria to receive a rebuttable presumption of eligibility for the Transmission Technology Incentive and the Deployment Incentive. For purposes of these incentives, we propose to define a pilot program as a public utility-led deployment of an eligible transmission technology, with costs under $25 million for each eligible transmission technology project, that has not been deployed to or operated on more than five percent of the applicant's transmission system,[133] and has a maximum duration of two years from installation to completion. Additionally, utilities that have completed a pilot program for an eligible transmission technology, but have not moved to deployment, will be eligible for the rebuttable presumption if they meet the pilot program criteria and demonstrate a plan for higher deployment. We seek comment on the limitations on pilot programs; specifically, on the percentage of deployment and duration of the pilot.

c. Reporting Requirement

113. We propose to add § 35.35(e)(5) of the revised Transmission Incentives Regulations which states that each public utility that receives the Transmission Technology Incentive or Deployment Incentive must submit an annual informational filing, for three years after the incentive is granted, to the Commission that details the progress of the technology, obstacles to its deployment and efforts to overcome them, lessons learned, and any quantifiable data measuring the benefits of the transmission technology project. Any duplicative data already submitted under Form 730, as revised in this NOPR,[134] need not be submitted. Collected data will not be used for ex-post analysis for the purpose of revising the awarded incentives. We propose to collect the data for internal analysis and provide an annual update of transmission technology development to benefit the industry and encourage widespread deployment of beneficial transmission technologies.

H. Disclosure of Anticipated Incentives

114. As discussed above, there have been significant developments in the regional transmission planning process since the adoption of FPA section 219 and the Commission's issuance of Order Nos. 679 and 679–A. We seek comment on whether it would be useful to require

[131] *See* Advanced Energy Economy Comments at 20–21; Grid-Enhancing Technologies Workshop Transcript Day 1 at 69, 77–82, 86–91, 95–98.

[132] *See supra* section IV.B.1.d.

[133] To determine whether an applicant's pilot program is eligible under this sub-section, we propose to consider an applicant's transmission system to include any affiliate companies' transmission systems that are within the same region as the transmission technology project seeking incentives, and exclude the affiliate companies' transmission systems outside of that region.

[134] *See infra* section IV.I.1.

a public utility seeking incentives to disclose all reasonably anticipated incentives to transmission planning regions as part of the public utility's transmission project proposal. We also seek comment on whether such a requirement should apply to all incentive applications or only to incentive applications for an increased ROE.

I. Program Management

1. FERC Form 730

115. As stated above, FPA section 219 provides that the Commission is to encourage transmission development for the purpose of benefitting consumers. To ensure that existing and proposed incentives are successfully meeting the objectives of FPA section 219, the Commission needs industry data, projections, and related information that detail the level of investment and the costs and benefits of transmission projects. Experience to date suggests that current information collection related to FPA section 219 incentives is insufficient to determine the effectiveness of individual incentive grants, or to evaluate the Commission's overall incentives program.

116. Order No. 679 established a reporting requirement associated with transmission projects that receive project-specific transmission incentives.[135] Order No. 679 created Form 730, which contains two reporting tables. Table 1 is an aggregate of the spending by a public utility over all the transmission projects that received incentives; Table 2 is a project-by-project status update. Under the current rules, jurisdictional public utilities are required to report annually to the Commission, on the date on which FERC Form No. 1 (Form 1) information is due, the following data and projections: (subsection i) in dollar terms, actual investment for the most recent calendar year and planned investments for the next five years; and (subsection ii) for all current and planned investments over the next five years, a project-by-project listing that specifies the expected completion date, percentage completion as of the date of filing and reasons for delay.[136] The information required in Form 730 is not available from FERC Form Nos. 1, 714, or 715, nor is it available from other federal agencies.

a. Form 730 Proposed Format Changes

117. We propose to retain the requirement in § 35.35(i) of the revised Transmission Incentives Regulations for public utilities that have been granted incentive rate treatment to file a Form 730 on an annual basis. However, we believe that there are several areas of improvement that can be made to Form 730's design to collect the necessary information without imposing undue burden on incentive recipients. The current aggregate reporting required on Form 730 can be difficult to interpret if the public utility has multiple transmission projects and multiple transmission incentive requests. The data reported in Table 1 is most useful when a public utility has requested incentives once for a single transmission project, or for multiple transmission projects, if a public utility reports the data in a project-by-project format rather than as an aggregate number.[137] Accordingly, we propose to modify § 35.35(i) of the revised Transmission Incentives Regulations to require that applicants provide the information on a project-by-project basis and propose other reforms to make the reporting requirement more effective, as detailed below.

118. We invite comment on the proposed modifications to the basic format and fields of Form 730,[138] specifically:

a. Require Table 1 data to display project-by-project data instead of aggregated data.

b. Identify each transmission project by a public utility-created transmission project code in each record of Table 1 and Table 2 to aid in merging the tables.

c. Add the report year to each record of Table 1 and Table 2.

d. Add the aggregate of actual spending on each transmission project prior to the report year to determine total actual spending on each transmission project for each year.

e. Add the aggregate of projected spending on each transmission project more than five years beyond the report year to estimate projected spending on each transmission project for each year.

f. Include a new column entitled ''Notes on Table 1'' that permits a 60-character text string, so public utilities can explain any issues in the data. Public utilities also have the option to add a footnote with no character limit to describe issues in as much detail as necessary. For example, public utilities can explain why cost forecasts have suddenly increased from a previous year.

g. Include Project Voltage as a field in Table 2. Previously, transmission project voltage was part of Project Description in Table 2. If no value can be used as the transmission project voltage, the number -9 is inserted to indicate that there is no value.

h. The data in Table 2 must be known as of midnight on December 31 of the record year. This is a clarification of a point of ambiguity in the original description of Table 2.

i. Modify the data in the column titled, ''If Project Not On Schedule, Indicate Reasons For Delay'' in Table 2 to a 60-character text string. Public utilities also have the option to add a footnote with no character limit so utilities can explain the reasons in more detail.

j. Report Form 730 data in eXtensible Business Reporting Language (XBRL). format.

119. The change to the XBRL data format for Form 730 reporting is consistent with the Commission's planned change to XBRL for Form 1 reporting.[139] The Commission has examined the transition to XBRL in depth and has provided justification and support for this change in data reporting format.[140] The same justifications apply in this context. For instance, XBRL will not only be a standard data format at the Commission; it is an international standard for digital reporting, and it enables the reporting of comprehensive, consistent, interoperable data that allows industry and other data users to automate submission, extraction, and analysis. XBRL is a language in which reporting terms can be authoritatively defined, and those terms can then be used to uniquely represent the contents of the Commission's data collections. XBRL is currently required for filing forms by a number of other federal agencies.

120. Additionally, XBRL provides an efficient way to exchange information inherent to the XML format and applies a standard way to capture the characteristics of that information. The XBRL standard also offers flexible benefits, including the ability to support simple formulas such as addition and subtraction and allow more complex formulas to be defined with a set of guidelines. We believe that requiring XBRL-based data would also lead to

[135] Order No. 679, 116 FERC ¶ 61,057 at P 367.

[136] *Id.* P 358.

[137] From June 2006 to March 2019, there were about 80 different developers that requested incentives. Of these developers, 60 have requested incentives only once.

[138] *See* Appendix B for a full draft of the proposed revised Form 730. These changes include the changes to the instructions requested by OMB and adopted by the instant final rule issued concurrently with this NOPR. Additional changes to Form 730 to track transmission project benefits are described in a section below.

[139] *Revisions to the Filing Process for Commission Forms,* Notice of Proposed Rulemaking, 166 FERC ¶ 61,027 (2019).

[140] *Id.* PP 4–18.

greater data quality through easier validation checks.

121. The transition to XBRL format will require modifications to the format of the current Form 730 Tables. However, the modifications and the data format reporting adjustments are justified by the aforementioned benefits, such as efficiency, consistency, and flexibility. We invite comment on the proposed changes to Form 730.

2. Scope of Public Utility Reporting Obligation

122. We propose to modify the scope of the public utilities reporting obligation for Form 730 to direct all public utilities that receive an incentive, other than the RTO-Participation Incentive, for any transmission project to submit information on Form 730 regardless of the transmission project's size. Currently, Order No. 679 only requires information reporting for transmission projects that cost $20 million or more [141] and we propose to eliminate this threshold. However, we propose that public utilities that receive only the RTO-Participation Incentive must report only for transmission projects that cost more than $3 million.[142] We seek comment on this general elimination of the threshold and the $3 million partial retention of it for some public utilities.

123. The expanded reporting obligation, as proposed here, would make Form 730 a more comprehensive forecast tool and permit the Commission to project how much transmission investment will occur in the next five years. Additionally, increasing the scope of the reporting requirement will allow the Commission to compare transmission projects and to evaluate the benefits of transmission projects awarded incentives. This will enable the Commission to evaluate the effectiveness of the incentives program and ensure that the Commission is meeting the statutory requirements of FPA section 219.

3. Benefits Reporting in Form 730

124. As proposed in this NOPR, the Commission's incentive policies will no longer focus on risks and challenges, but instead will evaluate the benefits of proposed transmission projects. In order to effectively evaluate the benefits and monitor the progress of transmission projects that have received incentives, we propose to modify Form 730 to include benefits metrics. We propose that reporting on benefits calculations, both the expected and the actual, should only apply to transmission projects that are $25 million or more in scale to reduce the reporting burden.

125. We also propose the following modifications to Form 730 to measure transmission project benefits:

a. Add a new column to Table 1 for the expected annual benefits of each transmission project.

b. Add a new Table 3 to record actual estimated benefits for each year for up to five years after the date of completion of the transmission project.

c. Incorporate the data in Tables 1 through 3 of Form 730 as new schedules in Form 1.

d. Require public utilities to report the estimated annual economic benefits of each transmission project that is under construction that receives any transmission incentive using the same methodology that would have been used to justify an economic transmission incentive regardless of whether that transmission project actually received an economic transmission incentive. Where possible, we propose to require such benefits to be calculated with the same methodology used by the RTO/ISO to determine economic benefits.

e. Require public utilities to report actual annual economic benefits of completed transmission projects that received any transmission incentive using actual data calculated using the same methodology that would have been used to justify an economic transmission incentive regardless if that transmission project actually received an economic transmission incentive. Where possible, we propose to require economic benefits to be calculated with the same methodology used by the RTO/ISO to determine economic benefits.

f. This annual economic benefit reporting requirement will be limited to the first full five years of the transmission project's implementation.

126. We request comment on the burden to public utilities to provide this benefit information.

V. Information Collection Statement

127. The information collection requirements contained in this NOPR are subject to review by the Office of Management and Budget (OMB) under section 3507(d) of the Paperwork Reduction Act of 1995.[143] OMB's regulations require approval of certain information collection requirements imposed by agency rules.[144] Upon approval of a collection of information, OMB will assign an OMB control number and expiration date. Respondents subject to the filing requirements of this rule will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control number.

128. This NOPR would revise the Commission's regulations and policy with respect to the mechanics and implementation of the Commission's transmission incentives policy; and with respect to the metrics for evaluating the effectiveness of incentives. These provisions would affect the following collections of information:

- FERC–516, Electric Rate Schedules and Tariff Filings (Control No. 1902–0096); and
- FERC–730, Report of Transmission Investment Activity (Control No. 1902–0239).

129. Interested persons may obtain information on the reporting requirements by contacting Ellen Brown, Office of the Executive Director, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426 via email (*DataClearance@ferc.gov*) or telephone (202) 502–8663.

130. The Commission solicits comments on the Commission's need for this information, whether the information will have practical utility, the accuracy of the burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected or retained, and any suggested methods for minimizing respondents' burden, including the use of automated information techniques.

131. Please send comments concerning the collection of information and the associated burden estimates to: Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission]. Due to security concerns, comments should be sent electronically to the following email address: *oira_submission@omb.eop.gov.* Comments submitted to OMB should refer to OMB Control Nos. 1902–0096 and 1902–0239.

132. Please submit a copy of your comments on the information collections to the Commission via the eFiling link on the Commission's website at *http://www.ferc.gov.* If you are not able to file comments electronically, please send a copy of your comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE,

[141] *See* Order No. 679, 116 FERC ¶ 61,057 at P 370.

[142] The threshold of $3 million is proposed because the Commission has had requests for incentives for transmission projects as small as $3 million. *See Va. Elec. Power Co.,* 124 FERC ¶ 61,207, at P 17 (2008).

[143] 44 U.S.C. 3507(d).

[144] 5 CFR 1320.11.

Washington, DC 20426. Comments on the information collection that are sent to FERC should refer to RM20–10–000.

Title: Electric Rate Schedules and Tariff Filings (FERC–516) and Report of Transmission Investment Activity (FERC–730).

Action: Proposed revision of collections of information in accordance with RM20–10–000

OMB Control Nos.: 1902–0096 (FERC–516) and 1902–0239 (FERC–730).

Respondents for this Rulemaking: Public Utilities that seek incentive-based rate treatment for transmission projects, public utilities for which the Commission has granted incentive-based rate treatment for transmission projects, RTOs/ISOs, and the non-RTO/ISO planning regions.

Frequency of Information Collection: On occasion, except for Form 730, which must be filed annually beginning with the calendar year the Commission grants incentive-based rate treatment, and except for the transmission technology annual report, which must be filed annually.

Necessity of Information: Required to obtain or retain benefits.

Internal Review: The Commission has reviewed the changes and has determined that such changes are necessary. These requirements conform to the Commission's need for efficient information collection, communication, and management within the energy industry. The Commission has specific, objective support for the burden estimates associated with the information collection requirements.

133. The NERC Compliance Registry, as of January 31, 2020, identifies approximately 337 Transmission Owners in the United States that are subject to this proposed rulemaking. Additionally, there are six RTOs/ISOs and six planning regions which are not RTOs/ISOs, for a total of 12 planning regions overall.

134. The Commission estimates that the NOPR would affect the burden [145] and cost [146] of FERC–516 (eTariff Filings) and Form 730 as follows:

PROPOSED CHANGES IN NOPR IN DOCKET NO. RM20–10–000

Area of modification	Number of respondents	Annual estimated number of responses per respondent	Annual estimated number of responses (Column B × Column C)	Average burden hours & cost per response	Total estimated burden hours & total estimated cost (Column D × Column E)
A.	B.	C.	D.	E.	F.
FERC–516, eTariff Filings (for Planning Regions)					
RTO/ISO regions provide transmission planning data to developers that examine economic attributes of projects.	6	1.67	10	5 hours; $400	50 hours; $4,000.
Non-RTO/ISO regions provide transmission planning data to developers that examine economic attributes of projects.	6	0.83	5	5 hours; $400	25 hours; $2,000.
Sub-Total for Planning Regions					75 hours; $6,000.
FERC–516, eTariff Filings (for Transmission Owners)					
Developers in RTO/ISO regions provide data made available by a transmission planning region that examines economic attributes of projects.	10	1	10	40 hours; $3,200	400 hours; $32,000.
Developers in non-RTO/ISO regions submit showings of proposed transmission projects' economic merits by using economic modeling within transmission planning regions; or provide showings of economic benefits as determined by third party experts.	5	1	5	480 hours; $38,400	2,400 hours; $192,000.
Demonstration that project met or came in under the project costs for additional incentive.	5	1	5	120 hours; $9,600	600 hours; $48,000.
Demonstration of reliability benefits	10	1	10	360 hours; $28,800	3,600 hours; $288,000.
Demonstration for transmission technology incentive requests.	15	1	15	40 hours; $3,200	600 hours; $48,000.
Annual report on progress, obstacles, lessons learned, and quantifiable data for transmission technology deployment.	15	1	15	400 hours; $32,000	6,000 hours; $480,000.
Sub-Total for Transmission Owners					13,600 hours; $1,088,000.

[145] "Burden" is the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further explanation of what is included in the information collection burden, refer to 5 CFR 1320.3.

[146] Commission staff estimates that respondents' hourly wages (including benefits) are comparable to those of FERC employees. Therefore, the hourly cost used in this analysis is $80.00 ($169,091 per year).

PROPOSED CHANGES IN NOPR IN DOCKET NO. RM20–10–000—Continued

Area of modification	Number of respondents	Annual estimated number of responses per respondent	Annual estimated number of responses (Column B × Column C)	Average burden hours & cost per response	Total estimated burden hours & total estimated cost (Column D × Column E)
A.	B.	C.	D.	E.	F.
Total Proposed Changes for eTariff Filings (FERC–516):.	.....	.....	.....	.....	13,675 hours; $1,094,000.
Form 730					
Additional reporting requirements for current filers of FERC Form 730.	63	1	63	6 hours; $480	378 hours; $30,240.
Additional filers of FERC Form 730	137	1	137	36 hours; $2,880	4,932 hours; $394,560.
Sub-Total of Proposed Changes for Form 730.	.....	.....	.....	.....	5,310 hours; $424,800.
Total Proposed Changes for FERC–516 & Form 730 in NOPR in RM20–10.	.....	.....	.....	.....	18,985 hours; $1,518,800.

135. To date, the Commission has received approximately 110 incentive requests since Order No. 679 was issued in 2006. For the purposes of estimating burden in this NOPR, in the table above, we conservatively estimate annual numbers of the different possible incentive requests. We seek comment on the estimates in the table above regarding the number of incentive requests.

136. With regard to eTariff Filings, as discussed above, the Commission proposes to change its analysis and the regulatory text to implement a benefits-based standard. Rather than connecting incentives with risks and challenges, the Commission proposes that applicants demonstrate that facilities receiving incentives either ensure reliability or reduce the cost of delivered power by reducing transmission congestion consistent the requirements of section 219, and that the resulting rates are just and reasonable. Since applicants already seek incentives, we estimate that the additional burden to applicants to be in the demonstration of economic reliability benefits or reliability benefits for those associated incentives, the demonstration for transmission technology incentives, and the reporting related to the transmission technology incentives. We also note that the transmission planning regions will also have an additional burden in providing information to developers. For applicants in non-RTO regions, we seek comment on the additional estimates of burden these demonstrations and information sharing will require.

137. With regard to Form 730, the Commission estimates that the proposed changes will increase the amount of time required to prepare the information in Form 730 for public utilities that already report data by about 20 percent, from 30 hours to 36 hours, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data-needed, and completing and reviewing the collection of information. The additional form preparation time data on prior spending and data on total projected spending on a project-by-project basis instead of as a total summation. It is the Commission's belief that public utilities are already gathering data in a project-by-project format to prepare the total summation in Table 1, so requiring a report on project-by-project spending would not require significant additional time.

138. Approximately 80 [147] transmission owners have requested transmission incentives and, therefore, only about 80 transmission owners have been subject to the requirement to file Form 730. We expect that requiring all transmitting utilities that receive the RTO-Participation Incentive for transmission projects that cost more than $3 million to report Form 730 will increase the number of utilities to about 150. Additionally, we conservatively estimate that, at any point in the future, the number of public utilities in non-RTO/ISO regions which may seek incentive requests to be about 50, leading to a conservative estimate of 200 transmission owners affected by the proposed changes to Form 730. We seek comment on the estimated additional burden and the number of transmission owners affected by the proposed changes to Form 730.

VI. Environmental Analysis

139. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[148] We conclude that neither an Environmental Assessment nor an Environmental Impact Statement is required for this NOPR under section 380.4(a)(15) of the Commission's regulations, which provides a categorical exemption for approval of actions under sections 205 and 206 of the FPA relating to the filing of schedules containing all rates and charges for the transmission or sale of electric energy subject to the Commission's jurisdiction, plus the classification, practices, contracts, and regulations that affect rates, charges, classification, and services.[149]

VII. Regulatory Flexibility Act

140. The Regulatory Flexibility Act of 1980 [150] generally requires a description and analysis of proposed and final rules that will have significant economic impact on a substantial number of small entities. The Small Business Administration (SBA) sets the threshold

[147] The current OMB-approved inventory shows 63 respondents, so that figure is shown in the table above for the number of current filers (who will have an additional six hours of burden).

[148] Order No. 486, Regulations Implementing the National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. Preambles 1986–1990 ¶ 30,783 (1987).

[149] 18 CFR 380.4(a)(15).

[150] 5 U.S.C. 601–612.

for what constitutes a small business. Under SBA's size standards,[151] RTOs/ISOs, planning regions, and transmission owners all fall under the category of Electric Bulk Power Transmission and Control (NAICS code 221121), with a size threshold of 500 employees (including the entity and its associates).[152]

141. The six RTOs/ISOs (SPP, MISO, PJM, ISO New England, NYISO, and CAISO) each employ more than 500 employees and are not considered small.

142. We estimate that 337 transmission owners and six planning authorities are also affected by the NOPR. Using the list of Transmission Owners from the NERC Registry (dated January 31, 2020), we estimate that approximately 68% of those entities are small entities.

143. We estimate additional annual costs associated with the NOPR (as shown in the table above) of:

- $480 each for 63 current filers of the Form FERC–730 and $2,880 each for 137 new filers of Form FERC–730
- $500 each for six RTO/ISO regions and six non-RTO/ISO regions to provide planning data (FERC–516)
- Costs ranging from $0 to $76,800 (for each transmission owner in RTOs/ISOs) to $112,000 [153] (for each transmission owner in non-RTO/ISO regions) for eTariff filers (FERC–516). These costs are only incurred on a voluntary basis.

144. Therefore, the estimated additional annual cost per entity ranges from $0 to $114,880.

145. According to SBA guidance, the determination of significance of impact ''should be seen as relative to the size of the business, the size of the competitor's business, and the impact the regulation has on larger competitors.'' [154] We do not consider the estimated cost to be a significant economic impact. As a result, we certify that the proposals in this NOPR will not have a significant economic impact on a substantial number of small entities.

VIII. Comment Procedures

146. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due July 1, 2020. Comments must refer to Docket No. RM20–10–000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments.

147. 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.

148. 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.

149. 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.

IX. Document Availability

150. 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.

151. 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.

152. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at 202–502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

List of Subjects in 18 CFR Part 35

Electric power rates, Electric utilities, Reporting and recordkeeping requirements.

By direction of the Commission. Commissioner Glick is dissenting in part with a separate statement to be issued at a later date.

Issued March 20, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

In consideration of the foregoing, the Commission proposes to amend part 35, chapter I, title 18, Code of Federal Regulations, as follows.

Subpart G—Transmission Infrastructure Investment Provisions

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

Authority: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 41 U.S.C. 7101–7352.

■ 2. Section 35.35 is revised to read:

§ 35.35 Transmission infrastructure investment.

(a) *Purpose.* This section establishes rules for incentive-based rate treatments for transmission of electric energy in interstate commerce by public utilities for the purpose of benefiting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.

(b) *General rules.* (1) All rates approved under the rules of this section, including any revisions to the rules, are subject to the filing requirements of sections 205 and 206 of the Federal Power Act and to the substantive requirements of sections 205 and 206 of the Federal Power Act that all rates, charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential.

(2) All rates approved under the rules of this section are subject to a 250-basis-point cap on total return on equity incentives.

(3) Applicants for the incentive-based rate treatment must make a filing with the Commission under section 205 of the Federal Power Act prior to recovering incentives in rates.

(c) *Applications for incentive-based rate treatments for transmission infrastructure investment.* The Commission will authorize any incentive-based rate treatment, as discussed in this paragraph (c), for transmission infrastructure investment, provided that the proposed incentive-based rate treatment is just and reasonable and not unduly

[151] 13 CFR 121.201.

[152] The threshold for the number of employees indicates the maximum allowed for a concern and its affiliates to be considered small.

[153] These values represent the theoretical maximum case in which a Transmission Owner applies for every type of incentive, and also files a transmission technology annual report.

[154] U.S. Small Business Administration, *A Guide for Government Agencies How to Comply with the Regulatory Flexibility Act,* at 18 (May 2012), *https://www.sba.gov/sites/default/files/advocacy/rfaguide_0512_0.pdf.*

discriminatory or preferential. An applicant's request for one or more incentive-based rate treatments, to be made in a filing pursuant to section 205 of the Federal Power Act, or in a petition for a declaratory order that precedes a filing pursuant to section 205 of the Federal Power Act, must include a detailed explanation of how the proposed rate treatment complies with the requirements of section 219 of the Federal Power Act and a demonstration that the proposed rate treatment is just, reasonable, and not unduly discriminatory or preferential. The applicant must demonstrate that the facilities for which it seeks incentives either ensure reliability or reduce the cost of delivered power by reducing transmission congestion consistent with the requirements of section 219 and that resulting rates are just and reasonable.

(d) *Types of incentive-based rate treatments for all transmission infrastructure investment.* For purposes of paragraph (c), incentive-based rate treatment means any of the following:

(1) A rate of return on equity sufficient to attract new investment in transmission facilities, including;

(i) 50-basis-points increase in return on equity incentives for ex-ante economic benefits;

(ii) 50-basis-points increase in return on equity incentives for ex-post economic benefits;

(iii) Up to 50-basis-points increase in return on equity incentives for reliability benefits;

(2) 100 percent of prudently incurred Construction Work in Progress in rate base;

(3) Recovery of prudently incurred pre-commercial operations costs;

(4) Hypothetical capital structure;

(5) Accelerated depreciation used for rate recovery;

(6) Recovery of 100 percent of prudently incurred costs of transmission facilities that are cancelled or abandoned due to factors beyond the control of the applicant;

(7) Deferred cost recovery; and

(8) Any other incentives approved by the Commission, pursuant to the requirements of this section, that are determined to be just and reasonable and not unduly discriminatory or preferential.

(e) *Incentive-based rate treatments for investment in transmission technology.* In addition to the incentives in § 35.35(d), the Commission authorizes the following incentive-based rate treatments and requirements for transmission technology investment by utilities that enhance reliability, economic efficiency, capacity, and improve the operation of new or existing transmission facilities:

(1) A stand-alone 100-basis-point return on equity incentive on the costs of the specified transmission technology project.

(2) Regulatory asset treatment for up to two years of initial costs related to deploying eligible transmission technologies that are traditionally expensed to be deferred and included in rate base for purposes of determining a public utility's rate of return, and amortized over five years.

(3) To be eligible to receive each incentive described in this subpart, each applicant must submit a transmission technology statement when requesting an incentive that demonstrates: how the technology meets the transmission technology criteria, the expected benefits of deployment, the cost of the transmission technology project, the cost of the overall transmission project if not a stand-alone transmission technology project, the expected useful life of the asset, and a demonstration that the transmission technology meets the economic benefits threshold.

(4) Eligible transmission technology pilot programs will receive a rebuttable presumption of eligibility for the incentives described in this subpart.

(5) Each applicant granted an incentive under this subpart must submit to the Commission an annual informational filing, for three years after the incentive is granted, that details the progress of the technology, obstacles to its deployment and efforts to overcome them, lessons learned, and any quantifiable data measuring the benefits of the transmission technology project. Any information already submitted to the Commission via existing forms need not be submitted under this requirement.

(f) *Incentives for joining and remaining in a Transmission Organization.* For purposes of this incentive, Transmission Organization means a Regional Transmission Organization, Independent System Operator, independent transmission provider, or other transmission organization finally approved by the Commission for the operation of transmission facilities. The Commission will permit transmitting utilities or electric utilities that join a Transmission Organization the ability to recover prudently incurred costs associated with joining the Transmission Organization in their jurisdictional rates. Additionally, the Commission will authorize a 100-basis-point increase in return on equity as an incentive-based rate treatment for a transmitting utility that joins and remains in a Transmission Organization and turns over operational control of the applicant's wholesale transmission facilities to the Transmission Organization.

(g) *Approval of prudently-incurred costs.* The Commission will approve recovery of prudently-incurred costs necessary to comply with the mandatory reliability standards pursuant to section 215 of the Federal Power Act, provided that the proposed rates are just and reasonable and not unduly discriminatory or preferential.

(h) *Approval of prudently incurred costs related to transmission infrastructure development.* The Commission will approve recovery of prudently-incurred costs related to transmission infrastructure development pursuant to section 216 of the Federal Power Act, provided that the proposed rates are just and reasonable and not unduly discriminatory or preferential.

(i) *FERC–730, Report of transmission investment activity.* Public utilities that have been granted incentive rate treatment for specific transmission projects must file FERC–730 on an annual basis beginning with the calendar year incentive rate treatment is granted by the Commission. Such filings are due by April 18 of the following calendar year and are due April 18 each year thereafter. The following information must be filed:

(1) In dollar terms, on a project-by-project basis actual transmission investment for the most recent calendar year, and projected, incremental investments for the next five calendar years;

(2) For all current and projected investments over the next five calendar years, a project-by-project listing that specifies for each transmission project the most up-to-date, expected completion date, percentage completion as of the date of filing, and reasons for delays. Exclude from this listing transmission projects with projected costs less than $3 million that did not receive a project-specific transmission incentive; and

(3) For good cause shown, the Commission may extend the time within which any FERC–730 filing is to be filed or waive the requirements applicable to any such filing.

(j) *Rebuttable presumption.* (1) The Commission will apply a rebuttable presumption that an applicant has demonstrated that its project is needed to ensure reliability or reduces the cost of delivered power by reducing congestion for:

(i) A transmission project that results from a fair and open regional planning

process that considers and evaluates projects for reliability and/or congestion and is found to be acceptable to the Commission; or

(ii) A transmission project that has received construction approval from an appropriate state commission or state siting authority.

(2) Effective date for abandoned plant costs: A public utility with a transmission project that is selected in a regional transmission planning process for the purposes of cost allocation can recover 100 percent of abandoned plant costs from the date such project is selected in a regional transmission planning process.

(3) To the extent these approval processes do not require that a project ensures reliability or reduce the cost of delivered power by reducing congestion, the applicant bears the burden of demonstrating that its project satisfies these criteria.

(k) *Commission authorization to site electric transmission facilities in interstate commerce.* If the Commission pursuant to its authority under section 216 of the Federal Power Act and its regulations thereunder has issued one or more permits for the construction or modification of transmission facilities in a national interest electric transmission corridor designated by the Secretary, such facilities shall be deemed to either ensure reliability or reduce the cost of delivered power by reducing congestion for purposes of section 219(a).

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

Appendix A—Benefit-Cost Data for Approved Economic Transmission Projects

TABLE 1—BENEFIT-COST RATIO SUMMARY

Average ratio calculations	Overall	>$25 million	<$25 million
All	*20.09*	*3.63*	*26.67*
PJM	35.12	4.95	38.30
CAISO	3.07	1.95	5.85
MISO	6.05	4.79	6.76
Total Projects	41.00	12.00	30.00

TABLE 2—BENEFIT-COST RATIO PERCENTILES

Percentile calculations	All	>$25 million	<$25 million
75th Percentile	15.21	3.98	33.91
90th Percentile	72.42	5.17	77.04

TABLE 3—ECONOMIC PROJECTS

[Project cost >$25 million]

Project	Region	Benefit	Cost ($)	Transmission planning cycle
Julian Hinds	CAISO	3.75	32,500,000	2018–2019
S-Line series reactor project*	CAISO	2.36	39,000,000	2018
East Marysville	CAISO	1.62	42,600,000	2018–2019
Delaney- Colorado River 500 kV line *(200 MW scenario)***	CAISO	0.94 (200 MW scenario) 1.10 (300 MW scenario)	501,000,000	2013–2014
Duff—Coleman 345 kV	MISO	15.80	49,600,000	2015
Southeast Louisiana Project	MISO	2.90	87,700,000	2016
Western Region Economic Project (WREP) (formerly known as East Texas Economic Project).	MISO	2.20	122,500,000	2015
Huntley—Wilmarth 345 kV	MISO	1.70	123,530,000	2016
Hartburg to Sabine Junction 500 kV Economic Project (Formerly WOTAB 500 kV Project).	MISO	1.35	158,520,000	2017
Conastone-Graceton (b2992)	PJM	5.23	39,600,000	2018
Market Efficiency Project 9A (b2743 & b2752)	PJM	4.67	320,190,000	2016

** This project's benefit-cost ratio was determined to be encouraging, but CAISO earmarked it for future consideration once the design and configuration of this line is finalized. We included this project in our calculation because its ratio was deemed to be acceptable, and therefore, a valid data point for the purposes of contextualizing "selectable" B–C Ratios.*

*** CAISO calculated The Delaney-Colorado River 500 kV line's benefits included sensitivity analyses for both under 5% and 7% discount rates. We averaged the two sensitivity B–C ratios for each scenario, and present both instances here as sub-parts of one approved project.*

TABLE 4—ECONOMIC PROJECTS

Project cost >$25 million]

Project	Region	B–C Ratio	Cost	Transmission planning cycle
Giffen Line Reconductoring	CAISO	7.50	6,500,000	2018–2019
Lodi-Eight Mile 230 kV Line	CAISO	4.20	10,000,000	2014–2015
Carlyss 230–138 kV Autotransformer: Upgrade Station Equipment	MISO	28.25	670,000	2017
Upgrade Minden—Sarepta 115 kV Terminal Equipment	MISO	1.83	1,900,000	2016
Elkhart Lake SS, 138 kV—Relieve Market Congestion	MISO	3.55	2,540,000	2018
Sam Rayburn to Doucette 138 kV: Upgrade Line Rating	MISO	8.51	3,880,000	2017
Mabelvale-Bryant: Reconductor 115kV line	MISO	5.88	6,100,000	2015

TABLE 4—ECONOMIC PROJECTS—Continued

Project cost >$25 million]

Project	Region	B–C Ratio	Cost	Transmission planning cycle
Lakeover 500/230 kV XFMR	MISO	1.43	6,700,000	2016
Rebuild Wabaco to Rochester 161kV	MISO	6.79	12,960,000	2018
P3212: Wheatland to Breed 345 kV	MISO	1.28	14,500,000	2012
Wilson-BR Tap-Paradise 161 kV Modification	MISO	3.28	18,900,000	2018
Replace L7915 B phase line trap at Wayne substation	PJM	7.20	100,000	2015
Replace terminal equipment at Reynolds on the Reynolds—Magnetation 138kV.	PJM	120.83	120,000	2017
Replace relays at AEP's Cloverdale and Jackson's Ferry substations to improve the thermal capacity of Cloverdale—Jackson's Ferry 765 kV line.	PJM	15.80	500,000	2015
Upgrade 138 kV substation equipment at Butler, Shanor Manor and Krendale substations. New rating of line will be 353 MVA summer normal/422 MVA emergency.	PJM	35.80	600,000	2015
Upgrade capacity on E. Frankford-University Park 345kV	PJM	147.69	840,000	2017
Reconductor limiting span of Lallendorf—Monroe 345kV (crossing of Maumee river).	PJM	11.30	1,000,000	2017
Reconductor two spans of the Graceton—Safe Harbor 230 kV transmission line. Includes termination point upgrades.	PJM	4.30	1,100,000	2015
Rebuild Worcester—Ocean Pine 69 kV ckt. 1 to 1400A capability summer emergency.	PJM	82.70	2,400,000	2015
Reconductor three spans limiting Brunner Island—Yorkana 230 kV line, add 1 breaker to Brunner Island switchyard, upgrade associated terminal equipment.	PJM	73.30	3,100,000	2015
Upgrade terminal equipment on the Lincoln—Carroll 115/138 kV path	PJM	52.60	5,200,000	2015
Upgrade substation equipment at Pontiac Midpoint station to increase capacity on Pontiac-Brokaw 345 kV line..	PJM	13.45	5,620,000	2017
Reconductor Michigan City—Bosserman 138kV	PJM	4.93	6,000,000	2017
Reconductor Roxana—Praxair 138kV	PJM	1.07	6,100,000	2017
Reconfigure Munster 345kV as ring bus	PJM	4.78	6,700,000	2017
Rebuild the Hunterstown—Lincoln 115 kV line (No.962) (~2.6 mi.). Upgrade limiting terminal equipment at Hunterstown and Lincoln..	PJM	76.41	7,210,000	2019
Increase ratings of Peach Bottom 500/230 kV transformer to 1479 MVA normal/1839 MVA emergency.	PJM	2.60	9,700,000	2015
Reconductor approximately 7 miles of the Woodville—Peters (Z–117) 138 kV circuit.	PJM	5.80	11,200,000	2015
Mitigate sag limitations on Loretto—Wilton Center 345 kV Line and replace station conductor at Wilton Center.	PJM	64.46	11,500,000	2016
Rebuild Michigan City-Trail Creek—Bosserman 138 kV (10.7 mi)	PJM	2.63	24,690,000	2019

Appendix B

OMB Control Number: 1902–0239

Expiration Date: nn/nn/nnnn

Annual Due Date: April 18

FERC–730, Report of Transmission Investment Activity

Company Name:

_____

To file this form, respondents should follow the instructions for eFiling available at *https://www.ferc.gov/docs-filing/efiling.asp.*

Template for Table 1

TABLE 1—ACTUAL AND PROJECTED ELECTRIC TRANSMISSION CAPITAL SPENDING BY PROJECT

Report year	Project code	Project description	Total actual and projected project spending on transmission facilities during each time period ($ Thousands) (1)								Notes
			Actual		Projected						
			Prior to report year	Report year +0	Report year +1	Report year +2	Report year +3	Report year +4	Report year +5	After Report year +5	
(2)	(3)	(4)	(5)	(6)	(7)					(8)	(9)

Instructions for completing ''Table 1'':

(1) Total Actual and Projected Project Spending on Transmission Facilities During Each Time Period is the total actual and projected spending on each project until it is completed. Transmission facilities are defined to be transmission assets as specified in the Uniform System of Accounts in account numbers 350 through 359 (*see,* 18 CFR part 101, *Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act,* for account definitions). The Transmission Plant accounts include: Accounts 350 (Land and Land Rights), 351 (Energy Storage Equipment- Transmission), 352 (Structures and Improvements), 353 (Station Equipment), 354 (Towers and Fixtures), 355 (Poles and Fixtures), 356 (Overhead Conductors and Devices), 357 (Underground Conduit), 358 (Underground Conductors and Devices), and 359 (Roads and Trails).

(2) Report Year is the year associated with data reported in that row. For

example, if it is April 2021 and the public utility is reporting on 2020 project activity, the report year is 2020. A public utility can use the same form to correct a prior year's data. It would just report the data associated with the previous report year as an entry in Table 1.

(3) Project Code is the same Project Code associated with the project as in Table 2 below. Project Code is a 12-character alphanumeric string unique to each project. Respondents should add as many additional rows as are necessary to list all relevant projects. The combination of Report Year and Project Code is the primary key for each record. The primary key allows Table 1 and Table 2 data to be combined into a single table.

(4) Project Description is a descriptive name for the project. It is the same description associated with the project code in Table 2.

(5) Prior to the Report Year is the sum of all Actual spending associated with the project prior to the report year. All capital spending data is formatted as a currency number.

(6) Report Year +0 is the sum of all Actual spending associated with the project during the report year.

(7) Report Year +n means the sum of all Projected spending on the project in the calendar year of the Report Year plus n. For example, if n equals one, and the report year is 2020, then Report Year +1 will be 2021 and that entry would be sum of all Projected spending on the project in the calendar year 2021.

(8) After Report Year +5 means the sum of all Projected spending on the project more than five years past the Report Year. For example, if the report year is 2020, then this entry would be the sum of all spending starting at the beginning of 2026 and continuing until the project is complete. Note, that this entry can be estimated by using the total projected spending on the project, which the public utility already knows.

(9) Notes includes information about spending and estimated spending not included elsewhere. Notes is a 120-character string.

Below is an example of Table 1 associated with a fictitious public utility with two fictitious projects.

TABLE 1—ACTUAL AND PROJECTED ELECTRIC TRANSMISSION CAPITAL SPENDING BY PROJECT

Report year	Project code	Project description	Total actual and projected project spending on transmission facilities during each time period ($ thousands)								Notes
			Actual		Projected						
			Prior to report year	Report year +0	Report year +1	Report year +2	Report year +3	Report year +4	Report year +5	After report year +5	
2019	AKX0303	Piney Ridge to Fulton	$2,600	$28,500	$60,000 (10)	$60,000	$50,000	$0	$0	$0	Revision to 2019 actual.
2020	AKX0303	Piney Ridge to Fulton	$31,100	$30,500	$30,000	$40,000	$50,000	$40,000	$0	$0	Cost forecasts are higher and further out due to reroute.
2020	AKX0304	Fulton to Grey Pike	$1,100	$1,000	$36,000	$50,000	$20,000	$0	$0	$0	N/A.

(10) The developer should not revise projected data from what it originally reported unless the developer is correcting an obvious data entry mistake.

In this example, the public utility revised the 2019 data. The public utility cannot revise projected data; however, it is appropriate to revise actual data if that data has been reported incorrectly. For example, in 2020 the Prior to Report Year data for project code AKX0303 is $31.1 million. If the sum of Prior to Report Year and Report Year +0 for project code AKX0303 and report year 2019 did not sum to $31.1 million, then the public utility reported the data incorrectly in 2019 and should revise those entries.

Template for Table 2

TABLE 2—PROJECT STATUS DETAILS

Report year	Project code	Project description	Project voltage (kV)	Project type	Expected project completion date (month/year)	Completion status	Was project on schedule? (Y/N)	If project was not on schedule, indicate reasons for delay
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)

Instructions for completing ''Table 2'':

(1) Report Year is the year of the report data and should be the same as reported in Table 1. There should be no information in Table 2 that could not be known at the end of the report year.

(2) Project Code is a public utility-created alphanumeric designator twelve digits or less that is unique to each project. Project Code is the same project code from Table 1 above. Respondents must list all projects included in Table 1 that received a project-specific transmission incentive. Projects that only received the RTO-Participation Incentive need only be listed if they are projected to be at least $3 million. It can be identical to the code used by the RTO/ISO if it is unique to the project and is 12 digits or less. This code never changes during the time the project is developed and is never reused for any subsequent project. Respondents should add as many additional rows as are necessary to list all relevant projects. The combination of Report Year and Project Code is the primary key for each record. The primary key allows Table 1 and Table 2 data to be combined into a single table.

(3) Project Description is the same description used in Table 1 associated with the Project Code. Respondents should incorporate the name given by the public utility when requesting incentives into the Project Description, whenever possible. The Project Description never changes. Project Description is a 40-character string. Respondents must create a Project Description, using plain English, that will uniquely identify the project. The same Project Description cannot be used for two different Project Codes and each Project Code has only one Project Description ever.

(4) Project Voltage is the maximum voltage associated with the project. If no voltage could logically be associated the project, then respondents should enter a Project Voltage value of -9. Project Voltage is a numeric value so -9 is a way of indicating that there is no number for this entry.

(5) Respondents should select between the following Project Types to complete the Project Type column: New Build, Upgrade of Existing, Refurbishment/Replacement, or Generator Direct Connection. Project Type is a 40-character string.

(6) Expected Project Completion Date is the date the public utility forecasts as the date that the project will be completed at the end of Report Year. If the project was completed during the report year, then Expected Project Completion Date is the actual project completion date. Project Completion date is formatted mm/yyyy.

(7) Respondents should select between the following designations to complete the Completion Status column: Complete, Under Construction, Pre-Engineering, Planned, Proposed, and Conceptual. If the project is completed between the end of the report year and the day the public utility reports the data, the Completion Status would be Under Construction because that was the project status at the end of the report year. Completion Status is a 20-character string.

(8) Was Project on Schedule? (Y/N) is either Y (yes) or N (no) depending on whether the project was on schedule at the end of the report year. Was Project on Schedule? (Y/N) is a 1-character string.

(9) If the Project Was Not on Schedule, Indicate Reasons for the Delay is a 120-character string. The utility has 120 characters to explain why the project was delayed at the end of the report year. If there was no delay at the end of the report year, then the respondent can just enter N/A.

Below is an example of Table 2 associated with the same fictitious public utility with the same two fictitious projects as used in the example of Table 1.

TABLE 2—PROJECT STATUS DETAILS

Report year	Project code	Project name	Project voltage (kV)	Project type	Expected project completion date (month/year)	Completion status	Was project on schedule? (Y/N)	If the project was not on schedule, indicate reasons for the delay
2020 (10)	AKX0303	Piney Ridge to Fulton.	230	New Build	06/2024	Under Construction	No	Unable to site original route.
2020	AKX0304	Fulton to Grey Pike.	230	New Build	09/2023	Pre-Engineering	Yes	N/A.

(10) There is no revision for the 2019 AKX0303 Table 2 entry even though the public utility now knows that the route will be delayed because this information was not knowable at the end of the report year. Revisions to data are only to correct information that would have been known to be incorrect at the end of the report year.

Paperwork Reduction Act of 1995 (PRA) Statement: The PRA (44 U.S.C. 3501 *et seq.*) requires us to inform you the information collected in the Form 730 is necessary for the Commission to evaluate its incentive rates policies, and to demonstrate the effectiveness of these policies. Further, the Form 730 filing requirement allows the Commission to track the progress of electric transmission projects granted incentive-based rates, providing an accurate assessment of the state of the industry with respect to transmission investment, and ensuring that incentive rates are effective in encouraging the development of appropriate transmission infrastructure. Responses are mandatory. 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. Public reporting burden for reviewing the instructions, completing, and filling out this form is estimated to be 36 hours per response. Send comments regarding the burden estimate or any other aspect of this form to *DataClearance@FERC.gov,* or to the Office of the Executive Director, Information Clearance Officer, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

Title 18, U.S.C. 1001 makes it a crime for any person knowingly and willingly to make to any Agency or Department of the United States any false, fictitious, or fraudulent statements as to any matter within its jurisdiction.

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Part VI

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 635

Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Fisheries; Pelagic Longline Fishery Management; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 200330–0091]

RIN 0648–BI51

Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Fisheries; Pelagic Longline Fishery Management

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

ACTION: Final rule.

SUMMARY: This final action will undertake a review process to collect and review data to evaluate the continued need for the Northeastern United States Closed Area and the Spring Gulf of Mexico Gear Restricted Area; remove the Cape Hatteras Gear Restricted Area; and adjust the Gulf of Mexico gear requirements to shorten the duration of required weak hook use from year-round to seasonal (January–June). NMFS has adopted a suite of measures to manage bluefin tuna bycatch in the pelagic longline fishery for Atlantic highly migratory species (HMS), including mandatory weak hook use, time/area closures, gear restricted areas, and electronic monitoring and the Individual Bluefin Quota (IBQ) Program adopted in 2015 through Amendment 7 to the 2006 Consolidated HMS FMP. However, quotas for target species have continued to be significantly underharvested and available IBQ allocation remains unused at the end of each year, indicating that all of the measures in tandem may not be necessary to appropriately limit incidental catch of bluefin tuna in the pelagic longline fishery and may not best achieve other management objectives, such as allowing fishermen a reasonable opportunity to harvest available quotas. These actions will ensure that conservation obligations are met and that bluefin bycatch continues to be minimized, but in a way that is not unnecessarily restrictive of pelagic longline fishery effort.

DATES: This final rule is effective on April 2, 2020.

ADDRESSES: The Final Environmental Impact Statement (FEIS) containing a list of references used in this document is available online at *https://www.fisheries.noaa.gov/action/pelagic-longline-bluefin-tuna-area-based-and-weak-hook-management-measures.* The Western Atlantic bluefin tuna stock assessment is available on the website for the International Commission for the Conservation of Atlantic Tunas (ICCAT) at *https://www.iccat.int/en/.*

FOR FURTHER INFORMATION CONTACT: Craig Cockrell at (301) 427–8503, or Jennifer Cudney or Randy Blankinship at (727) 824–5399.

SUPPLEMENTARY INFORMATION:

Background

Atlantic HMS are managed under the dual authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), as amended, and the Atlantic Tunas Convention Act (ATCA). The Magnuson-Stevens Act, at 16 U.S.C. 1802(21), defines the term ''highly migratory species'' as ''tuna species, marlin (Tetrapturus spp. and Makaira spp.), oceanic sharks, sailfishes (Istiophorus spp.), and swordfish (*Xiphias gladius*).'' The 2006 Consolidated HMS FMP and its amendments are implemented by regulations at 50 CFR part 635. A summary of the background of this final rule is provided below. Additional information regarding bluefin tuna and pelagic longline fishery management can be found in the FEIS and proposed rule (84 FR 33205; July 12, 2019) associated with this rulemaking, the 2006 Consolidated HMS FMP and its amendments, the annual HMS Stock Assessment and Fishery Evaluation (SAFE) Reports, and online at *https://www.fisheries.noaa.gov/topic/atlantic-highly-migratory-species.*

This rulemaking examined the continued need for several existing management measures related to the incidental catch of bluefin tuna in the pelagic longline fishery given implementation and the effects of the IBQ Program. A 1998 Recommendation by ICCAT to establish a Rebuilding Program for Western Atlantic Bluefin Tuna (Rec. 98–07) required that all Contracting Parties, including the United States, minimize dead discards of bluefin tuna to the extent practicable and set a country-specific dead discard allowance. Given the status of bluefin tuna and recommendations from ICCAT at that time, NMFS investigated a range of different time/area options for potential management measures in locations with high bluefin tuna bycatch through the rulemaking process for the 1999 HMS FMP for Atlantic Tunas, Sharks, and Swordfish (64 FR 29090, May 28, 1999). In the final rule for that FMP, NMFS implemented the Northeastern United States Closed Area based, in part, on a redistribution analysis (referred to as a ''disbursement analysis'' in the FEIS for that rule) that showed that a closure during the month of June could reduce bluefin tuna discards by 55 percent in this area, without any substantial changes to target catch or other bycatch levels. This area, located off the coast of New Jersey, has been closed from June 1 through June 30 each year. Considerable fishing effort has been occurring on the outer seaward edges of the closed area for the past 20 years.

From 2007–2010, NMFS conducted research on the use of weak hooks by pelagic longline vessels operating in the Gulf of Mexico to reduce bycatch of spawning bluefin tuna. A weak hook is a circle hook that meets NMFS' hook size and offset restrictions for the pelagic longline fishery. Weak hooks are constructed of round wire stock that is a thinner gauge (*i.e.,* no larger than 3.65 mm in diameter) than the circle hooks otherwise used in the pelagic longline fishery. Weak hooks straighten to release large fish, such as bluefin tuna, when they are caught, while retaining smaller fish, such as swordfish and other tunas. Research results showed that the use of weak hooks can significantly reduce the amount of bluefin tuna caught by pelagic longline vessels. Some reductions in the amount of target catch of yellowfin tuna and swordfish were noted but were not statistically significant. In 2011, a large year class (2003) of bluefin tuna was approaching maturity and was expected to enter the Gulf of Mexico to spawn for the first time. Consistent with the advice of the ICCAT Standing Committee on Research and Statistics (SCRS) that ICCAT may wish to protect the strong 2003 year class until it reaches maturity and can contribute to spawning, and for other stated objectives, NMFS, in a final rule on Bluefin Tuna Bycatch Reduction in the Gulf of Mexico Pelagic Longline Fishery, implemented mandatory use of weak hooks on a year-round basis to reduce bycatch of bluefin tuna (76 FR 18653; April 5, 2011). Weak hooks have since been required for vessels fishing in the Gulf of Mexico that have pelagic longline gear on board, and that have been issued, or are required to have been issued, a swordfish, shark, or Atlantic Tunas Longline category limited access permit (LAP) for use in the Atlantic Ocean, including the Caribbean Sea and the Gulf of Mexico.

In 2015, Amendment 7 to the 2006 Consolidated HMP FMP (79 FR 71510; December 2, 2014) implemented the Gulf of Mexico and Cape Hatteras Gear Restricted Areas. These gear restricted areas were designed based on the identification of areas with relatively high bluefin interaction rates with

pelagic longline gear (see page 29 of the Amendment 7 FEIS), and were implemented to address incidental catch of bluefin tuna in the pelagic longline fishery The Spring Gulf of Mexico Gear Restricted Area, which consists of two areas in the central and eastern Gulf of Mexico, is closed to pelagic longline gear from April 1 through May 31 annually. This coincides with the peak of the spawning season for bluefin in the Gulf of Mexico. The time and location were also selected to reduce bluefin interactions based on past patterns of interactions with the pelagic longline fishery. The Spring Gulf of Mexico Gear Restricted Area was closed to all vessels with pelagic longline gear onboard (unless the gear is properly stowed), rather than using performance-based criteria for access, because the distribution of interactions was more widespread across both the areas and fishery participants.

The Cape Hatteras Gear Restricted Area, established off the coast of Cape Hatteras, North Carolina is effective each year from December 1 through April 30. While the area encompassed by the Cape Hatteras Gear Restricted Area had a high level of bluefin interactions, the majority of those interactions were by only a few pelagic longline vessels. Due to this dynamic, NMFS implemented performance measures to grant ''qualified'' fishery participants access to the Cape Hatteras Gear Restricted Area provided they meet specific criteria. Access is granted based on an annual assessment of pelagic longline vessels using performance-based metrics. Pelagic longline vessels are evaluated on their ratio of bluefin interactions to designated species landings, compliance with the Pelagic Observer Program, and timely submission of logbooks. Designated target species include swordfish, the ''BAYS'' tunas (bigeye, albacore, yellowfin, and skipjack tunas), pelagic sharks (shortfin mako, thresher, and porbeagle), dolphin, and wahoo. For the 2019–2020 effective period of the Cape Hatteras Gear Restricted Area, 70 out of 89 vessels evaluated were granted access to the area based on these metrics.

In 2015, Amendment 7 reconfigured the management and allocation of bluefin tuna quota, and shifted the focus of managing bluefin bycatch in the HMS pelagic longline fishery from fishery-wide management measures to individual vessel accountability through the implementation of a bluefin tuna catch share program (*i.e.,* the Individual Bluefin Quota, or IBQ, Program). The IBQ Program distributes IBQ allocation (*i.e.,* an amount of bluefin quota, expressed as a weight in pounds or metric tons) that may be used to account for landings and dead discards by fishery participants, with the annual initial distribution based on the IBQ share percentage associated with an eligible Atlantic Tunas Longline permit. NMFS recently published the Three-Year Review of the IBQ Program, which concluded that the IBQ Program has met or exceeded expectations with respect to reducing bluefin interactions and dead discards in the pelagic longline fishery, improved timely catch reporting across the fleet, and addressed previous problems with Longline category quota overages. The Three-Year Review of the IBQ Program also noted that a healthy, functioning IBQ allocation leasing market exists to support the IBQ Program. However, the Three-Year Review also found that effort—as defined by the number of vessels, trips, sets, and hooks within the pelagic longline fishery—has continued to decrease. The Three-Year Review of the IBQ Program noted that it is difficult to separate out the effects of the IBQ Program from other factors, including the effect of swordfish imports on the market for U.S. product, other regulations such as closed and gear restricted areas, as well as target species availability/price.

This rulemaking began with a scoping process to identify issues to be addressed related to the management of Atlantic HMS in March 2018. As IBQ Program implementation progressed, and with early signs of its success at limiting bluefin tuna interactions and catch in the pelagic longline fishery, NMFS received comments from pelagic longline fishery participants and other interested parties suggesting that NMFS examine whether fleet-wide measures intended to reduce bycatch (such as gear requirements, area restrictions, or time/area closures) remained necessary to effectively manage the Longline category quota and bluefin tuna bycatch in the pelagic longline fishery. Commenters (including the public and HMS Advisory Panel members) specifically requested that NMFS evaluate ways to potentially reduce regulatory burden or remove regulations that may have been rendered redundant with implementation of the IBQ Program. On March 2, 2018, NMFS published a Notice of Intent in the **Federal Register** to prepare a Draft Environmental Impact Statement and to undertake a public process to identify the scope of issues to be addressed related to the management of Atlantic HMS (83 FR 8969). The Notice of Intent included a request for comments on area-based and weak hook management measures implemented to reduce discards of, and interactions with, bluefin tuna in the pelagic longline fishery. Concurrent with the Notice of Intent, NMFS published a scoping document (available at *https://www.fisheries.noaa.gov/action/pelagic-longline-bluefin-tuna-area-based-and-weak-hook-management-measures*), accepted public comments, and hosted five scoping meetings between March 1 and May 30, 2018, to obtain public feedback. The Environmental Protection Agency (EPA) published the notice of availability for the Draft Environmental Impact Statement (DEIS) on May 17, 2019 (84 FR 22492), and NMFS published a proposed rule on July 12, 2019 (84 FR 33205). The DEIS and proposed rule identified and analyzed 14 alternatives that would either retain, modify, or remove certain management measures, including the Northeastern United States Closed Area, Cape Hatteras Gear Restricted Area, Spring Gulf of Mexico Gear Restricted Area, and Gulf of Mexico weak hook requirements. NMFS subsequently published a correction notice (August 8, 2019; 84 FR 38918) to address some minor errors in the description two preferred alternatives, and a notice announcing an additional hearing in Gloucester, MA (August 30, 2019; 84 FR 45734). In addition to the Advisory Panel meeting, NMFS hosted five public hearings and two webinars on the DEIS and the proposed rule. The comment period closed on September 30, 2019. The comments received on the DEIS and the proposed rule, and responses to those comments, are summarized below in the section labeled ''Responses to Comments.''

This final rule implements the measures preferred and analyzed in the FEIS for this rulemaking in order to: (1) Continue to minimize, to the extent practicable, bycatch and bycatch mortality of bluefin tuna and other Atlantic HMS by pelagic longline gear consistent with the conservation and management objectives (*e.g.,* prevent or end overfishing, rebuild overfished stocks, manage Atlantic HMS fisheries for continuing optimum yield) of the 2006 Consolidated Atlantic HMS FMP, its amendments, and all applicable laws; (2) simplify and streamline Atlantic HMS management, to the extent practicable, by reducing any redundancies in regulations established to reduce bluefin tuna interactions that apply to the pelagic longline fishery; and (3) optimize the ability for the pelagic longline fishery to harvest target

species quotas (*e.g.,* swordfish), to the extent practicable, while also considering fairness among permit/quota categories. The FEIS analyzed the direct, indirect and cumulative impacts on the human environment as a result of the preferred management measures. The Notice of Availability for the FEIS, including the preferred management measures, was published in the **Federal Register** on January 24, 2020 (85 FR 4320). On March 30, 2020, the Assistant Administrator for NOAA signed a Record of Decision (ROD) adopting these measures. The FEIS, which includes detailed analyses of a reasonable range of alternatives to meet rulemaking objectives, is available on the HMS Management Division website (see **ADDRESSES**). This final rule implements the preferred alternatives identified in the FEIS. In the FEIS, NMFS divided the alternatives into the following four broad categories for organizational clarity and to facilitate effective review: Northeastern United States Closed Area, Cape Hatteras Gear Restricted Area, Spring Gulf of Mexico Gear Restricted Area, and Gulf of Mexico Weak Hook. NMFS considered 14 alternatives within these categories in the FEIS and is implementing four measures (one in each category).

In developing the final measures, NMFS considered public comments received on the proposed rule for this action, comments received at HMS Advisory Panel meetings, other conservation and management measures that have been implemented in HMS fisheries since 2006 that have affected relevant fisheries and bycatch issues, and public comments received during scoping on the Issues and Options paper for this rulemaking (83 FR 8969; March 2, 2018), including comments provided at HMS Advisory Panel meetings.

The final rule implements the following preferred alternatives identified in the FEIS:

—Conversion of the Northeastern United States Closed Area and the Spring Gulf of Mexico Gear Restricted Area to monitoring areas, and establishes a three-year evaluation period during which fishing is initially allowed at times when these areas were previously closed to pelagic longline fishing provided the amount of IBQ allocation used to account for bluefin catch from sets made within these areas stays below a specified threshold;
—Elimination of the Cape Hatteras Gear Restricted Area; and
—Modification of the requirement to use weak hooks in the Gulf of Mexico from a year-round requirement to a seasonal (January–June) requirement.

In response to public comment on this proposed rule, NMFS made two clarifying changes to the measures as finalized. The Northeastern United States Closed Area and the Spring Gulf of Mexico Gear Restricted Area are changed to ''Monitoring Areas'' and initially allow pelagic longline vessels to fish in the areas under a set of controlled conditions during an evaluation period. NMFS has added a clarifying provision to address what would happen if the ICCAT quota changes. If the ICCAT western Atlantic bluefin tuna quota were to decrease, the final rule specifies that NMFS would adjust the threshold downward to an equivalent threshold level. If the quota increases, the threshold would remain the same. A second minor clarification is made concerning the timing of inseason closure notices that could occur in response to the Monitoring Area thresholds being met. These changes are described in greater detail in the section titled ''Changes from the Proposed Rule.'' For quota-managed stocks, including western Atlantic bluefin tuna and North Atlantic swordfish, the measures in this final rule would not affect or alter the science-based quotas for the stocks. Any action considered in the alternatives and finalized in this rule would manage stocks within these already-established levels. For these stocks, NMFS previously implemented the quotas through rulemaking with the appropriate environmental analyses of the effects of quota implementation. While some increases in catch in the pelagic longline fishery may occur, any such increases would be within previously-analyzed quotas and would be consistent with other management measures that appropriately conserve the stocks. Other measures established in 2015 in Amendment 7 regarding the amount of quota and IBQ allocation available to the Longline category, regional IBQ allocation designations, and inseason quota transfers among categories, among other things, remain unchanged. The rule only affects the time, place, and manner in which established quotas may be caught.

Response to Comments

Approximately 11,460 comments, many of which were form letter campaign submissions, were submitted to NMFS, including comments from the EPA, the Department of the Interior, and the State of Florida. Many of the comments submitted to NMFS concerned the Spring Gulf of Mexico Gear Restricted Area. While some constituent groups supported the proposed action to undertake a review process to evaluate the continued need for these management measures, many of the commenters were concerned that any change in management of the area could lead to negative impacts to spawning bluefin tuna. NMFS received similar comments about changing the management of the Northeastern United States Closed Area. In general commenters supported the removal of regulations associated with the Cape Hatteras Gear Restricted Area, and the modification of the Gulf of Mexico weak hook requirement to a seasonal requirement. All written comments can be found at *http://www.regulations.gov/* by searching for ''0648–BI51.'' NMFS included a preliminary Response to Comments in Appendix F of the FEIS and the responses below refer to the analyses and Preferred Alternatives in the FEIS. The FEIS can be accessed at *https://www.fisheries.noaa.gov/action/pelagic-longline-bluefin-tuna-area-based-and-weak-hook-management-measures* for cross references.

General Rulemaking Comments

Comment 1: NMFS received comments in favor of and in opposition to the implementation of changes to gear restricted areas. Commenters supported changing the gear restricted areas to monitoring areas for a variety of reasons, such as collecting more data to determine a future action, and balancing the objective of protecting bluefin tuna and optimizing the harvest of target species. Other commenters opposed changes to the gear restricted areas because existing management measures have been effective at reducing bluefin tuna dead discards that they characterize as having led to a recent rebound of the bluefin stock and should be kept in place. Commenters opposed to changes in the gear restricted area also noted that the International Union for the Conservation of Nature (IUCN) has identified bluefin as a ''critically endangered'' species. Commenters opposed to the evaluation processes described under Preferred Alternatives A4 and C3 noted that if the threshold is not met during the review process for the monitoring areas (and thus the area would not be closed for the following year), the process does not allow for other responsive action if needed. Some commenters noted that fisheries regulations should be based on the best available science to facilitate continued recovery. Other commenters felt that NMFS should not implement any measures that would increase bluefin mortality on the spawning grounds.

Response: NMFS agrees that existing management measures such as the gear restricted areas and weak hooks have been effective at reducing bluefin tuna interactions and dead discards but also notes that available quota for pelagic

longline fishery target species has gone unharvested under the current management measures and that the fishery has caught well below the available IBQ allocation each year since Amendment 7's implementation. NMFS agrees that the actions in this final rule, which implement the FEIS preferred alternatives, are consistent with balancing the objectives of this rulemaking. NMFS agrees with commenters that it is important to collect additional data to help inform any potential future action for certain spatially managed areas that have been closed for extended periods of time. This is certainly the case when the lack of fishery-dependent or -independent data creates high levels of uncertainty. To address such uncertainties, for instance, NMFS prefers to undertake an evaluation process for removal of certain restrictions to collect data from pelagic longline vessels fishing in what would become monitoring areas under the preferred alternatives. Aside from establishing a path to evaluation, the preferred alternatives also balance the objectives to ''optimize the ability of the fleet to harvest target species quota'' (via reopening previously closed areas) and to ''continue to minimize bycatch and bycatch mortality of bluefin'' (via thresholds established for each area and the expectation that vessels still must abide by the requirements of the IBQ Program and use weak hooks). Because both the Spring Gulf of Mexico Gear Restricted Area and the IBQ Program were implemented at the same time, it is difficult to isolate the specific ecological impacts of the gear restricted areas alone. Data collected during evaluation periods would either support or refute the contention that gear restricted areas or closed areas established to minimize bluefin catch within the IBQ allocation levels adopted in Amendment 7 are not needed or whether they continue to be needed in addition to the IBQ Program. Similarly, NMFS has determined that implementing an evaluation process for the Northeastern United States Closed Area also reflects the best balance of objectives for this rulemaking.

NMFS also agrees that the Cape Hatteras Gear Restricted Area reduced bluefin tuna interactions and discards in the pelagic longline fishery. The removal of the Cape Hatteras Gear Restricted Area is consistent with the objective of this action to ''simplify and streamline HMS management by reducing redundancies in regulations'' given that it appears that not all of the regulations in place are necessary to appropriately limit incidental bluefin tuna catch in the pelagic longline fishery within the limits established in Amendment 7. The Cape Hatteras Gear Restricted Area was implemented under an access determination system that granted access to vessels that demonstrated high rates of bluefin avoidance and compliance with observer and reporting requirements. The area was based on identification of a bluefin tuna interaction ''hotspot'' that occurred from 2006 to 2012 that was used to delineate the boundaries of this gear restricted area (*e.g.,* Figure 4.9 of the FEIS for this rule). It was uncertain at the time of Amendment 7 implementation whether the IBQ Program implementation alone would have the intended effects in relation to issues with the pelagic longline fishery exceeding its bycatch quota. Through collection of fishery dependent data within this area since its implementation, NMFS was able to determine that the hotspot no longer exists, even with the majority of vessels qualifying for access to the area. Since the area no longer has the same high rate of bluefin interactions, and bluefin tuna catch in the pelagic longline fishery since implementation of Amendment 7 is well below the amount of IBQ allocation available consistent with provisions in Amendment 7, NMFS determined its removal to be consistent with the objective of ''continuing to minimize bycatch and bycatch mortality of bluefin'' and to ''optimize the ability of the fleet to harvest target species quotas.''

NMFS disagrees that the current status of the western Atlantic bluefin stock is justification for not undertaking the actions in this rule. The critically endangered listing referred to is under IUCN standards, which are not the same as domestic standards for listing a species under the Endangered Species Act and generally do not drive decisions regarding needed management action under that Act or the Magnuson-Stevens Act. Bluefin tuna are not currently listed as threatened or endangered under the Endangered Species Act, which specifies criteria for listing a species as endangered or threatened. Domestic stock status is determined in accordance with stock status determination criteria established under the 2006 Consolidated HMS FMP consistent with the Magnuson-Stevens Act, based on the best scientific information available, which for western Atlantic bluefin tuna is the stock assessment conducted by the ICCAT SCRS. The western Atlantic bluefin stock is not experiencing overfishing. However, whether the stock is overfished remains unknown as of the last stock assessment (completed in 2017). ICCAT adopted a 20-year rebuilding program for western Atlantic bluefin in 1998. The rebuilding plan period was set as 1999 through 2018. In 2017, ICCAT adopted an interim conservation and management plan (ICCAT Recommendation 17–06) for western Atlantic bluefin tuna as an interim measure to transition from the rebuilding program to a long-term management strategy for the stock. This interim plan included an annual Total Allowable Catch set for 2018 through 2020 while ICCAT develops a management strategy evaluation approach to future stock management. The management measures in this action respect the science-based quotas for the stock as well as the relevant subquotas established in Amendment 7 in 2015.

NMFS disagrees that the evaluation process does not allow for responsive action if needed. The evaluation period includes a threshold of combined bluefin catch and dead discards that, if exceeded, would result in NMFS closing the monitoring area for the remainder of the three-year evaluation period. Provided that the threshold is not exceeded during the three-year evaluation period, the area would remain open until NMFS decides to take additional action. Following the three-year evaluation period, NMFS will review data collected from the Monitoring Areas and compile a report. Based on the findings of the report, NMFS may then initiate a follow up action to implement new management measures for the area, if needed.

NMFS agrees that fisheries management should be based on the best science information available. As discussed in Chapter 9 of the FEIS, the preferred alternatives are consistent with National Standard 2 because they are based on the best scientific information available, including the latest stock assessments, scientific research, and up-to-date data sources. The data sources cited throughout the FEIS represent the best available science. Additionally, the actions in this rule are designed in full consideration of science-based quotas set by ICCAT for western Atlantic bluefin tuna and with the category subquotas established in Amendment 7. The IBQ Program was designed with specific provisions in place to prevent potential increases in bluefin catch in the Gulf of Mexico, which could occur if fishing effort was redistributed from the Atlantic to the Gulf of Mexico through either vessel or permit movement or purchase of IBQ allocation. The IBQ Program limits incidental catch of bluefin tuna in the

pelagic longline fishery by putting limits on available IBQ allocation and puts the responsibility for compliance with the Program requirements on individual vessels. This action is expected to continue to limit bluefin tuna incidental catch to the levels previously established and implemented in Amendment 7. Furthermore, the preferred alternative for the Spring Gulf of Mexico Gear Restricted Area includes a provision to adjust the threshold incorporated into the evaluation option in the event that the U.S. allocation of bluefin quota is adjusted via a future ICCAT Recommendation. The threshold adopted in this final rule would limit the amount of Gulf of Mexico IBQ allocation (lb of quota) that could be used to account for bluefin landings and dead discards in the monitoring area. As described in Comment #11, if the ICCAT quota and U.S. allocation are decreased, then the threshold could become too large to be effective at minimizing bycatch and bycatch mortality of bluefin relative to the new ICCAT quota. This is a change between the DEIS and the FEIS made after consideration of a public comment asking NMFS to increase the threshold level if the ICCAT quota increases. While NMFS considered this comment, it determined it would not be appropriate to adjust the threshold upward but that it would be appropriate to adjust the threshold downward if the ICCAT quota is adjusted downward, consistent with a conservative approach to re-opening areas. This final action does not change regulations that prohibit directed fishing for bluefin tuna in the Gulf of Mexico and are consistent with ICCAT recommendation 17–06's prohibition of targeting bluefin tuna in the Gulf of Mexico.

Comment 2: NMFS received comments that the reduction in the number of active pelagic longline vessels and fishing effort began before gear restricted areas were implemented, and that the gear restricted areas were not the cause of such reduction.

Response: NMFS agrees that decreases in the number of active vessels and effort, landings, and revenue began prior to the implementation of the gear restricted areas under Amendment 7 in 2015. Table 1.1 in the FEIS (which shows data from 2012 through 2018) indicates that a decrease in estimated pelagic longline revenue and effort started prior to implementation of Amendment 7 despite efforts to revitalize the U.S. swordfish fishery for a number of years. Prior to initiation of this action, NMFS received suggestions from the public to consider the regulatory burden on the pelagic longline fleet and, at minimum, to evaluate whether current regulations are still needed to achieve management objectives (see Section 1.1.4 and Appendix A of the FEIS associated with this rulemaking for a history of public feedback concerning these issues and a summary of comments received during scoping, respectively). While the gear restricted areas may not be the sole factor influencing recent trends in the fleet, NMFS received public comment on the proposed rule noting that the collective regulatory burden may have had a role in decreasing the number of active vessels, effort, landings, and revenue of some target species (*e.g.,* swordfish).

Comment 3: NMFS received comments that relieving regulations associated with the Spring Gulf of Mexico Gear Restricted Area, the Cape Hatteras Gear Restricted Area, and the Northeastern United States Closed Area will increase billfish, sea turtle, and other non-target species bycatch mortality to levels that are not sustainable. NMFS also received comments that all preferred alternatives in this rulemaking would lead to unsustainable harvest of billfish, which would adversely affect recreational fishing communities. Specifically, commenters stated that reopening the closed areas and implementing a seasonal weak hook requirement would result in higher numbers of billfish interactions from pelagic longline fishing activity that could in turn reduce numbers of billfish in these areas. Such reductions in billfish would adversely affect Atlantic HMS tournaments and the jobs created by the recreational fishing industry.

Response: NMFS disagrees that implementing the actions in this final rule would increase bycatch mortality in a manner inconsistent with stock assessments or inconsistent with the requirement that NMFS minimize bycatch and bycatch mortality to the extent practicable. In the FEIS, NMFS presented an impacts analysis in Chapter 4 that discussed the potential effects of alternatives on restricted and protected species, such as marlin, spearfish, sailfish, shortfin mako, dusky shark, and sea turtles. Predicted total annual catch was, where possible, presented as a range of catch per unit effort (CPUE) in impact tables. NMFS also provided in the tables the annual catch from the applicable region for comparison to the No Action Alternative.

Regarding elimination of the Cape Hatteras Gear Restricted Area (Preferred Alternative B2 in the FEIS) ecological impacts to these species and sea turtles were anticipated to be neutral due to minimal change in fishing effort, as the majority of the fleet has recently already had access to the area. The vessels denied access to this area in recent years had few to no interactions with restricted and protected species in the boundaries of the Cape Hatteras Gear Restricted Area (see discussion in *Ecological Impacts on Restricted or Protected Species,* Section 4.2.2 of the FEIS). Regarding the action that establishes the Northeastern United States Pelagic Longline Monitoring Area (Preferred Alternative A4 in the FEIS), the predicted total annual discards of spearfish and dusky shark, and interactions with sea turtles, were less than predicted discards or interactions under the No Action Alternative. This suggests that the ecological impacts to spearfish, dusky shark, and sea turtles are anticipated to be more beneficial under the Preferred Alternative than under the No Action Alternative due to predicted redistribution away from areas with high CPUE. The predicted annual interactions of shortfin mako and discards of white and blue marlin, and sailfish, under the preferred alternative were calculated to be similar to the No Action Alternative, interactions or discards associated with the No Action Alternative fell within the range of predicted total annual interactions or discards that might occur under Preferred Alternative A4, suggesting that the ecological impacts would also be similar for these species. Regarding the action that would establish the Spring Gulf of Mexico Monitoring Area (Preferred Alternative C3 in the FEIS), the predicted total annual interactions with shortfin mako and discards of dusky sharks was calculated to be less than the current annual interactions and discards of these species in open areas of the Gulf of Mexico. This suggests that the ecological impacts to shortfin mako and dusky shark are predicted to be more beneficial under Preferred Alternative C3 than the No Action Alternative, due to predicted redistribution away from areas with high CPUE. The predicted annual sea turtle interactions, and discards of blue and white marlin and sailfish, were similar between the No Action Alternative and Preferred Alternative C3, suggesting comparable ecological impacts across the two alternatives for these species.

NMFS disagrees that allowing pelagic longline vessels access to these areas would adversely affect fishing tournaments or reduce jobs associated with recreational fishing. Roundscale

spearfish was the only species for which the predicted range of Gulf of Mexico discards under Preferred Alternative C3 exceeded the ongoing average levels (*i.e.,* the No Action Alternative). Given the results of these analyses, which do not imply a large increase in the number of interactions with most billfish species, NMFS does not anticipate that implementing the action would adversely affect the billfish stocks in the Gulf of Mexico.

NMFS also disagrees that the action to implement a seasonal weak hook requirement (Preferred Alternative D2 in the FEIS) would adversely affect billfish populations in the Gulf of Mexico. As noted in Appendix B of the FEIS, research conducted by the NOAA Southeast Fisheries Science Center (SEFSC) indicated that weak hook use did not have a statistically significant effect on CPUE of Atlantic sailfish or blue marlin. However, a statistically significant increase in CPUE of white marlin and roundscale spearfish was associated with weak hook use. Because catch per unit effort of white marlin and roundscale spearfish increases in the second half of the year, the implementation of a seasonal weak hook requirement is anticipated to have a positive impact on these stocks.

NMFS would continue to monitor bycatch of roundscale spearfish and other species during the evaluation period included in the alternatives related to the Spring Gulf of Mexico Monitoring Area and the Northeastern United States Pelagic Longline Monitoring Area (Preferred Alternatives C3 and A4) and compile results in a report generated from data collected during the evaluation period. The evaluation report may include, but not be limited to, target species landings and effort, bluefin catch rates, IBQ debt from vessels fishing in the area, percentage of IBQ allocation usage, compliance with other pelagic longline regulations, enforceability concerns, and amount of bycatch of restricted or protected species. Based on the findings of the report, NMFS may initiate a follow up action to implement new management measures for the area if necessary. As part of this evaluation, NMFS could compare these data to other data collected by the agency, such as tournament reporting, to determine whether a change in the number of landed billfish occurred during the evaluation period. The actions provide opportunities to monitor bycatch and bycatch mortality of numerous species in the Gulf of Mexico, and would not commit the agency to an action that would remove these protected areas from the regulations. Reopening the gear restricted area to fishing could provide more flexibility for fishermen to move away from areas with higher bycatch to areas with lower bycatch. By establishing the three-year evaluation period for the monitoring area before considering removal of gear restrictions for the longer term, NMFS is balancing the objective of ''minimizing bycatch and bycatch mortality of bluefin and other Atlantic HMS'' with the other two objectives of this rulemaking.

Comment 4: NMFS received comments that suggested modifying regulations associated with the Spring Gulf of Mexico Gear Restricted Area, the Cape Hatteras Gear Restricted Area, and the Northeastern United States Closed Areas could negatively impact Atlantic HMS essential fish habitat (EFH) and critical habitat identified under the ESA for loggerhead sea turtles. These commenters suggested that opening gear restricted or closed areas that overlap with EFH and critical habitat designations is not consistent with objectives of minimizing bycatch or bycatch mortality of these species.

Response: NMFS agrees that the Spring Gulf of Mexico Gear Restricted Area, the Cape Hatteras Gear Restricted Area, and the Northeastern United States Closed Area do overlap with critical habitat and EFH designations for Atlantic HMS and other species. However, NMFS disagrees that opening closed or restricted areas that overlap with loggerhead sea turtle critical habitat (79 FR 39855; August 11, 2014) or EFH is inconsistent with objectives to minimize bycatch and bycatch mortality of these species. Since NMFS is not changing any bluefin tuna or other quotas with this rulemaking, the likely effect of this rulemaking would be redistribution of fishing effort back into areas previously closed (but without a significant overall increase in effort). Some of this redistribution will occur from areas that have been designated as EFH and/or critical habitat. NMFS is currently undergoing reinitiated consultation over the effects of the pelagic longline fishery on ESA-listed species and habitat under the ESA. The HMS Management Division will continue to coordinate with the NMFS Office of Protected Resources during the consultation and on implementation of a new Biological Opinion after it is completed, which will include consideration of the impacts of fishing activities on listed species. Atlantic HMS EFH is not designated in a way that can distinguish the value of habitats in specific locations or across multiple scales (*i.e.,* it is based on Level 1 or presence/absence data); there is therefore no basis to determine that redistribution of effort from one location designated as EFH to another location designated as EFH would have either an adverse or beneficial ecological impact.

Based on the analysis presented in Amendment 10 to the 2006 Consolidated Atlantic HMS FMP, HMS gears fished in upper water column were determined to not have adverse effects on Atlantic HMS EFH or the EFH of other pelagic species. The importance of these habitats is based more on the combination of oceanic factors such as current influences, temperature edges, and surface structure. As discussed in Chapter 4 of the FEIS, NMFS has not identified new information that would supplant the conclusions of Amendment 10. The closed and gear restricted areas considered in this rulemaking do not in themselves provide protection for a specific type of habitat. Rather, the Northeastern United States Closed Area was implemented in response to a 1996 ICCAT recommendation that the United States reduce BFT discards. NMFS used pelagic longline logbook data collected between 1992 and 1997 to select a preferred alternative for the Northeastern United States Closed Area. The Gulf of Mexico and Cape Hatteras Gear Restricted Areas were designed using HMS logbook geographically referenced set data from 2006–2012 to identify areas with relatively high bluefin interaction rates with pelagic longline gear (see page 29 of the Amendment 7 FEIS). Given that the data used to implement these areas are dated, and that environmental conditions and distribution of fish may change, having an opportunity to collect new fishery-dependent data in these areas may assist with future evaluations of fishing impacts on EFH. The end of the three-year evaluation period in the preferred alternatives coincides with the timing of the next Atlantic EFH 5-Year Review, which provides an opportunity for the new fishery-dependent data collected in these areas to be incorporated into the EFH review.

Comment 5: NMFS received comments that any increased bluefin tuna landings from the pelagic longline fishery that result from having access to previously closed areas or gear restricted areas will negatively impact market prices of bluefin caught in directed fisheries.

Response: NMFS agrees that increased landings of bluefin tuna can have localized impacts on market prices if the landings are concentrated geographically and increase dramatically over a short period of time. However, the pelagic longline fleet only lands approximately 8.7% (88.1 metric

tons) of total Atlantic bluefin tuna landings of 1013 metric tons (U.S. total landings as reported in the 2019 U.S. Report to ICCAT). Often the global market for bluefin tuna has a more direct impact on the market prices for bluefin caught by the U.S. Atlantic directed fisheries than any change in U.S. Atlantic bluefin tuna incidental landings.

Comment 6: NMFS received comments that relieving restrictions on the pelagic longline fleet could result in, and/or encourage, the pelagic longline fishery targeting bluefin, and this should be avoided. Specifically, commenters expressed that allowing pelagic longline fishing in the Gear Restricted Area was comparable to allowing targeted fishing on Gulf of Mexico spawning bluefin, and that allowing pelagic longline vessels to retain spawning bluefin caught in the Gulf of Mexico has unintentionally resulted in a *de facto* ''incidental'' catch fishery for bluefin in this area in violation of ICCAT mandated measures.

Response: NMFS agrees that pelagic longline vessels are prohibited from targeting bluefin tuna and reiterates that current management measures are structured as such (see, *e.g.,* Amendment 7). NMFS has managed the pelagic longline fishery as an incidental category for bluefin for many years and has implemented a number of regulations to discourage interactions with bluefin and limit the bluefin that can be retained or discarded. Furthermore, ICCAT recommendations including the current management measure (Rec. 17–06) specify that there ''shall be no directed fishery on the bluefin tuna spawning stock in the western Atlantic spawning grounds (*i.e.,* the Gulf of Mexico).''

NMFS disagrees that implementing the preferred alternatives would result in targeting of bluefin tuna by pelagic longline vessels. The Longline quota category is an incidental category for bluefin tuna used to account for known bycatch in the pelagic longline fishery during directed fishing operations for other species. Specifically, bluefin tuna are caught as bycatch in pelagic longline fisheries that target swordfish and yellowfin tuna, and any mortality of that bycatch (retained or discarded dead) is subject to being accounted for via IBQ allocation. Longline category permit holders who qualified for IBQ shares through the process established in Amendment 7 annually receive a limited IBQ allocation, which they are required to use to account for incidentally caught bluefin tuna. Active vessels not associated with IBQ shares must lease IBQ allocation to depart on a trip with pelagic longline gear and must account for all bluefin bycatch during targeted fishing for other species. In limited circumstances (*i.e.,* when available and following consideration of regulatory determination criteria provided at 50 CFR 635.27(a)(8)), NMFS has distributed IBQ allocation directly to active vessels, where available, to facilitate fishing for other species that are the target.

Amendment 7 provided an amount of bluefin quota to the pelagic longline fishery that reduces dead discards yet accounts for a reasonable amount of incidental catch that can be anticipated and will enable the continued generation of revenue associated with the pelagic longline fishery's target catch while limiting allowable bluefin incidental catch. Implementation of the preferred alternatives would not change the amount of regionally specific pelagic longline IBQ allocation that is designated as either ''Atlantic'' or ''Gulf of Mexico.'' It would only change where fishing could occur within these regions. Atlantic Tunas Longline category permit holders would continue to be required to use IBQ allocation to account for incidental catch of bluefin tuna during directed fishery operations. When actively fishing, vessel operators are encouraged to modify their fishing behavior to minimize bluefin tuna interactions and therefore ensure that catch does not exceed the available IBQ allocation to cover the vessel's incidental catch of bluefin. Any exceedances must be accounted for via a lease of IBQ allocation (and may incur financial and logistical costs) to account for this catch, or the owner/operators risk limiting their ability to continue to participate in the fishery if outstanding quota debt is not resolved. Quota debt must be repaid on a quarterly basis or continued fishing would be prohibited. Overall limits are placed on available IBQ allocation consistent with the measures adopted in Amendment 7, and this action does not change the provisions on IBQ allocation availability.

NMFS disagrees that allowing pelagic longline vessels to retain bluefin tuna caught in sets made within the boundaries of the Spring Gulf of Mexico Gear Restricted Area incentivizes directed fishing on bluefin tuna. Any interactions with pelagic longline gear are incidental to other directed fishing, and regulations have been designed to discourage any such interactions and to minimize bycatch to the extent practicable. The boundaries of the Spring Gulf of Mexico Gear Restricted Area were originally delineated based on increased catch rates of bluefin tuna in the area relative to other areas in the Gulf of Mexico during the years of analysis for Amendment 7, not based on reports of targeted fishing.

NMFS disagrees that allowing retention of incidentally-caught bluefin in the Gulf of Mexico is in violation of ICCAT recommendations. The ICCAT recommendation, implemented as necessary and appropriate through regulations under ATCA, specifies that there is to be no directed fishery on the bluefin tuna spawning stock in the Gulf of Mexico. It does not prohibit retention of incidentally-caught bluefin tuna in the Gulf of Mexico during directed fishing operations for other species. Through the limitations in place (*i.e.,* weak hooks, GOM IBQ allocation limits, electronic monitoring), the regulations appropriately limit the pelagic longline fleet to an incidental fishery for bluefin tuna.

Comment 7: NMFS received comments that the DEIS mentions the removal of measures that could reduce redundancies in regulations without identifying or enumerating the alleged redundancies. Some commenters agreed that some or all of the management measures are redundant with other regulations such as the IBQ Program, while other commenters disagreed that these measures were redundant with the IBQ Program.

Response: The DEIS and proposed rule clearly articulated which regulations are being considered in this rulemaking as potentially having redundant effects with regard to limiting incidental catch of bluefin tuna in the pelagic longline fishery, after considering public input at earlier stages of the rulemaking. Each of these regulations has similar objectives related to limiting and managing bluefin tuna incidental catch in the pelagic longline fishery. Specifically, these include regulations for the Northeastern United States Gear Restricted Area (implemented to reduce dead discards of bluefin tuna), the Cape Hatteras Gear Restricted Area and the Spring Gulf of Mexico Gear Restricted Area (implemented to reduce interactions, thereby decreasing dead discards of bluefin tuna), and the current year-round weak hook requirements (implemented to reduce bluefin tuna bycatch in the Gulf of Mexico). The proposed rule clearly described the proposed management measures, and NMFS facilitated communication with the public via the internet and its website and through public hearings and Atlantic HMS Advisory Panel meetings.

As discussed in the scoping document and later in the proposed rule, NMFS

selected management measures for inclusion in the rulemaking because they had similar objectives to the IBQ Program. The IBQ Program was implemented to, among other things, limit the amount of landings and dead discards of bluefin tuna and incentivize the avoidance of bluefin tuna interactions. Through this rulemaking, NMFS is reviewing whether all of these measures implemented are still needed to appropriately limit incidental bluefin tuna catch, given the success of the IBQ Program, and, if not, whether leaving them all in place is unnecessarily restrictive of the pelagic longline fishery.

This review was undertaken, as explained in the proposed rule and DEIS, because significant regulatory action overhauled management of bluefin tuna several years ago, and it appears that not all of the measures in place remain needed to accomplish the management objectives of that rulemaking. To address, limit, and account for bluefin tuna incidental catch in the pelagic longline fishery, Amendment 7 modified the distribution of quota among categories, implemented the IBQ allocation program and electronic monitoring of every pelagic longline set, established regional limits on bluefin incidental catch—including in the Gulf of Mexico, which provided additional protections for spawning bluefin tuna—and implemented gear restricted areas. This was in addition to other measures already in place (*e.g.,* closed areas, weak hooks). Adopted in 2015, these measures were developed respecting science-based quotas and also making difficult management decisions regarding the need to balance multiple objectives, including limiting the pelagic longline fishery to incidental bluefin catch, the requirement to minimize bycatch and bycatch mortality to the extent practicable, and the requirement to provide vessels a reasonable opportunity to catch available quotas (*i.e.,* swordfish).

Several years later, participation in the pelagic longline fishery has continued to decline, available quota for target species remains unharvested (*e.g.,* swordfish), and available IBQ allocation within the limits set in the 2015 action goes unused. Given these factors and public feedback starting at the scoping stage, not all of the measures in place remain needed or useful in appropriately limiting incidental catch of bluefin tuna in the pelagic longline fishery consistent with the approach first established in Amendment 7. Through this rulemaking, NMFS also considers whether there are ecological benefits that warrant retaining management measures with similar objectives.

This rule analyzes multiple regulations in effect that are intended to reduce bluefin tuna bycatch, interactions, and/or discards. Specifically, NMFS has posed the question of whether weak hooks and gear restricted area measures are still needed in concert with the IBQ Program to meet overall management objectives of reducing bluefin interactions or dead discards. In some cases, where warranted by the extent of the benefits in relation to conservation objectives, it may be appropriate to maintain regulations that may be redundant in effect in relation to other objectives. Here, the SEFSC noted a statistically significant decrease in bluefin CPUE by 46 percent with the use of weak hooks. This rule maintains the weak requirement during the times that the hooks offer a substantial conservation benefit for bluefin. However, the SEFSC also noted a statistically significant increase in white marlin and roundscale spearfish catch-per-unit effort by 46 percent associated with weak hooks deployment. This suggests that the use of weak hooks may have an adverse ecological impact on white marlin and roundscale spearfish. Therefore, NMFS is retaining the weak hook requirement when bluefin tuna are present in the Gulf of Mexico but removing the requirement from July through December to mitigate the negative effects of the weak hook requirement on white marlin and roundscale spearfish. Even though weak hooks and the IBQ Program were implemented to reduce bluefin tuna bycatch in the pelagic longline fishery, the need and ecological benefit of weak hooks for bluefin remains when it is most effective, and NMFS has determined that the preferred alternative strikes the best balance between multiple objectives of this rulemaking and conservation objectives for white marlin and roundscale spearfish.

Because the IBQ Program and the Spring Gulf of Mexico Gear Restricted Area were implemented at the same time, NMFS acknowledges that it is challenging to separate out the impacts of the individual management measures. Data collection from this area during a Monitoring Area period would allow NMFS to isolate the impacts of implementing both the gear restricted areas and the IBQ Program versus just implementing the IBQ Program. Should the gear restricted areas be considered necessary to achieving management objectives, NMFS could consider retaining them in a future rulemaking despite the similar goals for the gear restricted areas and the IBQ Program. NMFS has addressed similar concerns regarding the Northeastern United States Closed Area, the Cape Hatteras Gear Restricted Area, and weak hook implementation in relevant sections of this Response to Comments.

Comment 8: NMFS received comments in support of and in opposition to modifying the spatial extent of the Spring Gulf of Mexico Gear Restricted Area and the Northeastern United States Closed Area. Specifically, commenters suggested that NMFS create a large box (on the map of the management area) that contains both areas comprising the Spring Gulf of Mexico Gear Restricted Area, and expand the Northeastern United States Closed Area northeastward to encompass an area south of Georges Bank along the continental shelf that includes areas with higher bluefin interactions (*e.g.,* see dark blue cells southeast of Cape Cod in Figure 3.11 of the FEIS associated with this rulemaking). NMFS received comments expressing concern that pelagic longline fishery participants have fished around the edges of the closure for years, particularly to the east of the Northeastern United States Closed Area, and that reopening the area could result in high bluefin tuna bycatch, including ''disaster sets.''

Response: NMFS disagrees that it is appropriate to expand existing gear restricted areas to cover adjacent areas where pelagic longline interactions with bluefin occur. While such an expansion would be consistent with objectives to ''minimize bycatch and bycatch mortality of bluefin,'' expanding these areas to include additional productive fishing grounds in these regions is not consistent with the objective to ''optimize the ability for the pelagic longline fleet to harvest target species quotas.'' Although some fishing activity did occur along the northeastern corner of the Northeastern United States Closed Area in 2015–2016, and was included in analyses for the FEIS alternatives, the implementation of the National Monument has shifted fishing effort out of this area due to lack of space in which to deploy gear between the boundaries of the two closures. NMFS acknowledges that there is uncertainty associated with reopening the Northeastern United States Closed Area due to the amount of time that has passed since fishery dependent data has been collected in this area during the month of June. For this reason, instead of selecting an alternative that would reopen the area immediately, NMFS has preferred an alternative that would allow for fishery-dependent data

collection provided that bluefin landings and dead discards do not exceed a specified threshold. Because these suggestions do not represent a reasonable balance between the three rulemaking objectives, NMFS has not included them for further consideration in the FEIS.

Comment 9: NMFS received comments on the evaluation of spatially managed areas (*i.e.,* Preferred Alternatives A4 and C3). Some commenters felt that review processes for spatially managed areas are important and should be included in the implementing design for any closed area to understand the effectiveness/level of impact of the areas and to gather data. Other commenters felt that the review process should also include consideration of whether the size and shape of the closed area should be adjusted. Many commenters were opposed to the changes proposed to the Northeastern United States Closed Area and the Spring Gulf of Mexico Closed Area (Preferred Alternative A4 and Preferred Alternative C3 in the FEIS) because they felt that the design of the evaluation period that is a component of the new ''monitoring areas'' is unscientific. NMFS received comments that the agency should only explore data collection from gear restricted or closed areas through a separate initiative on how to collect data in support of area-based fishery management and not make any decisions about opening any areas to fishing until after such data collection and evaluation processes that come from that initiative are implemented. NMFS also received suggestions to research the location and variability of bluefin preferred habitat (temperature, chlorophyll, depth, etc.), and use electronic tagging data to check incidence of bluefin in the proposed closed areas. Some commenters felt that NMFS should incorporate the implementation of target catch requirements (previously removed in Amendment 7) in the evaluation process for the Northeastern United States Monitoring Area and the Spring Gulf of Mexico Monitoring Area (Preferred Alternatives A4 and C3 in the FEIS) to ensure that pelagic longline vessels do not target bluefin in sensitive areas.

Response: NMFS agrees that it is important to undertake periodic evaluations of management measures to ensure that they meet FMP objectives. In particular, NMFS agrees that review processes for spatially managed areas that impose restrictions or closures in space or time are important, because distribution of fishing effort, managed species, or environmental conditions upon which Atlantic HMS are dependent may change with time. NMFS acknowledges that modifications to the spatial extent of the area may be included as a future management option for these areas if the outcomes of the evaluation process indicates that such an idea warrants further consideration. As part of the monitoring area actions, NMFS would compile data for an evaluation report that may include, but not be limited to, target species landings and effort, bluefin catch rates, IBQ debt from vessels fishing in the area, percentage of IBQ allocation usage, compliance with other pelagic longline regulations, enforceability concerns, and amount of bycatch with restricted or protected species. NMFS will use data from this report to consider additional next steps for the Spring Gulf of Mexico Gear Monitoring Area and the Northeastern United States Monitoring Area, which may include consideration of the size and shape of the area in addition to options such as reinstating the areas, removing the areas from the regulations, or some form of provisional access. NMFS chose to include bluefin tuna fisheries management measures in this rulemaking that were originally implemented with similar objectives; namely, to minimize bluefin tuna interactions or dead discards with pelagic longline gear. NMFS is undertaking a separate initiative which considers data collection and research in closed areas to consider other time area closures implemented for different species or different reasons. The initiative on HMS spatial management data collection and research will consider spatial management measures for all HMS.

NMFS disagrees that the actions being implemented in this rule are unscientific, as they have been developed to work within science-based quotas for target and bycatch species, and with the intent of collecting fishery dependent data upon which to base ongoing and future management measures in accordance with the monitoring protocols established by this action.

NMFS disagrees that target catch requirements should be re-instituted and included in the evaluation process to prevent targeting of bluefin in sensitive areas. The pelagic longline fishery in the United States does not target bluefin tuna; rather, it targets swordfish and yellowfin tuna and catches bluefin tuna incidentally. Regulations minimize bycatch and bycatch mortality of bluefin tuna in the fishery and limit it to an incidental fishery through the IBQ Program, and the use of available fishery data including vessel monitoring system (VMS) set reporting and monitoring via electronic monitoring (EM) to ensure that targeted fishing of bluefin is not occurring. Prior to Amendment 7, target catch requirements were used to limit retention of bluefin tuna incidentally caught during directed fishing operations for other HMS species. As discussed in Amendment 7, however, this sometimes led to wasteful discards of bluefin tuna if the amount of target species catch was insufficient to retain the numbers of bluefin caught. Under Amendment 7's approach, vessels that caught some bluefin tuna but had insufficient target species to meet the target catch requirement would not have to choose between discarding bluefin or fishing for more target species; rather the vessel would use its available IBQ allocation or lease allocation. The IBQ Program replaced the target catch requirement as the means of limiting the amount of bluefin landed and discarded dead per vessel on an annual basis, instead of on a per trip basis. The Amendment 7 management measures, inclusive of the IBQ Program and removal of target catch requirements, have had a substantial effect on the number of dead discards occurring in the pelagic longline fishery. As noted in the Three-Year Review of the IBQ Program, the average amount of dead discards in the pelagic longline fishery was 89 percent less after (2015–2017) implementation of the IBQ Program than in the three years immediately prior to implementation (2012–2014). Reinstating the target catch requirements, while also maintaining the IBQ Program as a means of limiting the amount of bluefin landed and discarded dead, is unnecessarily restrictive on pelagic longline fishery effort and not consistent with the objective to ''simplify and streamline Atlantic HMS management, to the extent practicable, by reducing redundancies in regulations.''

Comment 10: NMFS received comments suggesting that there was a significant role for government observers in the design or implementation of the Northeastern United States and Spring Gulf of Mexico Monitoring Areas, or in making changes to the Cape Hatteras Gear Restricted Area. For example, some commenters felt that only data collected by an official government observer should be used in designing evaluative options to ensure that there is no bias. Others felt that the monitoring areas would only be effective if an official government observer (not contracted commercial fishing industry observer or technician) is on board to ensure no bias.

Response: NMFS agrees that the observer program provides important scientific data for management and science-based stock assessments. NMFS has available a variety of sources of commercial fisheries data to inform management decisions. While extremely useful in estimating dead discards and providing other information, the observer program is not a complete census of the fishery, and the extent of observer coverage is not necessarily useful in all cases in assessing ecological or economic effects of time/area closures, especially on a very fine scale. Furthermore, there is a small percentage of vessels that have not been observed. In addition to observer data, there are other fishery-dependent data streams that NMFS finds acceptable for use in these monitoring areas and their evaluation including the HMS logbook, EM, and the IBQ Program. NMFS disagrees that the presence of observers should be a condition for entry into the Northeastern United States Monitoring Area or the Spring Gulf of Mexico Monitoring Area. NMFS believes that the current data streams, including but not limited to the observer program, provide sufficient mechanisms to crosscheck data validity and ensure compliance.

NMFS disagrees with the commenter that only observer data should have been used in the design and analysis of the evaluation process in the DEIS and FEIS, or in making management decisions about the Cape Hatteras Gear Restricted Area. NMFS would consider all available sources of fishery data, including observer program data, collected between 2020 and 2022 when finalizing the report generated as part of the evaluation process for the Northeastern United States Monitoring Area or the Spring Gulf of Mexico Monitoring Area (Preferred Alternatives A4 and C3 in the FEIS). NMFS considered multiple data sources in the development of this action, as reflected in the DEIS and FEIS. This action focuses on area-based measures, whether related to fishing vessel access or gear requirements. Given that the action addresses discrete geographical area designations and gear configuration within certain areas, rather than, for example, the amount of allowable catch for a stock or estimates of stock abundance for a stock assessment, the most relevant data sources for this action are fishery-dependent data that reflect the needed geographic and other data for the area-based analyses. Atlantic HMS logbook data is required, self-reported data that includes landings, discards, gear, location, and other set and trip information. All pelagic longline fishermen with Atlantic HMS permits are required to use this logbook. NMFS used the HMS logbook as the primary data source for the analysis of ecological and socioeconomic impacts on preferred alternatives for the Cape Hatteras Gear Restricted Area, the Northeastern United States Closed Area, and the Spring Gulf of Mexico Gear Restricted Area in this rulemaking for the following reasons: (1) The need for action focuses on the HMS pelagic longline fishery; (2) all HMS pelagic longline fishermen are required to report in this logbook; (3) data can be cross-validated with other data sources; and (4) the HMS logbook data provides location and other fishing variables required for various analyses of ecological and socio-economic impacts. NMFS also used some Atlantic HMS electronic dealer data and weighout slips provided to the fishermen by dealers (which must be submitted with the logbooks) for the socioeconomic calculations.

Comment 11: NMFS received comments in support of and in opposition to incorporating thresholds into the evaluation process component of the Northeastern United States Monitoring Area and the Spring Gulf of Mexico Monitoring Area (Preferred Alternatives A4 and C3 in the FEIS). Commenters in support of the threshold (particularly for the Northeastern United States Monitoring Area) expressed concern that the threshold would be met quickly, triggering a closure. These commenters questioned whether NMFS would disburse additional IBQ allocation via an inseason quota transfer if that occurs. NMFS also received suggestions that a threshold in the evaluation process was not necessary, as the evaluation process itself was too complex for a rulemaking with an objective focused on simplifying or streamlining regulations, and would result in micromanagement. NMFS also received comments with suggested modifications to the threshold, including the use of a percentage of the available Gulf IBQ allocation instead of setting a hard poundage limit for a threshold in the Gulf of Mexico Monitoring Area. Regarding thresholds established for the Northeastern United States Monitoring Area, the 150,519-pound threshold for June in just the Northeastern area is equivalent to 68 mt. Since this is almost the entire longline catch for all months and all areas of 2018 (88.1 mt), commenters questioned whether such a threshold is limiting as part of an ''evaluation'' program.

Response: NMFS disagrees that the threshold for the Northeastern United States Monitoring Area would be met quickly. The analysis of Preferred Alternative A4 predicts that between 14 and 68 bluefin would be retained per year from the Northeastern United States Monitoring Area and adjacent reference area as a result of implementing this action. If all of these fish were harvested from sets made within the Northeastern United States Monitoring Area, based on the average weight of an Atlantic region landed bluefin (275 lb), the amount of IBQ allocation used to account for these landed fish would be between 3,850 lb and 18,700 lb per year. Under the No Action Alternative, 48 bluefin are estimated to be retained per year. Using the same calculation, the amount of IBQ allocation used to account for landed fish in this region under the No Action Alternative is estimated to be around 13,200 lb. NMFS therefore predicts that a range of impacts could occur, which might result in a small increase in the number of landed bluefin (+ 20 fish per year, based on the high end of the estimated range of fish kept) and the corresponding amount of IBQ allocation required to account for those fish (+5,500 lb IBQ allocation) (Table 4.9 in the FEIS associated with this rulemaking). This increase would not meet the threshold established in the action, and fishing could occur for the three-year evaluation period if the high range estimate were to occur. While the provisions on the evaluative period and opening the Northeastern United States Monitoring Area are new, the provisions in Amendment 7 regarding inseason quota transfers among categories remain the same as those adopted in 2015. The disbursement of inseason quota transfers to the Longline category depends on several factors and are listed at 50 CFR 635.27(a)(8). NMFS would continue to evaluate any inseason quota transfers on a case by case basis consistent with regulatory criteria and provisions previously established.

NMFS acknowledges that the review process is complex with several steps involved, but disagrees that the threshold is not necessary. The threshold was designed to address uncertainties associated with allowing access back into areas that had previously been closed, and to ensure that steps taken by the agency to assess potential deregulation does not compromise management goals and objectives for the pelagic longline fishery. Specifically, the evaluation periods for the Northeastern United States Monitoring Area and the Spring

Gulf of Mexico Monitoring Area (Preferred Alternatives A4 and C3 in the FEIS) include a mechanism to collect fishery dependent data from these Monitoring Areas, monitor the fishing practices and close the area if excessive incidental catch of bluefin tuna during directed fishing occurs, and formulate a report of data collected to determine the best management decision for the area based on current data. NMFS agrees that there are situations where it makes sense to codify a percentage instead of a hard number into the regulations for the thresholds identified for the evaluation process for the Monitoring Areas. The 63,150 lb IBQ allocation threshold for the Spring Gulf of Mexico Monitoring Area (Alternative C3) and the 150,519 lb IBQ allocation threshold for the Northeastern United States Monitoring Area (Alternative A4) are respectively equivalent to 55 percent of the total Gulf of Mexico IBQ annual allocation and 72 percent of the total Atlantic IBQ annual allocation issued to the fleet in 2018. The final rule modifies the proposed action to adjust the threshold to a comparable percentage of Gulf of Mexico IBQ allocation (*i.e.,* 55 percent) and Atlantic IBQ allocation (*i.e.,* 72 percent) in the event that ICCAT reduces the U.S. allocation of bluefin quota. Although NMFS acknowledges that the threshold is large for the Northeastern United States Monitoring Area, it is less than the entire Longline category quota. NMFS based the threshold for the Northeastern United States Monitoring Area on the recent average amount of available quota on June 1 because fishing is happening in multiple locations along the east coast at this time of year. While it is true that this threshold is equivalent to a large proportion of the bluefin catch (landings and dead discards), NMFS designed the threshold is to ensure that opening the area to fishing would not compromise the ability of fishery participants to obtain enough IBQ allocation to account for Atlantic-wide bluefin landings and dead discards for the rest of the year. This threshold will allow for data collection to continue for the three-year period and continue to manage incidental catch of bluefin tuna in the pelagic longline fishery consistent with the Longline category subquota, the limits established for use of IBQ allocation in the Atlantic and Gulf of Mexico regions, and with the science-based overall quotas.

Comment 12: NMFS received comments that generally supported deregulation. Specifically, these comments expressed that the IBQ Program is an output control, and that input controls are not needed as much when the output control is effective. Other comments expressed that removing spatial restrictions would enhance the ability of the fleet to avoid bycatch, as closures hinder the ability to move away from a problem area and locate elsewhere. These comments also noted that in order for the IBQ Program to work well, fishermen need access to enough productive fishing grounds in order to make choices about location based on bluefin interactions of the fleet. If they don't have good alternatives to fish in, they will be forced to fish in riskier areas. Some commenters felt that fishermen have better tools and information (*e.g.,* rapid access to environmental data to make informed decisions on fishing locations), and increased capabilities to avoid bluefin. Fishermen can therefore be precautionary in selecting where to fish.

Response: NMFS agrees that it was appropriate to evaluate through this rulemaking and the associated FEIS whether certain regulations are necessary to meet management objectives. Under the IBQ Program, fishermen are incentivized to minimize incidental catch of bluefin in the pelagic longline fishery directing on other Atlantic HMS direct accountability for such incidental catch and associated costs and risks if it exceeded (*e.g.,* the cost to lease additional IBQ allocation, risk of not fishing in a quarter if quota debt is not resolved). NMFS also agrees that fishermen have tools to make informed decisions in advance of trips to select fishing locations that optimize target catch and minimize bluefin bycatch, such as the availability of free or commercially available environmental or satellite data and communication with other members of the fleet. While outright removal of spatially managed areas would provide the most flexibility concerning site selection for commercial fishermen, NMFS is implementing actions that would include an evaluation period to collect fishery-dependent data before such areas would be removed. NMFS believes this provides a more precautionary approach and a better balance of rulemaking objectives than removing the areas immediately without an evaluative period.

Comment 13: NMFS received comments that the Secretary of Commerce recently called for action in removing unnecessary restrictions on U.S. fishermen which contributes to the United States reliance on imported seafood to meet consumer demand.

Response: This rulemaking is considered to be deregulatory in nature, and would either remove restrictions, or provide a mechanism to evaluate whether the management measures are still needed to meet management objectives. The latter would provide information to support a future potential rulemaking that could modify or remove restrictions on U.S. commercial fishermen.

Comment 14: NMFS received comments requesting geographically referenced catch and effort data in the form of ''shot charts'' be included in the FEIS.

Response: In order to be responsive to the request for information, NMFS provided the requested charts in Appendix D of the FEIS associated with this rulemaking. ''Shot charts,'' as referenced by the commenters, are based on a graphic tool initially popularized by Kirk Goldsberry for depicting basketball statistics. Spatial data are joined to a hexagon grid, which removes clustering and allows for easier pattern visualization. Unlike other maps produced by NMFS, shot charts contain a bivariate display that allows a single symbol to convey two pieces of information. For example, colors might be used to confer rate information while size indicates frequency. Commenters requested that NMFS include higher resolution shot charts for bluefin, yellowfin, and swordfish in the areas surrounding the Northeastern United States Closed Area and the Spring Gulf of Mexico Gear Restricted Area in the FEIS. Although the shot charts provide a new way to visualize information, the underlying catch and effort data was presented in the DEIS in the form of tables, figures, and maps depicting single variables on $10' \times 10'$ grid cells. No new or different information from that analyzed in the DEIS and proposed rule is presented. The new charts are only a new visual presentation of the earlier data. The administrative burden to create a shot chart is significantly higher than other data maps that were included in the DEIS (4 hours versus a half hour), therefore NMFS retained current data mapping protocols and analyses in addition to including shot charts as an appendix of the FEIS. NMFS will continue to evaluate the best tool to depict data in the future on an as-needed basis.

Comment 15: NMFS received comments suggesting that the proposed rule is not aligned with National Standard 9, which requires NMFS to ''avoid or minimize bycatch'' and ''minimize the mortality of bycatch which cannot be avoided.'' 16 U.S.C. 1851(a)(9). NMFS also received comments that this rule is not aligned with § 1853(a)(11), which requires all

FMPs to contain measures to minimize bycatch and bycatch mortality, because it does not propose that bycatch be avoided or reduced.

Response: NMFS disagrees that the proposed rule is not consistent with National Standard 9. NMFS analyzed consistency with the National Standards in Chapter 9 of the FEIS. This rulemaking includes as an objective the need to ''continue to minimize, to the extent practicable, bycatch and bycatch mortality of bluefin tuna and other Atlantic HMS by pelagic longline gear consistent with conservation and management objectives. . . .'' NMFS evaluated and selected preferred alternatives that best meet and/or balance the rulemaking objectives. As an example, NMFS has chosen to retain a seasonal weak hook requirement in the Gulf of Mexico as a tool to continue to minimize bycatch and bycatch mortality of both bluefin and white marlin. Furthermore, although the establishment of the Northeastern U.S. Monitoring Area and the Spring Gulf of Mexico Monitoring Area (preferred alternatives A4 and C3 in the FEIS) would allow the pelagic longline fleet access to previously closed areas, there would still be measures in place requiring individual accountability for bluefin catch and incentivizing avoidance of bluefin tuna (accountability requirements, regional IBQ share/allocation designations, minimum IBQ allocation requirements, enhanced monitoring and reporting) and to provide a safety precaution against uncertainty (thresholds) in the monitoring areas. Pelagic longline fishing would be allowed in the areas provided total catch (landings and dead discards) remains under an established threshold, measured by the amount of IBQ allocation used to account for bluefin catch in the area. After the 2020–2022 evaluation period, NMFS will evaluate data collected from the Monitoring Area and compile a report. Based on the findings of the report, NMFS may then decide to initiate a follow-up action to implement new, longer-term management measures for the area (*e.g.,* retaining the closure, removing the closure, applying another monitoring period, applying performance metrics for access). This evaluation would review new fishery-dependent data collected on bluefin tuna and other bycatch that would inform future decisions. Furthermore, the requirement that bycatch be minimized to the extent practicable does not require the agency to reduce bycatch to zero with every fishery action, as to do so would not be practicable, given other fishery objectives and requirements.

Northeastern United States Closed Area

Comment 16: NMFS received comments in favor of and in opposition to making any changes to the Northeastern United States Closed Area under the preferred alternative. Comments in favor of the preferred alternative noted that the evaluation process provides a reasonable level of precaution to ensure that pelagic longline fleet-wide bluefin tuna mortality is appropriately managed. Comments in opposition noted that the existing closed area regulations have been effective in managing the bluefin tuna fishery and reducing bluefin tuna dead discards and have effectively created a conservation area. NMFS received comments that this area overlaps with the migratory pathway for bluefin headed north to forage in the Gulf of Maine, and that bluefin tuna are vulnerable to high catches by the pelagic longline fleet in the area encompassed by the Northeastern United States Closed Area, (*i.e.,* the area is still a ''hot spot.'')

Response: NMFS agrees that the evaluation process that is a component of the Northeastern United States Monitoring Area (Preferred Alternative A4 in the FEIS) provides an opportunity to collect information about the area and determine what future management action would be appropriate for the Northeastern United States Closed Area. After the three-year evaluation period, NMFS would analyze data collected and compile an evaluation report. This report would be used to inform any necessary management changes to the Northeastern United States Closed Area. The processes established for the Northeastern United States Monitoring Area could include a number of options for NMFS action after the evaluation period.

NMFS acknowledges that there is considerable uncertainty concerning the Northeastern United States Closed Area. Since this area closure was implemented, fishery-dependent data have not been collected from the area in over 20 years. While this area may provide a conservation benefit for bluefin tuna as they migrate northward, changes in both the ocean environment and pelagic longline fishery have occurred since 1999 making it difficult to ascertain both its value as a conservation area and as a location where bluefin are vulnerable to high catches by the pelagic longline fleet in that area. The preferred alternative in the FEIS will provide a way to collect fishery dependent data from the area under close monitoring and evaluation. The preferred alternative includes a threshold of allowable bluefin catch (landings and dead discards) for the area during the month of June. If mortality exceeds this threshold, NMFS would re-close the area. Data collection is essential in order to determine if this area is still necessary for the management of the Atlantic pelagic longline fishery.

Comment 17: NMFS received comments suggesting we change the shape of the Northeastern United States Closed Area by removing the western area as considered in Alternative A2 and potentially shift the area eastward to include certain canyon areas to account for areas of higher CPUE. The commenter notes that this would free up western portions of the closure that historically had low pelagic longline bluefin tuna interactions.

Response: NMFS disagrees that shifting the Northeastern United States Closed Area eastward would result in additional protections beyond those currently in place for bluefin tuna. Much of the area to the east of the Northeastern United States Closed Area is now part of the Northeast Canyon and Seamount Marine National Monument as shown in Figure 3.4 of the FEIS. This area prohibits commercial fishing operations, including pelagic longlining, thus the area immediately east of the Northeastern United States Closed Area is effectively closed to the pelagic longline fishery.

NMFS did consider opening the western portion of the Northeastern United States Closed Area (Alternative A2 in the FEIS) based on historically low catches from that area in 1996 and 1997. NMFS did not prefer this alternative in the DEIS or the FEIS because this area also had historically low catch rates of target species and little effort, making this alternative less aligned than others with the objective to ''optimize the ability of the pelagic longline fleet to harvest target species quotas.'' While this alternative would allow for some data collection in western portions of the closure, the ecological and socio-economic benefits of this alternative for bluefin, target species, and protected or restricted species were anticipated to be neutral. NMFS therefore is implementing an action (Alternative A4) that would collect data, under close scrutiny, from the entire closure in order to evaluate fishery trends from within the entire spatial extent of the Northeastern United States Closed Area.

Comment 18: NMFS received comments in opposition to Alternative A2 in the FEIS, which considered

modifying the Northeastern United States Closed Area to remove a western portion of the closure. The comment stated the alternative relies on outdated data that are irrelevant to current fishing practices and the ecosystem and that it would maintain a substantial part of the closure, which in their view is ineffective, inefficient, and redundant.

Response: NMFS agrees that this alternative does rely on some historical data for justification of where the Northeastern United States Closed Area should be opened and where it should remain closed. Current catch rates from a surrounding reference area, delineated by NMFS, were used to predict catch rates that would occur in the area that would be opened under Alternative A2. NMFS included this data in the analysis because it is the most recent fishery-dependent data collected in the area which can be used for management decisions.

NMFS is not implementing this approach because it does not balance the objectives of this rulemaking as well as other alternatives. Retaining portions of the closure might coarsely address uncertainty associated with bluefin distribution through retaining portions of the closure where historically there were elevated fishery interactions, especially if bluefin distribution is presumed to not have changed since the early to mid-1990s. In this case, this alternative is aligned with the objective to ''*minimize bycatch and bycatch mortality of bluefin tuna and other Atlantic HMS . . .*''. When this area was open, the pelagic longline fleet largely fished for target species in areas that became the eastern portion of the closure. Retaining this area as a closure may, depending on the distribution and abundance of target species, not be consistent with the rulemaking objective to ''optimize the ability of the pelagic longline fleet to harvest target species quotas.'' Given the uncertainty, NMFS believes it is appropriate to evaluate the entire closed area to determine if it is still needed to manage bluefin tuna bycatch in the pelagic longline fishery. Retaining a portion of the Northeastern United States Closed Area does not provide the same opportunity in this area to ''simplify and streamline HMS regulations . . . by reducing any redundancies in regulations established to reduce bluefin tuna interactions.''

Comment 19: NMFS received comments that NMFS should eliminate the Northeastern United States Closed Area (Alternative A5) as this closed area is an ineffective and inefficient input-control measure and is redundant with the far more effective and efficient output control IBQ Program now in place. It also is an important fishing area for pelagic longline vessels because of the continental shelf break and local current patterns, and may now be where longliners need to have access to fishing ground while avoiding bluefin tuna.

Response: NMFS disagrees that it is appropriate to eliminate the Northeastern United States Closed Area without an appropriate evaluative period, given the lack of data collected since implementation of the closure in 1999. The lack of current data makes it difficult to determine if bycatch of bluefin tuna would be a problem in the Northeastern United States Closed Area. It is therefore difficult to determine the extent to which this alternative can be aligned with objectives to ''minimize . . . bycatch and bycatch mortality of bluefin tuna and other Atlantic HMS . . .''. This alternative does not provide NMFS the ability to restrict fishing if bycatch impacts to bluefin tuna or other species are beyond acceptable levels. This alternative also does not provide a mechanism for NMFS to initiate the review of the monitoring area after the three-year evaluation period, which makes it difficult to ascertain whether removal of this area is an appropriate balance between the objective to ''simplify and streamline Atlantic HMS management . . . by reducing redundancies in regulations established to reduce bluefin tuna interactions'' with other objectives. NMFS is aware that the area around the edge of the continental shelf in the Northeastern United States Closed Area is an important area for pelagic longline fishermen to target swordfish and BAYS tunas. The preferred alternative will allow access to that area for fishermen to pursue target species and collect fishery-dependent data to inform future management of the Northeastern United States Closed Area. Presuming that the distribution of target species in this area has not changed, removing the regulations associated with this area might provide additional fishing opportunities to pelagic longline fishermen, and therefore be aligned with the objective to ''optimize the ability of the pelagic longline fishery to harvest target species quotas.'' However, given the uncertainty associated with the length of time the area has been closed, it is unclear how closely aligned Alternative A5 would be with this objective. For these reasons, NMFS did not prefer this alternative in the DEIS or FEIS.

Cape Hatteras Gear Restricted Area

Comment 20: NMFS received comments in support of and in opposition to removal of the Cape Hatteras Gear Restricted Area (Alternative B2). Specifically, comments in favor of removal noted that this area is potentially redundant with the IBQ Program; that ecological benefits may be negligible due to low numbers of vessels which did not meet criteria for access; that the stock condition is improving; and removal of the Cape Hatteras Gear Restricted Area is consistent with section 304(g) of the Magnuson-Stevens Act (which requires fishing vessels be provided a reasonable opportunity to harvest allocation). NMFS also received suggestions on future steps if the Cape Hatteras Gear Restricted Area is removed. Specifically, comments suggested that continued oversight over bluefin interactions with pelagic longline vessels in the Cape Hatteras region (utilizing observers) is necessary to monitor interactions with bluefin tuna and other species.

Comments in opposition to removing the Cape Hatteras Gear Restricted Area noted that the existing gear restricted area measures have been effective at managing bluefin tuna and reducing bluefin tuna discards and serve as a deterrent against future bad behavior. Removal of the Cape Hatteras Gear Restricted Area could change fishing behavior and result in vessels directly targeting bluefin tuna. NMFS also received comments that the gear restricted area should be retained because it has not caused any economic hardships to date. NMFS also received comments that the Cape Hatteras Gear Restricted Area should be maintained because climate change may shift the location of future bluefin spawning into this area.

Response: NMFS agrees with the commenters that the Cape Hatteras Gear Restricted Area should be removed given data about the results of the implementation of the performance metrics, and the broader context of quota management of bluefin. NMFS would closely monitor future fishing activity by vessels in this area, and levels of bluefin tuna bycatch would be limited by the IBQ Program and other measures such as EM. Although removal of the gear restricted area would give vessel owners more flexibility in deciding where to fish, NMFS does not anticipate substantive changes to fishing behavior as a result of removal of the Cape Hatteras Gear Restricted Area because a majority of the fleet has had access to this area in recent years. Data presented in Chapter 4 of the FEIS (*e.g.,* Figure 4.9 and Figure 4.11) shows that despite the majority of the fleet meeting criteria to access the area, the interaction and CPUE hotspots that previously was noted within the

boundaries of the gear restricted area no longer exist. NMFS therefore agrees that the overall impact of the Cape Hatteras Gear Restricted Area on reducing bluefin interactions is likely low due to the small proportion of total effort that was excluded from the area as a result of access decisions and the temporary nature of the access decisions. Removal of the Cape Hatteras Gear Restricted Area is not anticipated to have negative impacts on the Western Atlantic bluefin stock. Since 2015, the catch of bluefin tuna (landings and dead discards) by the pelagic longline fishery has been well within the bluefin quota allocated to the Atlantic tunas longline category. The western Atlantic bluefin stock is not experiencing overfishing (see description of stock status under Response to Comment #1). However, whether the stock is overfished remains unknown as of the last stock assessment (completed in 2017). The total U.S. bluefin quota is consistent with ICCAT recommendations, which are based upon the best available scientific information on the status of the Western Atlantic bluefin stock.

NMFS agrees that in addition to evaluating the utility of the gear restricted area in reducing bluefin interactions, providing reasonable fishing opportunity is an important consideration in determining management actions. NMFS will continue to closely monitor bluefin catch in the Cape Hatteras area, and in the future may take additional steps to manage fisheries within this or other areas to address bycatch concerns. NMFS does not anticipate changes to observer requirements applicable to pelagic longline vessels fishing off Cape Hatteras or elsewhere.

Although the Cape Hatteras Gear Restricted Area has had some positive impacts in reducing bluefin tuna discards through the incentives associated with the performance metrics and conditional access, as a whole, the Cape Hatteras Gear Restricted Area is not needed to maintain the low level of bluefin catch documented by NMFS for 2015 through 2018. NMFS agrees that the gear restricted area may have curtailed interactions within the first few years following implementation, given that nearly 40 percent of vessels that fished in the area did not meet criteria for access in the first year of the program. However, more recently the vessels fishing locally within the Cape Hatteras region have met criteria for access to the gear restricted area. Vessels that did not meet criteria for access primarily fish in other regions, and therefore may not be incentivized to adjust and maintain ''good behavior'' to ensure access to the gear restricted area. NMFS disagrees that removal of the Cape Hatteras Gear Restricted Area will change behavior. As discussed above, only a small proportion of vessels recently did not meet criteria for access to the gear restricted area. The fishery has adjusted to new requirements under the IBQ Program, and new VMS reporting and EM monitoring requirements. Pelagic longline vessels are prohibited from targeting bluefin tuna with pelagic longline gear. However, while fishing for other target species they may elect to retain more bluefin than what was previously allowed (*i.e.,* target catch requirements prior to 2015). These vessels must account for all incidental catch of bluefin tuna during direction fishing operations of the pelagic longline fishery for other Atlantic HMS, possibly incurring significant financial costs to obtain sufficient quota to cover landings or dead discards. NMFS disagrees that the Cape Hatteras Gear Restricted Area has not had any negative economic impacts. It is highly likely that some vessels not qualified to fish in the Cape Hatteras Gear Restricted Area incurred greater fishing costs on some trips where they fished in alternate locations instead of in the boundary of the Cape Hatteras Gear Restricted Area. NMFS agrees that climate change may substantially alter the spatial distribution of the life stages of fish, including bluefin tuna, but disagrees that continuation of the Cape Hatteras Gear Restricted Area is warranted based on current information concerning the primary spawning grounds for western Atlantic bluefin tuna or any hypothetical future changes thereof.

Comment 21: NMFS received comments that supported retaining the Cape Hatteras Gear Restricted Area and questioned whether there is a relationship between the performance metrics and the ability of vessels to avoid bluefin. Specifically, comments indicated that there was no rigorous scientific evaluation of the metrics, and that the Cape Hatteras Gear Restricted Area has weak accountability associated with it (*i.e.,* no observers or ''other recording system''). NMFS also received comments suggesting that the bluefin performance metric, which is used in part to determine access to the Cape Hatteras Gear Restricted Area, may reward under-reporting.

Response: NMFS disagrees that the performance metrics provided no incentive to avoid bluefin tuna. NMFS acknowledges that the relationship of the performance metrics to fishers' avoidance behavior is complex and drivers of such behavior may be variable, depending upon the performance metric formulas, the level of interest of vessels in fishing in the area, and the regulatory context of the gear restricted area. The performance metric formulas were specifically tailored to address an observed hotspot of bluefin interactions and compliance issues that were observed in the Cape Hatteras region at the time of implementation. Nearly 40 percent of the vessels that fished in the gear restricted area did not meet criteria for access in the first year that the gear restricted area was implemented. Most of these vessels have subsequently met criteria for access due to lower bluefin interaction rates and improvements in logbook and observer program compliance. As discussed in the FEIS, the number of vessels which did not meet criteria for access that also operate locally within the Cape Hatteras region has decreased. Most of the vessels that did not meet criteria for access to the gear restricted area have recently fished elsewhere, such as the South Atlantic Bight, the high seas east of the Bahamas, the Northeast Distant Area, or the Gulf of Mexico. These vessels may not be incentivized to adjust behavior by access determinations because they do not fish in the Cape Hatteras Gear Restricted Area. Therefore, the application of the specific metrics in the context of the IBQ Program has recently had relatively low impact in achieving the objectives of the Cape Hatteras Gear Restricted Area (*i.e.,* minimizing bycatch and bycatch mortality of bluefin tuna).

The implementation of the Cape Hatteras Gear Restricted Area coincided with the implementation of the IBQ Program under Amendment 7 (2015), and at that time the effectiveness of the IBQ Program was unknown. The gear restricted area therefore served as a secondary means to reduce bluefin interactions in this hotspot and was intended specifically to address the behavior of a few vessels responsible for the majority of interactions in the area. These vessels must now account for incidental catch of bluefin tuna during pelagic longline fishery operations through the IBQ Program, and have not accrued the same number of bluefin in sets recently made within the Cape Hatteras Gear Restricted Area. However, the removal of the Cape Hatteras Gear Restricted Area should not be interpreted as an indication that performance metrics are an invalid management tool.

NMFS disagrees that there was no scientific basis for the performance metrics. The design of the Cape Hatteras Gear Restricted Area was the result of an

iterative process. In Amendment 7, NMFS analyzed multiple time periods and geographic areas in order to take into consideration both the potential reduction in the number of bluefin interactions and the potential reductions in target species retained. The analysis considered relevant fisheries data, and also oceanographic trends. NMFS identified appropriate performance metrics to address two issues: (1) Relatively few vessels were consistently responsible for the majority of bluefin tuna dead discards in the Longline category; and (2) some vessels had poor records of compliance with reporting and monitoring programs that provide fishery data necessary for successful management of pelagic longline fisheries. Based on the performance metrics, between 7 and 34 vessels were determined to be not qualified to fish in the Cape Hatteras Gear Restricted Area (from 2014 to 2019). There was a declining pattern in the number of vessels that were not qualified on the basis of compliance with either logbook or observer requirements declined from 2014 to 2019. In contrast, the pattern in the number of vessels that did not meet criteria due to high bluefin interaction rates was more variable, with a slight increase over time. NMFS disagrees that there was weak accountability associated with the Cape Hatteras Gear Restricted Area. All pelagic longline vessels, including those that met criteria for access to fish in the Cape Hatteras Gear Restricted Area were subject to observer and electronic monitoring system requirements.

In the development of this final rule, NMFS could have considered revision of the formula underlying the performance metric so that fewer bluefin interactions would result in a vessel being not qualified. However, it is not likely that the benefits associated with a revised Cape Hatteras Gear Restricted Area would outweigh the costs to vessels excluded from fishing in the area, given what is now known about the effectiveness of the IBQ Program. Reductions in bluefin interactions can be achieved through the IBQ Program, which provides incentives for vessels to reduce bluefin interactions, but also allows flexibility for vessels to make decisions when and where to fish.

NMFS acknowledges that individual accountability measures may incentivize certain behaviors such as underreporting. NMFS has implemented specific, enhanced monitoring and reporting procedures to discourage underreporting. As discussed in the Three-Year Review of the IBQ Program (*e.g.,* see page 52 and Figure 3.18), the frequency of bluefin catch is similar across observer, audited EM sets, and VMS set reports. NMFS also observed relatively good correspondence between logbook data and VMS data for the number of bluefin tuna released alive and number discarded dead (see Section 6.7 of the Three-Year Review). NMFS has not identified a significant underreporting issue in the Mid-Atlantic Region, but will continue to cross-validate data streams and take additional management or enforcement steps as necessary to address future underreporting of bluefin.

Spring Gulf of Mexico Gear Restricted Area

Comment 22: NMFS received comments in support of and in opposition to Preferred Alternative C3, which would undertake an evaluation of the Spring Gulf of Mexico Gear Restricted Area to assess its continued need to meet bluefin tuna management objectives. Comments in opposition to the Preferred Alternative noted that the Spring Gulf of Mexico Gear Restricted Area should be retained in order to protect western Atlantic bluefin tuna on their primary spawning grounds. Specifically, NMFS should not undertake management measures that could result in catch of spawning bluefin tuna or elevating the mortality rates in the Gulf of Mexico. The Gulf of Mexico is the known primary spawning ground for the western Atlantic stock of bluefin tuna, and thus the area is important to protect. Comments in opposition to the preferred alternative also noted the effectiveness of existing measures and indicated that removal would not meet the objective of minimizing bycatch and bycatch mortality of bluefin tuna. NMFS received comments in support of Preferred Alternative C3 for a variety of reasons, such as collecting more data to determine a future action, and balancing the objective of protecting bluefin tuna and optimizing the harvest of target species.

Response: NMFS acknowledges that current information shows the Gulf of Mexico contains the known primary spawning grounds for western Atlantic bluefin tuna, and that bluefin tuna present in the Gulf of Mexico during the early winter and spring are primarily there for spawning. NMFS agrees that bluefin tuna should be protected while on the spawning grounds. A number of management measures that limit bluefin catch and mortality in the Gulf of Mexico would still be in effect under the preferred alternative. For example, pelagic longline vessels would still be required to comply with the requirements of the IBQ Program. NMFS designed specific provisions of the IBQ Program to prevent potential increases in bluefin catch in the Gulf of Mexico, which could occur if fishing effort was redistributed from the Atlantic region. NMFS designated a separate quota for the Gulf of Mexico equivalent to 35 percent of the total Longline category quota, which limits overall bluefin catch in this region. In comparison to bluefin catch in the Atlantic region (which can be accounted for with allocation from the Purse Seine category or Gulf of Mexico IBQ allocation), Gulf of Mexico bluefin catch may only be accounted for with Gulf of Mexico IBQ allocation. This regional category designation, and stricter rules for Gulf of Mexico IBQ allocation use, provides additional protection for spawning bluefin by restricting the amount of bluefin mortalities that can occur within the Gulf of Mexico. The IBQ Program also provides a constraint on effort, since pelagic longline vessels must acquire a minimum amount of Gulf of Mexico IBQ allocation in order to depart on a trip and must account for quota debt on a quarterly basis. NMFS also is retaining a seasonal weak hook requirement in the Gulf of Mexico (Preferred Alternative D2 in the FEIS) to provide additional protections for spawning bluefin. As discussed below and in Appendix B of the FEIS, a statistically significant 46 percent decline in CPUE for bluefin tuna has been associated with weak hook use. In addition, there are enhanced reporting and monitoring requirements that support data validation in the monitoring area under the preferred alternative.

As discussed in Comment #1 above, NMFS agrees that existing management measures such as the gear restricted areas or weak hooks have been effective at reducing bluefin tuna interactions and dead discards. However, NMFS committed to a three-year evaluation of the effectiveness of gear restricted areas in Amendment 7. Page 30 of the Amendment 7 FEIS notes that the ''effectiveness of [the Gulf of Mexico and Cape Hatteras Gear Restricted Areas] depends on the defined area and time of the restriction(s) coinciding with the presence of bluefin in the area(s), the availability of target species outside of gear restricted area(s), the presence of bluefin outside the gear restricted area(s), annual variability in bluefin interactions, environmental conditions that may drive the distribution of bluefin, and other factors that affect the feasibility of fishing for target species outside of the gear restricted area(s).''

The most efficient and relevant means of considering these effectiveness measures in the context of pelagic longline fishery operations is through fishery dependent data collection.

NMFS disagrees that the preferred alternative would not meet the objective to ''continue to minimize bycatch and bycatch mortality of bluefin tuna''. Given the uncertainty associated with allowing pelagic longline fishing in an area that has previously been closed, NMFS agrees that it is appropriate to collect information to inform future management decisions. NMFS prefers a more incremental approach that focuses on data collection and requires a future rulemaking to remove the closed area from the regulations as opposed to removing regulations in this action. The evaluation period of both the Spring Gulf of Mexico Gear Restricted Area and Northeastern United States Closed Area will be closely monitored under a threshold designed for each area, which is intended to ensure that the proposed evaluation process would not result in high bluefin catch rates. In the event that bluefin catch is higher than this threshold, NMFS would close the area to pelagic longline fishing. Furthermore, as discussed in the Response to Comment #11 above, the final action was adjusted from the proposed action but ensures that the threshold remains conservative in the event that the U.S. allocation is adjusted at a future ICCAT meeting. In the event that ICCAT adjusts the U.S. allocation downward, this threshold would also be adjusted downward such that it would be equivalent to 55 percent of the total Gulf of Mexico allocation. Even if the threshold is reached, the incidental catch of bluefin tuna by the pelagic longline fishery would be within previously-adopted relevant levels, including the science-based overall quota, the Longline category quota and other limits adopted in Amendment 7, and the Gulf of Mexico allowable IBQ allocation.

As discussed in Comment #1 above, NMFS agrees that the actions implemented under this rule, including the actions to evaluate the Spring Gulf of Mexico Gear Restricted Area and the Northeastern United States Closed Area by converting them to Monitoring Areas, are highly consistent with balancing the objectives of this rulemaking. While outright removal of the restrictions associated with the gear restricted areas or closed area would provide the most flexibility to fishermen to select locations that would optimize target species catch and minimize bluefin bycatch that alternative would not provide the same amount of agency monitoring and control as would occur under an evaluation process. As discussed in Comment #1, the actions undertaken in this rule would also provide an opportunity to evaluate the continued need for these spatially managed areas, with removal being one of many potential outcomes in a future rulemaking that considers next steps. Establishing such an evaluation process, instead of outright removal of the area, is therefore consistent with balancing the objectives to ''simplify and streamline HMS regulations . . . by reducing redundancies in regulations'' and the need to ''continue to minimize bycatch and bycatch mortality of bluefin.''

Comment 23: NMFS received comments that the DEIS and proposed rule did not demonstrate whether the Spring Gulf of Mexico Gear Restricted Area still contains areas of high concentration of bluefin, and therefore the agency has not determined whether the original rationale for closing the Spring Gulf of Mexico Gear Restricted Area (''locations of high bluefin tuna concentrations and interactions with pelagic longline gear'') is still valid.

Response: NMFS acknowledges that the current regulations do not routinely allow for fishery-dependent data collection in areas that have been closed, which makes it difficult to determine if these areas still meet the objectives for which they were originally implemented. Interannual variability in biological, oceanographic, or fishery conditions may shift the location of fishery interactions. As new information comes available concerning spatio-temporal bluefin interactions with the longline fleet, NMFS will consider whether it is appropriate to undertake different management actions. NMFS has incorporated such information into management in recent years. For example, between the draft and final EIS for Amendment 7, NMFS adjusted the boundaries of the Spring Gulf of Mexico Gear Restricted Area eastward (as part of a new alternative) and added a second area for inclusion adjacent to the Desoto Canyon closure. As discussed in the FEIS for Amendment 7, this adjustment was based on new information that had recently come available and public comment which suggested the original proposed boundaries would not be as effective. In this final rule, NMFS is implementing a measure that would include an evaluation via fishery-dependent data collection to determine whether the Spring Gulf of Mexico Gear Monitoring Area still contains relatively high bluefin interaction rates. The evaluation process does not permanently remove the gear restricted area requirements from the regulations. Rather, it establishes a timeline for evaluation and dictates the status (*i.e.,* whether it is open or closed to pelagic longline fishing) of the area during that evaluation and development of a subsequent action.

Comment 24: NMFS received comments in opposition to making regulatory changes to the Spring Gulf of Mexico Gear Restricted Area, noting that the Spring Gulf of Mexico Gear Restricted Area has not had adverse economic impacts on the pelagic longline fleet. Comments also noted that the preferred alternative was bad for fishermen due to a decrease in the estimated pelagic longline revenue as a result of implementing the preferred alternative (according to the impacts analysis presented in the DEIS.

Response: The analysis of socio-economic impacts of Spring Gulf of Mexico Gear Restricted Area alternatives in Chapter 4 of the FEIS includes quantitative estimates of average annual revenues. These analyses were updated from the DEIS with an additional year of data in the FEIS and reflect a range of potential annual revenues for Longline category permitted vessels fishing in the Gulf of Mexico generated from select target species and incidentally-caught bluefin tuna. For the No Action alternative, such annual revenue in April and May (2015–2018) averaged approximately $677,007. For Preferred Alternative C3, the estimated range of potential revenues is between $538,151 and $687,962.

NMFS acknowledges that much of this range reflects a decrease in potential revenue from the Preferred Alternative compared to the No Action alternative. We expect, however, that fishermen would operate to optimize their revenues. Access to the Spring Gulf of Mexico Monitoring Area will give fishermen the opportunity to make decisions about where to fish depending on fish availability, and the flexibility to fish in areas that optimize target catch while minimizing bycatch. If swordfish and yellowfin tuna landings in the Gulf of Mexico decrease due to shifting effort into the Monitoring Areas, then fishermen would likely continue fishing outside of the areas. Thus, we expect that revenue results would bear out at the high end of the range.

NMFS disagrees that the Spring Gulf of Mexico Gear Restricted Area has not had adverse economic impacts on pelagic longline fishermen. In addition to the quantitative analyses, pelagic longline fishermen have commented during this rulemaking process that

there are adverse economic impacts and regulatory burdens associated with complying with the number of regulations and restrictions on the fishery. During the effective period of the Spring Gulf of Mexico Gear Restricted Area, pelagic longline fishermen in the northern Gulf of Mexico must conduct fishing operations around the geographic patchwork of the Spring Gulf of Mexico Gear Restricted Area's two designated areas as well as the Desoto Canyon closure (See Figure 3.4 of the FEIS associated with this rulemaking). These restrictions on available fishing grounds limit operational flexibility and fishermen cannot react as quickly to changing conditions—a particularly variable factor when fishing for highly migratory species such as bluefin tuna, yellowfin tuna, and swordfish. This, in turn, means that they cannot make decisions to best increase revenue and best avoid potential costs associated with accounting for incidental bluefin tuna catch. Fishermen have also reported general operational costs of having to move to fishing grounds farther away and incurring fuel and opportunity costs given the additional time that can be needed.

Given that we have concluded that all of the measures in place are likely not needed to continue to appropriately limit incidental catch in the pelagic longline fishery as first established in Amendment 7, it is appropriate for the agency to consider this feedback in examining how to relieve regulatory burden on individuals, minimize costs, and avoid unnecessary regulatory duplication. See 16 U.S.C. 1851(a)(7) (National Standard 7). This is consistent with the guidelines, which specify that management measures should be designed ''to give fishermen the greatest possible freedom of action in conducting business and pursuing recreational opportunities that are consistent with ensuring wise use of the resources and reducing conflict in the fishery.''

Comment 25: Commenters questioned the impact of the IBQ Program on reducing discards of bluefin tuna in the Gulf of Mexico. Some commenters stated that the Spring Gulf of Mexico Gear Restricted Area, not the IBQ Program, is the reason for reductions in bluefin tuna bycatch in the pelagic longline fishery since implementation of Amendment 7 in 2015. Other commenters felt that the IBQ Program by itself cannot be credited with reduction in mortality in the Gulf of Mexico; therefore, removing the gear restricted area could compromise management objectives and could inappropriately increase catch of spawning bluefin tuna. Commenters noted that, based on Table 6.32 in the Draft Three-Year Review of the IBQ Program (page 151), the rate of change in bluefin tuna catch in February and March versus in April and May is not constant before and after implementation of the closed area. Since the reduction in catch was not the same, these commenters felt that the IBQ Program alone cannot be credited with this reduction in mortality.

Response: Both the IBQ Program and the Spring Gulf of Mexico Gear Restricted Area, along with reduced fishery effort that has been occurring within the Gulf of Mexico over the last decade, have likely played a role in reducing bluefin tuna interactions. Because the IBQ Program and the gear restricted areas were implemented at the same time, it is difficult to separate out the impact each has had in relation to reducing bluefin tuna interactions and catch. NMFS therefore strongly prefers an evaluative option that will enable certain data collection under a single management tool, which is the IBQ Program. These data could then be compared to data that were collected while both the IBQ Program and the gear restricted areas were in place to better evaluate the impacts when both regulatory measures were in place against the impacts of having just one measure (the IBQ Program) in place. This evaluation will enable NMFS to determine whether there remains sufficient justification to retain both management measures, each of which may be effective in their own right but are not necessarily needed to continue in tandem to minimize bluefin tuna bycatch and bycatch mortality to the extent practicable given other management objectives that also must be considered, particularly where all of these actions occur within an overall, science-based total allowable catch.

NMFS received a specific comment on the Proposed Rule and DEIS, which drew conclusions about the continued need for the Spring Gulf of Mexico Gear Restricted Area in tandem with the IBQ Program. The commenter concluded, based on a relatively simple analysis of a limited set of data, that the IBQ Program alone could not appropriately limit incidental catch of bluefin tuna by the pelagic longline fishery in the Gulf of Mexico. As a number of other comments used this conclusion as their foundation, we determined a more in-depth response was warranted. Although NMFS considered the comment as presented, we concluded that it oversimplified a number of relevant factors, and that the conclusions drawn were not consistent with those that would be drawn from a broader analysis. In Appendix E of the FEIS associated with this rulemaking, NMFS offers information to support our response to this comment, reviewing pelagic longline catch data from the Gulf of Mexico prior to and following the implementation of the Spring Gulf of Mexico Gear Restricted Area and the IBQ Program in Amendment 7. The information is included in an Appendix given its length and the inclusion of several figures. Appendix E of the FEIS associated with this rulemaking does not present any new or different information than was in the DEIS, the referenced Three-Year Review of the IBQ Program, or in the analyses developed for Amendment 7.

NMFS agrees with public comment noting that Table 6.32 in the Draft Three-Year Review shows a reduction between two time periods (2012–2014 vs. 2015–2016), and that the magnitude of that reduction is greater for the months during which the Spring Gulf of Mexico Gear Restricted Area was effective (April and May), however these data reflect *landings,* which are only a subset of the relevant interactions that could inform effects, including reported mortalities, reported landings, reported discards, and reported dead discards across multiple time periods. The comment also compared an uneven number of years before (2012–2014, *i.e.,* 3 years) and after (2015–2016, *i.e.,* 2 years) implementation of Amendment 7 without standardizing the data, which might influence results since more years presumably result in more data and influences the weight of the variables influencing catch. As discussed in Appendix E of the FEIS, events in the management environment may influence year-to-year behavior within the fishery. In general, temporal data variables can influence fishery trend analyses. For example, analyzing years of data under different management requirements (*e.g.,* the 2006 Consolidated HMS FMP versus previous FMPs; target catch requirements for retention of bluefin tuna versus accounting for bluefin incidental catch through the IBQ Program; before and after weak hook implementation) or in years where significant events may have an impact on fishing behavior (*e.g.,* Deepwater Horizon oil spill, Hurricane Katrina) may have an impact on the conclusions of these analyses that might either be not relevant to the current management environment or unlikely to occur under normal circumstances. Furthermore, it takes time for a fishery to adapt to change. As shown in Table

3.4 of the DEIS, the number of swordfish retained by the fleet in the Gulf of Mexico decreased after implementation of Amendment 7 for two years before starting to increase in 2017. Therefore, just considering 2015 and 2016 as representative of a post-Amendment 7 environment may not be reflective of the current state of the fishery. This is why NMFS tends to estimate potential ecological impacts over multiple years of data and carefully considers the selection of years included in ecological impacts analyses. Therefore, for the information presented in Appendix E of the FEIS associated with this rulemaking, NMFS presented data from different time periods in an effort to balance out the suite of variables that could have influenced information derived from the pelagic longline fishery's operations in the Gulf of Mexico.

As presented in Appendix E of the FEIS associated with this rulemaking, NMFS found that the difference in the percent change by month varied depending on time period and which variable was considered in the analysis. For example, the change in landings of fish was higher during Gear Restricted Area effective months (April and May) than it was in the two months preceding the Gear Restricted Area effective months (February and March) when comparing time periods immediately prior to (2012–2014) and after (2015–2017) implementation of Amendment 7 management measures (Table E.3). However, a slightly different analysis comparing the change in average annual number of landings noted similar reductions in landings in February, April and May across a historical (2006–2012) and more recent (2015–2018) time period (Table E.3). NMFS found that adding a year of data can change the conclusions that might be drawn (*e.g.,* comparing reductions in landings in Table E.2 and E.3 in Appendix E of the FEIS associated with this rulemaking).

In general, given the influence of time on data trends and the short periods of time analyzed by the commenter, NMFS believes these analyses demonstrate a benefit of data collection to inform future management.

The preferred alternative would allow fishery-dependent data collection to explore catch rates, landings, mortality, and other data in the Spring Gulf of Mexico Gear Restricted Area. By collecting fishery dependent data in this area while vessels are operating under the IBQ Program, NMFS will be better able to isolate the impacts of the gear restricted area and determine if both management measures are needed to meet the objectives for reducing bluefin tuna bycatch in the pelagic longline fishery as set out in Amendment 7 when both measures were adopted and consistent with the objectives of this rulemaking. Certain aspects of the IBQ Program (*e.g.,* regional IBQ allocation designations and individual accountability) and design elements of this evaluation process (*e.g.,* thresholds) will both allow for this data collection and stop pelagic longline fishing in the area if the fleet were to use Gulf of Mexico IBQ allocation in exceedance of an established annual threshold to account for bluefin landings or dead discards caught within the boundaries of the Monitoring Area. This will ensure that fishing is not counter to the objectives of ''minimiz[ing], to the extent practicable, bycatch and bycatch mortality of bluefin tuna and other Atlantic HMS by pelagic longline gear consistent with the conservation and management objectives of the 2006 Consolidated HMS FMP, its amendments, and all applicable laws.''

Regarding the effects of the preferred alternative specifically on spawning bluefin tuna, the preferred alternative may increase catch of bluefin tuna compared to the No Action alternative, although the actual predicted increase (versus the potentially allowable amount) is relatively minor. While some increases in target catch and bluefin tuna bycatch could occur as a result of removal of the area, any such increases would be within previously analyzed, applicable quotas and would be consistent with other management measures that NMFS determined appropriately limit bycatch and conserve the stock in Amendment 7, including the Longline subquota and the IBQ allocation provisions.

Comment 26: NMFS received comments requesting that NMFS expand the current Spring Gulf of Mexico Gear Restricted Area, by creating a larger box that encompasses both areas within a single larger closure in time and space.

Response: NMFS' management objectives under Amendment 7 included both the reduction of bluefin tuna interactions and dead discards, and to balance the need to limit landings and dead discards with the objective of optimizing fishing opportunity and maintaining profitability, among other things. One of the objectives of this rulemaking was to optimize the ability for the pelagic longline fishery to harvest target species quotas while also considering fairness among permit/quota categories. Expansion of the Spring Gulf of Mexico Gear Restricted Area is not considered to be consistent with current management objectives or objectives of this rulemaking because such a box would likely encompass the remaining, non-regulated pelagic longline fishing grounds in the northern Gulf of Mexico. Closing these areas would remove most fishing opportunity for fleets that fish in these areas. Thus, NMFS did not determine expansion of this area was warranted.

In an analysis completed for the Amendment 7 rulemaking, NMFS also considered the need to gather scientific data from the Gulf of Mexico longline fishery for the development of effective conservation and management measures. A larger Gear Restricted Area (*e.g.,* such as the Gulf of Mexico EEZ) was noted to severely reduce the collection of important data from the pelagic longline fishery and would increase uncertainty in the western Atlantic bluefin stock assessment. Gulf of Mexico pelagic longline data are critical to the development of CPUE information, which is used as the index of abundance for spawning bluefin tuna, an important element of the stock assessment for western Atlantic bluefin tuna. Such uncertainty would make it more difficult to assess the status of stocks, to set the appropriate optimum yield and define overfishing levels, and to ensure that optimum yield is attained and overfishing levels are not exceeded. NMFS conducted a ''power analysis'' to determine the number of pelagic longline sets that would be required to maintain the current level of precision for the CPUE and found that approximately 60 percent of the recent number of pelagic longline sets in the Gulf of Mexico would be required. Closing additional area would likely reduce the amount of available data for these stock assessment indices.

Weak Hooks

Comment 27: NMFS received comments that expressed support for the Preferred Alternative (D2) to require weak hooks in the pelagic longline fishery for six months of the year (January–June) in order to reduce bycatch of bluefin in the winter and spring and white marlin in the summer and fall. NMFS also received comments in opposition to the preferred alternative, indicating that weak hook use in the summertime has no ecological value, so fishermen will not care if the requirement goes away. Other comments indicated that the IBQ Program is sufficient for its purpose.

Response: NMFS agrees that implementing a seasonal requirement for weak hooks in the Gulf of Mexico will provide protections for bluefin tuna during the spawning season and may decrease bycatch of white marlin in the

summer and fall. The preferred alternative, which would implement a seasonal weak hook requirement, was selected in the DEIS and the FEIS as the alternative expected to strike the best balance between the objectives of ''continue to minimize . . . bycatch and bycatch mortality of bluefin tuna and other Atlantic HMS by pelagic longline gear . . .''. and to ''optimize the ability of the pelagic longline fishery to harvest target species quotas.'' This alternative provides increased flexibility with respect to hook requirements in the second half of the year (provided basic circle hook requirements are still met). This alternative only requires the use of gear intended to minimize bluefin bycatch when spawning bluefin are abundant in the Gulf of Mexico and the ecological benefits for spawning bluefin are the greatest (*i.e.,* in the first half of the year). The preferred alternative in the FEIS would not prohibit the use of weak hooks in the summer and fall. Some commenters from pelagic longline fishermen in the central Gulf of Mexico prefer the use of weak hooks year round. These fishermen noted that yellowfin tuna catch is slightly higher with weak hooks and they may continue to use weak hooks during the months that they are not required. NMFS agrees that the use of weak hooks in the summer (*i.e.,* after June) may not provide ecological benefits to bluefin tuna. Removing the weak hook requirements when they have negligible ecological benefit for spawning bluefin (due to low abundance in the second half of the year) is consistent with the rulemaking objectives to simplify and streamline Atlantic HMS management by reducing redundancies in regulations established to reduce bluefin interactions. NMFS also designed this alternative to mitigate bycatch of white marlin. This alternative therefore balances the bycatch mitigation needs for two different species, which is consistent with the alternative *to* ''continue to minimize . . . bycatch and bycatch mortality of bluefin tuna and other Atlantic HMS by pelagic longline gear . . .''

Comment 28: NMFS received comments that suggested that weak hooks should only be required while pelagic longline vessels are fishing in the within the boundaries of the Spring Gulf of Mexico Gear Restricted Area if the preferred alternative (Alternative C3) was finalized.

Response: NMFS disagrees with this comment to require weak hooks within the boundaries of the Spring Gulf of Mexico Gear Restricted Area. Although the catch rates were higher in the Spring Gulf of Mexico Gear Restricted Area during the Amendment 7 rulemaking, distributions of spawning bluefin tuna may change throughout the Gulf of Mexico and requiring their use in all portions of the Gulf of Mexico will maximize the conservation benefit provided by weak hooks. Additionally, requiring weak hook use in a discrete area of the Gulf of Mexico may present enforcement challenges and require extensive at-sea resources. Some fishing could occur on the border of the current Gear Restricted Area and gear drift could inadvertently create compliance issues.

Comment 29: Weak hook regulations are obsolete and redundant given that the restrictions of a vessel's IBQ allocation maintains the conservation goals in the Gulf of Mexico and elsewhere.

Response: NMFS disagrees that weak hooks are redundant with the IBQ Program for maintaining low levels of bycatch of bluefin tuna in the Gulf of Mexico. While the IBQ Program incentivizes fishery participants to avoid bluefin tuna, there is a proven scientific benefit in the use of weak hooks with pelagic longline gear in the Gulf of Mexico. Research has shown a statistically significant 46 percent decline in bluefin tuna catch-per-unit-effort associated with weak hook use. The release of large spawning bluefin tuna caught on weak hooks creates conservation benefits to the western Atlantic bluefin tuna stock during the spawning season.

Comment 30: NMFS received comments that a weak hook requirement from January through June would continue to severely impact the winter swordfish fishery in the eastern Gulf of Mexico. Comments indicated that there has been a large reduction in swordfish landings in the eastern Gulf of Mexico winter swordfish fishery; that there is no conservation value to maintaining this regulation in the eastern Gulf of Mexico; and that the loss of revenue is making it harder to find crew for longline boats. NMFS received comments suggesting that NMFS create a new spatially managed area in the southeastern Gulf of Mexico where weak hook use would not be required. NMFS also received comments suggesting that the monofilament on swordfish leaders that have straightened hooks are usually very opaque instead of clear, which may indicate physical stress on the line from a swordfish bill striking the leader as the escaped fish reacts to being hooked. One commenter estimated their 2017 losses at 5,000–6,000 lb of swordfish, with an estimated value of $30,000.

Response: NMFS investigated catch rates of several target species occurring in the area in the eastern Gulf of Mexico delineated by several pelagic longline fishermen during the development of the FEIS. Appendix D of the FEIS includes this data analysis. NMFS compared catch rates from the area from 2009–2011 (3 years prior to weak hook implementation; 2011 included since weak hooks were not mandatory until May) and 2015–2017 (3 years after implementation). Overall catch rates and landings of swordfish were annually variable from before and after implementation of weak hooks. Although variable from year to year, data suggested landings and catch rates have not changed in this area since implementation of weak hooks in the Gulf of Mexico

NMFS also analyzed bluefin tuna landings and dead discard catch rates and catch numbers. Bluefin tuna catches were slightly higher in the eastern Gulf of Mexico area delineated by several pelagic longline fishermen prior to the implementation of weak hooks. Since higher catch rates were experienced prior to implementation of weak hooks, there is likely to be a continued conservation benefit to retaining a seasonal weak hook requirement in the area shown in Appendix E of the FEIS because bluefin tuna are likely to still occur in the eastern Gulf of Mexico.

Comment 31: NMFS received comments indicating that the original NOAA weak hook experiments conducted between 2008 and 2012 occurred in a yellowfin tuna fishery, and resulted in few swordfish data points (and the swordfish interactions were mostly juvenile). This gives an inaccurate portrayal of the swordfish fishery in the Gulf of Mexico and the results of the study should not be used for management purposes.

Response: NMFS disagrees that the weak hook research was not representative of the entire Gulf of Mexico fishery. During the research conducted from 2007–2010, eight vessels were involved in the experiment observing 418 sets and deploying 245,881 hooks. An additional 51,067 hooks were deployed over 111 sets on 2 vessels in 2012. A Fisher's Exact, which is a common statistical test used to determine significance of two classes of objects, in this case the object being hooks (weak and standard) and significant differences in their catch rates, was used to analyze results. The research did show reductions in the amount of target catch of yellowfin tuna and swordfish; however, these reductions were not statistically significant.

NMFS also compared the catch rates, prior to and after implementation, of weak hooks of several species from the entire Gulf of Mexico in Appendix C of the FEIS. In general, actual weak hook effects match results from the 2007–2010 research project. Bluefin tuna catch-per-unit effort and interactions both dropped after the requirement while catch-per-unit effort and interactions for swordfish, yellowfin tuna, and blue marlin remained relatively stable. White marlin and roundscale spearfish catch-per-unit effort and interactions increased with the use of weak hooks (Table C.2 in the FEIS). White marlin and roundscale spearfish were combined for analytical purposes because they can be difficult to tell apart, and because combination of data enabled a more robust sample size for analysis. Therefore, this data suggest that the weak hook research was an accurate representation of the Gulf of Mexico fishery.

Comment 32: NMFS received comments regarding a seasonal weak hook requirement stating that there is a substantial expense in changing gear type in labor and materials. Financial burden is not just associated with the cost of hooks. As shown in Chapter 3 of the FEIS associated with this rulemaking, Figure 3.2 and 3.3, pelagic longline gear consists of a mainline suspended in the water column, from which branch lines (which hang off the mainline and are used to suspend hooks in the water column). Monofilament line is used widely for both the mainline (the longline) and branchlines. Branchlines may incorporate a section of line (of variable length) known as a leader, with a lead weight at one end and the baited hook at the other. Commenters noted that they must purchase a different, stretchy type of leader to deploy with weak hooks that keep small swordfish from straightening the hooks. NMFS received comments that there is an impracticality to carrying double gear and/or storing the non-weak hook gear shoreside. Its takes a full crew two days to change out the gear. Additionally, because of regulations, the hooks must be corrosive and the aluminum crimps will eventually fail; extra supplies to support the deployed hook of choice are needed to be stored onboard. Few boats in the fishery have the deck capacity to carry double gear.

Response: NMFS disagrees with this comment because fishermen may fish with weak hooks in the Gulf of Mexico for the entire year if they wish to do so. The removal of the requirement for the July–December time period does not prohibit the use of weak hooks during that period. If fishermen find that using weak hooks throughout the year is less burdensome they may do so. NMFS recognizes that vessels that fish outside the Gulf of Mexico, may not be rigged with weak hooks and would need to re-rig their gear to use weak hook when the requirement is in effect. Due to little change in the catch and catch rates of swordfish in the Gulf of Mexico and the conservation benefit afforded to bluefin tuna when spawning, NMFS is at this time preferring a seasonal requirement. NMFS also notes that currently in the entire Gulf of Mexico, all vessels with pelagic longline onboard must only possess weak circle hooks 50 CFR 635.21(c)(5)(iii)(B)(*2*)(*i*) (with a limited exception when greenstick gear is also onboard).

Comment 33: NMFS received comments that noted a seasonal weak hook requirement may create enforcement concerns when switching between weak hooks and standard circle hooks.

Response: NMFS disagrees that modifying the weak hook requirement to become seasonal would reduce enforceability of the requirement. Enforcement officers have tools that allow them to determine the type of hook on board a vessel and are accustomed to making those determinations during vessel boardings. With this rule, the only change from an enforcement perspective is that it will not be necessary to verify the exclusive use of weak hooks on pelagic longline vessels in the Gulf of Mexico during the months of July to December.

Changes From the Proposed Rule

This section explains the changes from the proposed rule to the final rule and resulting changes in the regulatory text. NMFS is making two minor clarifying changes to actions proposed regarding the Northeastern United States Closed Area and the Spring Gulf of Mexico Gear Restricted Area were made in response to public comment. NMFS has also made some minor clarifications to regulatory text for the final rule in support of these changes.

NMFS has added two clarifying modifications from the DEIS to the FEIS to Preferred Alternative A4. The first addresses what would happen if the U.S. allocation of bluefin is changed at a future ICCAT meeting. The 150,519 lb threshold is approximately 72 percent of the adjusted total Atlantic IBQ allocation currently distributed to the fleet. In the event that the western Atlantic bluefin tuna quota later is reduced at ICCAT and the U.S. allocation of bluefin quota is adjusted downward as a result, the threshold would also be adjusted. Such adjustment would make the threshold 72 percent of the total Atlantic IBQ allocation disbursed to the fleet as a result of the lower U.S. allocation. If the ICCAT quota were to increase and the United States' allocation increased as well, adjustments would not be made to increase the threshold for several reasons. The second clarifying modification concerns the timing of inseason notices that could be filed in response to the threshold for this area being met. NMFS originally noted in the DEIS in the description of the preferred alternative that ''If no closure notice is filed between January 1, 2020 and December 31, 2022, the Monitoring Area would remain open, unless, and until, NMFS decides to take additional action''. Since the thresholds are not cumulative in nature with respect to IBQ allocation use by the pelagic longline fishery to account for landings and dead discards, the design of this process would not necessitate inseason closure to be filed until after the respective start dates for monitoring. NMFS is adjusting this statement to read ''If no closure notice is filed between April 1, 2020 and December 31, 2022, the Monitoring Area would remain open, unless, and until, NMFS decides to take additional action.''

NMFS has added two clarifying modifications from the DEIS to the FEIS to Preferred Alternative C3. The first addresses what would happen if the U.S. allocation of bluefin is changed at a future ICCAT meeting. The 63,150 lb threshold is approximately 55 percent of the adjusted total Gulf of Mexico IBQ allocation currently distributed to the fleet. In the event that the western Atlantic bluefin tuna quota later is reduced at ICCAT and the U.S. allocation of bluefin quota is adjusted downward as a result, the threshold would also be adjusted. Such adjustment would make the threshold 55 percent of the total Gulf of Mexico IBQ allocation disbursed to the fleet as a result of the lower U.S. allocation. The second clarifying modification concerns the timing of inseason notices that could be filed in response to the threshold for this area being met. NMFS originally noted in the DEIS in the description of the preferred alternative that ''If no closure notice is filed between January 1, 2020 and December 31, 2022, the Monitoring Area would remain open, unless, and until, NMFS decides to take additional action''. Since the thresholds are not cumulative in nature with respect to IBQ allocation use by the pelagic longline fishery to account for landings and dead discards, the design

of this process would not necessitate inseason closure to be filed until after the respective start dates for monitoring. NMFS is adjusting this statement to read ''If no closure notice is filed between April 1, 2020 and December 31, 2022, the Monitoring Area would remain open, unless, and until, NMFS decides to take additional action.''

Classification

Pursuant to the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that the final rule is consistent with the 2006 Consolidated HMS FMP and its amendments, other provisions of the Magnuson-Stevens Act, ATCA, and other applicable law, subject to further consideration after public comment.

NMFS is waiving the 30-day delay in effectiveness for this final rule under 5 U.S.C. 553(d)(3) for good cause and because it is in the public interest. Among other things, this final rule will allow pelagic longline fishing in two previously closed or gear restricted areas, subject to a monitoring and evaluation period. For the Spring Gulf of Mexico Closed Area, if this final rule does not become effective by April 1, the area will close under the existing regulations. It would then re-open as a Monitoring Area when the final rule becomes effective. In such an event, delaying the effectiveness of this final rule would unnecessarily deny vessels fishing opportunities and flexibility in choosing fishing locations by keeping the area closed. Furthermore, multiple actions in relation to the area in a short time could confuse the regulated community. A delay in effectiveness could also affect the evaluation process for the Spring Gulf of Mexico Monitoring Area. If this measure is not implemented on or before April 1, pelagic longline fishermen would not be able to fish in the area until later in the period, affecting the efficacy of the evaluation. The fishery would be subject to the requirements of the Spring Gulf of Mexico Gear Restricted Area for the first part of the April 1–May 31 time period, and then subject to a different set of requirements when the 30-day delay in effectiveness period ends. The evaluation process culminates in the compilation of data and creation of a report that would guide future management measures for the area. Delayed implementation would reduce the amount of information that could be incorporated into the evaluation for future management of the area and would affect the comparability of the before- and after- rulemaking components of the evaluation. Finally, the action relieves regulatory burden in relation to access to these fishing grounds, by allowing fishing in a previously closed area, and the regulated community does not need a 30-day period in which to come into compliance with that provision. It is in the public interest to implement these measures in a timely manner to fully achieve the objectives of the rulemaking and to implement the deregulatory action in a way that is concurrent with the relevant timing provisions of the new evaluative measures. Therefore, NMFS is waiving the 30-day delay in effectiveness under 5 U.S.C. 553(d)(3) to make the rule effective immediately upon publication in the **Federal Register**.

This final rule has been determined to be not significant for purposes of Executive Order 12866. The agency has consulted, to the extent practicable, with appropriate state and local officials to address the principles, criteria and requirements of Executive Order 13132. This final rule is an Executive Order 13771 deregulatory action.

In compliance with section 604 of the Regulatory Flexibility Act (RFA), NMFS prepared a Final Regulatory Flexibility Analysis (FRFA) for this final rule. The FRFA analyzes the anticipated economic impacts of the final actions and any significant economic impacts on small entities. The FRFA is below. This FRFA has been updated from the Initial Regulatory Flexibility Analysis (IRFA) to reflect analyses that were updated with the inclusion of an additional year of data (2018). In the FRFA, revenue estimates associated with the Northeastern United States Closed Area are adjusted in response to a calculation error that occurred in the IRFA. The revenue calculations for all the alternatives related to the Northeastern United States Closed Area inadvertently omitted the prices for each of the target species (resulting in a default value of $1 per pound). This error resulted in the underestimate of revenue for these alternatives. Irrespective of the calculation error, the estimated changes in revenue associated with the alternatives presented in the FEIS falls within a similar range to those presented in the DEIS, when compared to the no action alternative.

Section 604(a)(1) of the RFA requires a succinct statement of the need for and objective of the rule. Please see Chapter 1 of the FEIS associated with this rulemaking for a full description of the need for and objectives of this action. Consistent with the provisions of the Magnuson-Stevens Act and ATCA, NMFS is adjusting measures put in place to manage incidental catch of bluefin in the pelagic longline fishery, namely the Northeastern United States Closed Area, the Cape Hatteras Gear Restricted Area, and the Spring Gulf of Mexico Gear Restricted Area, as well as the weak hook requirement in the Gulf of Mexico. NMFS has identified the following objectives with regard to this action: (1) Continue to minimize, to the extent practicable, bycatch and bycatch mortality of bluefin and other Atlantic HMS by pelagic longline gear consistent with the conservation and management objectives (*e.g.,* prevent or end overfishing, rebuild overfished stocks, manage Atlantic HMS fisheries for continuing optimum yield) of the 2006 Consolidated Atlantic HMS FMP, its amendments, and all applicable laws; (2) simplify and streamline Atlantic HMS management, to the extent practicable, by reducing any redundancies in regulations established to reduce bluefin tuna interactions that apply to the pelagic longline fishery; and (3) optimize the ability for the pelagic longline fishery to harvest target species quotas (*e.g.,* swordfish), to the extent practicable, while also considering fairness among permit/quota categories. This evaluation is necessary given the IBQ Program's shift in management focus towards individual vessel accountability for bluefin tuna bycatch in the pelagic longline fishery; the continued underharvest of quotas in the associated target fisheries, particularly the swordfish quota; comments from the public and the HMS Advisory Panel members indicating that certain regulations may be redundant in appropriately limiting bluefin incidental catch in the pelagic longline fishery and thus may be unnecessarily restrictive of pelagic longline fishery effort; and requests from the public and HMS Advisory Panel members to reduce regulatory burden in relation to carrying out fishery operations.

Section 604(a)(2) requires a summary of significant issues raised by public comment in response to the IRFA and a summary of the assessment of the Agency of such issues, and a statement of any changes made in the rule as a result of such comments. NMFS did not receive any comments specifically on the IRFA, however the Agency did receive some comments regarding the anticipated or perceived economic impact of the rule. These comments are summarized below. NMFS did not receive any comments from the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule or the IRFA. All of the comments and responses to the

comments are summarized in Appendix F of the FEIS.

Comment: NMFS received a comment that the reduction in the number of active pelagic longline vessels and fishing effort began before gear restricted areas were implemented, and that the gear restricted areas were not the cause of such reduction.

Response: NMFS agrees that decreases in the number of active vessels and effort, landings, and revenue began prior to the implementation of the gear restricted areas under Amendment 7 in 2015. Table 1.1 in the FEIS (which shows data from 2012 through 2018) indicates that a decrease in estimated pelagic longline revenue and effort started prior to implementation of Amendment 7 despite efforts to revitalize the U.S. swordfish fishery for a number of years. Prior to initiation of this action, NMFS received suggestions from the public to consider the regulatory burden on the pelagic longline fleet and, at minimum, to evaluate whether current regulations are still needed to achieve management objectives. While the gear restricted areas may not be the sole factor influencing recent trends in the fleet, NMFS received public comment noting that the collective regulatory burden may have had a role in decreasing the number of active vessels, effort, landings, and revenue of some target species (*e.g.,* swordfish).

Comment: NMFS received comments that reopening the closed areas and implementing a seasonal weak hook requirement would result in higher numbers of billfish interactions from pelagic longline fishing activity that could in turn reduce numbers of billfish in these areas. Such reductions in billfish would adversely affect Atlantic HMS tournaments and the jobs created by the recreational fishing industry.

Response: NMFS disagrees that implementing the actions in this final rule would increase bycatch mortality in a manner inconsistent with stock assessments or inconsistent with the requirement that NMFS minimize bycatch and bycatch mortality to the extent practicable. In the FEIS, NMFS presented an impacts analysis in Chapter 4 that discussed the potential effects of alternatives on restricted and protected species, such as marlin, spearfish, sailfish, shortfin mako, dusky shark, and sea turtles. Predicted total annual catch was, where possible, presented as a range of catch per unit effort in impact tables. NMFS also provided in the tables the annual catch from the applicable region for comparison to the No Action Alternative.

Comment: NMFS received comments that any increased bluefin landings from the pelagic longline fishery that result from having access to previously closed areas or gear restricted areas will negatively impact market prices of bluefin caught in directed fisheries.

Response: Increased landings of bluefin tuna can have localized impacts on market prices if the landings are concentrated geographically and increase dramatically over a short period of time. However, the pelagic longline fleet only lands approximately 8.7% (88.1 metric tons) of total Atlantic bluefin tuna landings of 1013 metric tons (U.S. total landings as reported in the 2019 U.S. Report to ICCAT). Often the global market for bluefin tuna has a more direct impact on the market prices for bluefin caught by the U.S. Atlantic directed fisheries than any change in U.S. Atlantic bluefin tuna incidental landings.

Comment: NMFS received comments in opposition to making regulatory changes to the Spring Gulf of Mexico Gear Restricted Area, noting that the Spring Gulf of Mexico Gear Restricted Area has not had adverse economic impacts on the pelagic longline fleet. Comments also noted that the preferred alternative was bad for fishermen due to a decrease in the estimated pelagic longline revenue as a result of implementing the preferred alternative (according to the impacts analysis presented in the DEIS).

Response: The analysis of socio-economic impacts of Spring Gulf of Mexico Gear Restricted Area alternatives in Chapter 4 of the FEIS includes quantitative estimates of average annual revenues. These analyses were updated from the DEIS with an additional year of data in the FEIS and reflect a range of potential annual revenues for Longline category permitted vessels fishing in the Gulf of Mexico generated from select target species and incidentally-caught bluefin tuna. For the No Action alternative, such annual revenue in April and May (2015–2018) averaged approximately $677,007. For Preferred Alternative C3, the estimated range of potential revenues is between $538,151 and $687,962.

NMFS acknowledges that much of this range reflects a decrease in potential revenue from the Preferred Alternative compared to the No Action alternative. We expect, however, that fishermen would operate to optimize their revenues. Access to the Spring Gulf of Mexico Monitoring Area will give fishermen the opportunity to make decisions about where to fish depending on fish availability, and the flexibility to fish in areas that optimize target catch while minimizing bycatch. If swordfish and yellowfin tuna landings in the Gulf of Mexico decrease due to shifting effort into the Monitoring Areas, then fishermen would likely continue fishing outside of the areas. Thus, we expect that revenue results would bear out at the high end of the range.

NMFS disagrees that the Spring Gulf of Mexico Gear Restricted Area has not had adverse economic impacts on pelagic longline fishermen. In addition to the quantitative analyses, pelagic longline fishermen have commented during this rulemaking process that there are adverse economic impacts and regulatory burdens associated with complying with the number of regulations and restrictions on the fishery. During the effective period of the Spring Gulf of Mexico Gear Restricted Area, pelagic longline fishermen in the northern Gulf of Mexico must conduct fishing operations around the geographic patchwork of the Spring Gulf of Mexico Gear Restricted Area's two designated areas as well as the Desoto Canyon closure (See Figure 3.4 of the FEIS associated with this rulemaking). These restrictions on available fishing grounds limit operational flexibility and fishermen cannot react as quickly to changing conditions—a particularly variable factor when fishing for highly migratory species such as bluefin tuna, yellowfin tuna, and swordfish. This, in turn, means that they cannot make decisions to best increase revenue and best avoid potential costs associated with accounting for incidental bluefin tuna catch. Fishermen have also reported general operational costs of having to move to fishing grounds farther away and incurring fuel and opportunity costs given the additional time that can be needed.

Given that we have concluded that all of the measures in place are likely not needed to continue to appropriately limit incidental catch in the pelagic longline fishery as first established in Amendment 7, it is appropriate for the agency to consider this feedback in examining how to relieve regulatory burden on individuals, minimize costs, and avoid unnecessary regulatory duplication. See 16 U.S.C. 1851(a)(7) (National Standard 7). This is consistent with the guidelines, which specify that management measures should be designed ''to give fishermen the greatest possible freedom of action in conducting business and pursuing recreational opportunities that are consistent with ensuring wise use of the resources and reducing conflict in the fishery.''

Comment: NMFS received comments that a weak hook requirement from January through June would continue to severely impact the winter swordfish fishery in the eastern Gulf of Mexico. Comments indicated that there has been a large reduction in swordfish landings in the eastern Gulf of Mexico winter swordfish fishery; that there is no conservation value to maintaining this regulation in the eastern Gulf of Mexico; and that the loss of revenue is making it harder to find crew for longline boats. NMFS received comments suggesting that NMFS create a new spatially managed area in the southeastern Gulf of Mexico where weak hook use would not be required. NMFS also received comments suggesting that the monofilament on swordfish leaders that have straightened hooks are usually very opaque instead of clear, which may indicate physical stress on the line from a swordfish bill striking the leader as the escaped fish reacts to being hooked. One commenter estimated their 2017 losses at 5,000–6,000 lb of swordfish, with an estimated value of $30,000.

Response: NMFS investigated catch rates of several target species occurring in the area in the eastern Gulf of Mexico delineated by several pelagic longline fishermen during the development of the FEIS. Appendix D of the FEIS includes this data analysis. NMFS compared catch rates from the area from 2009–2011 (3 years prior to weak hook implementation; 2011 included since weak hooks were not mandatory until May) and 2015–2017 (3 years after implementation). Overall catch rates and landings of swordfish were annually variable from before and after implementation of weak hooks. Although variable from year to year, data suggested landings and catch rates have not changed in this area since implementation of weak hooks in the Gulf of Mexico.

NMFS also analyzed bluefin tuna landings and dead discard catch rates and catch numbers. Bluefin tuna catches were slightly higher in the eastern Gulf of Mexico area delineated by several pelagic longline fishermen prior to the implementation of weak hooks. Since higher catch rates were experienced prior to implementation of weak hooks, there is likely to be a continued conservation benefit to retaining a seasonal weak hook requirement in the area shown in Appendix E of the FEIS because bluefin tuna are likely to still occur in the eastern Gulf of Mexico.

Comment: NMFS received comments regarding a seasonal weak hook requirement stating that there is a substantial expense in changing gear type in labor and materials. Financial burden is not just associated with the cost of hooks. As shown in Chapter 3 of the FEIS associated with this rulemaking, Figure 3.2 and 3.3, pelagic longline gear consists of a mainline suspended in the water column, from which branch lines (which hang off the mainline and are used to suspend hooks in the water column). Monofilament line is used widely for both the mainline (the longline) and branchlines. Branchlines may incorporate a section of line (of variable length) known as a leader, with a lead weight at one end and the baited hook at the other. Commenters noted that they must purchase a different, stretchy type of leader to deploy with weak hooks that keep small swordfish from straightening the hooks. NMFS received comments that there is an impracticality to carrying double gear and/or storing the non-weak hook gear shoreside. Its takes a full crew two days to change out the gear. Additionally, because of regulations, the hooks must be corrosive and the aluminum crimps will eventually fail; extra supplies to support the deployed hook of choice are needed to be stored onboard. Few boats in the fishery have the deck capacity to carry double gear.

Response: NMFS disagrees with this comment because fishermen may fish with weak hooks in the Gulf of Mexico for the entire year if they wish to do so. The removal of the requirement for the July–December time period does not prohibit the use of weak hooks during that period. If fishermen find that using weak hooks throughout the year is less burdensome they may do so. NMFS recognizes that vessels that fish outside the Gulf of Mexico, may not be rigged with weak hooks and would need to re-rig their gear to use weak hook when the requirement is in effect. Due to little change in the catch and catch rates of swordfish in the Gulf of Mexico and the conservation benefit afforded to bluefin tuna when spawning, NMFS is at this time preferring a seasonal requirement. NMFS also notes that currently in the entire Gulf of Mexico, all vessels with pelagic longline onboard must only possess weak circle hooks 50 CFR 635.21(c)(5)(iii)(B)(*2*)(*i*) (with a limited exception when greenstick gear is also onboard).

Section 604(a)(4) of the RFA requires Agencies to provide an estimate of the number of small entities to which the rule would apply. The Small Business Administration (SBA) has established size criteria for all major industry sectors in the United States, including fish harvesters. Provision is made under the SBA regulations for an agency to develop its own industry-specific size standards after consultation with SBA Office of Advocacy and an opportunity for public comment (see 13 CFR 121.903(c)). Under this provision, NMFS may establish size standards that differ from those established by the SBA Office of Size Standards, but only for use by NMFS and only for the purpose of conducting an analysis of economic effects in fulfillment of the agency's obligations under the RFA. To utilize this provision, NMFS must publish such size standards in the **Federal Register**, which NMFS did on December 29, 2015 (80 FR 81194; December 29, 2015). In this final rule effective on July 1, 2016, NMFS established a small business size standard of $11 million in annual gross receipts for all businesses in the commercial fishing industry (NAICS 11411) for RFA compliance purposes. NMFS considers all HMS permit holders to be small entities because they had average annual receipts of less than $11 million for commercial fishing. The Small Business Administration (SBA) has established size standards for all other major industry sectors in the U.S., including the scenic and sightseeing transportation (water) sector (NAICS code 487210, for-hire), which includes charter/party boat entities. The SBA has defined a small charter/party boat entity as one with average annual receipts (revenue) of less than $7.5 million.

Regarding those entities that would be directly affected by the preferred alternatives, the average annual revenue per active pelagic longline vessel is estimated to be $187,000 based on the 170 active vessels between 2006 and 2012 that produced an estimated $31.8 million in revenue annually. The maximum annual revenue for any pelagic longline vessel between 2006 and 2016 was less than $1.9 million, well below the NMFS small business size standard for commercial fishing businesses of $11 million. Other non-longline HMS commercial fishing vessels typically generally earn less revenue than pelagic longline vessels. Therefore, NMFS considers all Atlantic HMS commercial permit holders to be small entities (*i.e.,* they are engaged in the business of fish harvesting, are independently owned or operated, are not dominant in their field of operation, and have combined annual receipts not in excess of $11 million for all its affiliated operations worldwide). The preferred commercial alternatives would apply to the 280 Atlantic tunas Longline category permit holders, 221 directed shark permit holders, and 269 incidental shark permit holders. Of these 280 Atlantic tunas Longline category permit holders, 85 pelagic

longline vessels were actively fishing in 2016 based on logbook records.

NMFS has determined that the proposed measures would not likely directly affect any small organizations or small government jurisdictions defined under RFA, nor would there be disproportionate economic impacts between large and small entities. More information regarding the description of the fisheries affected can be found in Chapter 3.0 of the DEIS.

Section 604(a)(5) of the RFA requires Agencies to describe any new reporting, record-keeping and other compliance requirements. The action does not contain any new collection of information, reporting, or record-keeping requirements.

Under Section 604(a)(6) of the RFA requires Agencies to describe the steps taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected. These impacts are discussed in Chapters 4 and 6 of the FEIS associated with this rulemaking.

Northeastern United States Closed Area

Alternative A1, the No Action alternative, would maintain the current regulations regarding the Northeastern United States Closed Area. The currently defined area would remain closed to all vessels using pelagic longline gear onboard from June 1 through June 30 of a given year. Average annual revenue for bluefin and target species combined during this time period in the surrounding open reference area was $178,847. Since 16 vessels operated in this area in June between 2015 and 2018, the average annual revenue per vessel during this time period was $11,178. This alternative would maintain the recent landings levels and corresponding revenues, resulting in neutral direct economic impacts to these small entities. This alternative does not balance the objective of appropriately managing and limiting bluefin bycatch in the pelagic longline fishery and the requirement to provide vessels with a reasonable opportunity to harvest available target species quotas consistent with objectives of this rulemaking and those established in Amendment 7. Retaining, or not evaluating continued need for, a closed area intended to limit bluefin discards while at the same time requiring fishery participants to individually account for their incidental bluefin catch with IBQ allocation appears to be redundant in effect. Not all of the regulations currently in place appear to be needed to appropriately limit incidental catch of bluefin in the pelagic longline fishery, and maintaining all of the restrictions may unnecessarily restrict pelagic longline fishery effort and create unnecessary regulatory burden for fishery participants. Furthermore, NMFS is required under ATCA and the Magnuson-Stevens Act to give fishing vessels a reasonable opportunity to harvest the ICCAT quotas. See 16 U.S.C. 1854(g)(1)(D). The gear restricted areas, if no longer necessary to manage bluefin incidental catch, may unnecessarily restrict the longline fleet in this regard. Therefore, this alternative is not preferred at this time.

Alternative A2 would modify the current Northeastern United States Closed Area to remove portions of the closure (*i.e.,* those areas west of 70° W longitude) that current analyses indicate: (1) Did not historically have high numbers of bluefin discards reported in the HMS logbook during the timeframe of data (1996–1997) originally analyzed for implementation of the closure in 1999, and (2) were adjacent to areas that recently (2015–2018) did not have bluefin interactions. Total average annual revenue for bluefin and target species in June of 2015 through 2018 was $178,847. The predicted range of total average annual revenue under this alternative would be $172,389. As mentioned above regarding Alternative A1, in the reference area, total average annual revenue for the 16 vessels for bluefin and target species in June of 2015 through 2018 was $$11,178 per vessel. The predicted total average annual revenue under Alternative A2 would be $10,774,528 per vessel). Under Alternative A2, revenue from most species is predicted to decrease during the month of June, particularly for swordfish. Revenue from bigeye tuna, on the other hand, could increase slightly. Some of the analyses in the DEIS predicted that, if fishing effort moved directly and proportionately from the now-open areas to the newly-opened areas, catch rates could be lower for most species, and revenue would also be lower. This analysis rests, however, on the presumption of direct movement of the same levels of effort from one area to the other. It does not account for a critical element of fishing behavior that is determinative of how and where effort changes would actually occur under this rule: Namely, fishermen selection of productive fishing grounds. In practical application, we expect that fishermen would make decisions about productive fishing grounds and move their effort responsively and accordingly, thus offsetting any impact that the change in area could otherwise produce. Fishermen will make decisions about productive fishing grounds in any given year depending on fish availability and will likely decide not to fish in the area being considered for opening if they discover it could lower their fishing revenue. Thus, fishing revenue impacts for this alternative are expected to be neutral. Given the low numbers of expected target catch in the area that could be opened under this alternative, this alternative would not provide access to the more productive areas of the modified Northeastern United States Closed Area. Also, this alternative does not provide an evaluative mechanism for the modified Northeastern United States Closed Area that would remain closed, available fishery data for this area is over 20 years old, and there are considerable differences in management strategies for the fishery. Therefore, NMFS is not preferring Alternative A2 at this time.

Alternative A3 considered converting the Northeastern United States Closed Area to the ''Northeastern United States Gear Restricted Area'', and allowing performance-based vessel access therein using the access criteria currently used for the Cape Hatteras Gear Restricted Area (currently codified at §§ 635.21(c)(3) and 635.14). Vessels would be evaluated against criteria (*i.e.,* performance metrics) evaluating a vessel's ability to avoid bluefin tuna, comply with Pelagic Observer Program requirements, and comply with HMS logbook submission requirements using the three most recent years of available data associated with a vessel. If no data are available, then NMFS would not be able to make a determination about vessel access, and such vessels would be excluded from gear restricted area access until NMFS has collected sufficient data for assessment (consistent with current procedures for the Cape Hatteras Gear Restricted Area). Those vessels that meet the criteria for performance metrics would be allowed to fish in the closed area. This measure would be evaluated after at least three years of data have been collected to determine whether it effectively achieves the management objectives of this rulemaking.

Total average annual revenue for bluefin and target species in June of 2015 through 2018 was $178,847, which is on average $11,178 per vessel for the

16 vessels fishing in that area. The predicted range of average annual revenue per vessel during this time period under this alternative would be $5,720 to $12,140. Revenue from some species is predicted to decrease during the month of June, particularly for swordfish and dolphin, because anticipated catch rates for some species in the Northeastern United States Gear Restricted Area were lower than those in the reference area. Revenue from yellowfin tuna, on the other hand, could increase substantially. Some of the analyses in the FEIS predicted that, if fishing effort moved directly and proportionately from the now-open areas to the newly-opened areas, catch rates could be lower for most species, and revenue would also be lower. This analysis rests, however, on the presumption of direct movement of the same levels of effort from one area to the other. It does not account for a critical element of fishing behavior that is determinative of how and where effort changes would actually occur under this rule: Namely, fishermen selection of productive fishing grounds. In practical application, we expect that fishermen would make decisions about productive fishing grounds and move their effort responsively and accordingly, thus offsetting any impact that the change in area could otherwise produce. Fishermen will make decisions about productive fishing grounds in any given year depending on fish availability and will likely decide not to fish in the Northeastern United States Closed Area if they qualify for access and discover it could lower their fishing revenue. Thus, fishing revenue impacts for this alternative are expected to be neutral. Implementing performance-based access would provide increased flexibility for fishermen to adapt to changing distributions and concentrations of bluefin and target catch. This alternative will also give fishermen the ability to make choices on where to fish to optimize target catch while minimizing bycatch. An unquantified short-term economic benefit of this alternative is a reduction in trip length and associated fuel cost. The Northeastern United States Gear Restricted Area would open areas for qualified pelagic longline vessels that are closer to shore than where most of the effort is currently occurring during the month of June in the adjacent open areas. The closure is approximately 320 miles wide from west to east, so allowing fishing in the area could reduce some trips by hundreds of miles. Less fuel consumption would lower the trip cost and increase the trip profit, which may influence fishermen's decisions on fishing in the Monitoring Area. In addition, shorter trip lengths could also reduce the opportunity costs for crew and captains on the vessel by reducing the number of days they are away at sea fishing.

In the short-term, overall economic impacts are expected to range between minor positive to neutral based on the increased flexibility in fishing areas, potentially shorter trips and associated lower fuel costs, and thus potentially increased profits from fishing.

This alternative does not present much difference in ecological or socioeconomic impacts from opening this area as a Monitoring Area (Alternative A4) or eliminating the Closed Area (Alternative A5). Depending on the access levels, this alternative may not meet the objectives of optimizing the ability of the pelagic longline fleet to harvest target species. For these reasons, NMFS does not prefer this alternative at this time.

Alternative A4, the preferred alternative, would convert the ''Northeastern United States Closed Area'' to a ''Northeastern United States Pelagic Longline Monitoring Area.'' This area has been closed to pelagic longline fishing during the month of June since 1999. This alternative would have a three-year evaluation period (January 1, 2020 through December 31, 2022) for the Monitoring Area, which would be managed as follows:

—The Monitoring Area would initially remain open to pelagic longline fishing from June 1 to June 30.
—There would be an annual 150,519 pound IBQ allocation threshold for landings and dead discards of bluefin caught within the Monitoring Area.
—If the threshold is reached, or is projected to be reached, NMFS would file a closure notice for the Monitoring Area with the Office of the Federal Register.
—On and after the effective date of the notice, the Monitoring Area would be closed to pelagic longline fishing each year from June 1 through June 30, unless NMFS takes further action.
—If no closure notice is filed between June 1, 2020 and December 31, 2022, the Monitoring Area would remain open, unless and until NMFS decides to take additional action regarding the area.

The 150,519 lb threshold is based on the average annual amount of unused Atlantic IBQ allocation that is available for use by the pelagic longline fleet from June 1 through December 31. Using unused allocation as the threshold helps to ensure that opening the area to fishing would not compromise adherence to the overall bluefin quota or the ability of fishery participants to obtain enough IBQ allocation to cover bluefin landings and dead discards for the rest of the year. It should be noted that the threshold does not mean that 150,519 lb of IBQ allocation can be used *only* in the Monitoring Area. IBQ allocation is still subject to the same regulations previously applicable. The threshold is for NMFS' monitoring and evaluation purposes for the Area only. After the 2020–2022 evaluation period, NMFS will evaluate data collected from the Monitoring Area and compile a report. Based on the findings of the report, NMFS may then decide to initiate a follow-up action to implement new, longer-term management measures for the area. As discussed in Chapters 2 and 4 of the FEIS, the status of the Monitoring Area following the three-year evaluation period is dependent on whether the threshold has been reached in any of those three years.

NMFS received comment suggesting that if the ICCAT western Atlantic bluefin quota, and thus the U.S. allocation of bluefin quota, were to be adjusted upwards by ICCAT, maintaining a threshold based on a designated poundage would make the threshold disproportionately small in relation to the new quota. NMFS agrees that using a percentage as well as a specific poundage for management of the monitoring areas may be appropriate. However, given the concerns expressed by the public about the uncertain ecological effects of pelagic longline fishing in the Spring Gulf of Mexico Gear Restricted Area and the Northeastern United States Closed Area, NMFS prefers to take a more conservative approach to managing these areas and only make adjustments based on a percentage if the U.S. allocation is adjusted downwards by ICCAT. The 150,519 lb threshold is equivalent to 72 percent of the Atlantic IBQ allocation issued to the fleet in 2018. If the ICCAT quota is adjusted downward, the threshold would also be adjusted downward, to reflect a percentage of overall IBQ allocation commensurate with the current threshold (*i.e.,* 72 percent of the new Atlantic IBQ allocation disbursed to the fleet, the equivalent percentage of the current threshold in relation to the overall available IBQ allocation).

This Monitoring Area will provide increased flexibility for fishermen to adapt to changing distributions and concentrations of bluefin and target catch. This alternative will also give fishermen the ability to make choices about where to fish to optimize target

catch while minimizing bycatch. An unquantified benefit of this alternative could be a reduction in trip length and associated fuel cost. The alternative would open areas for pelagic longline fishing that are closer to shore than where most of the effort is currently occurring during the month of June in the adjacent open areas. The short-term economic impacts would be very similar to those of Alternative A3. Long-term economic impacts would depend on the result of the three-year evaluation period for this Monitoring Area. If NMFS were to decide to take action so that these areas remain open after three years, long-term impacts would be expected to be the same as short-term impacts.

This alternative is consistent with the objectives of optimizing the ability of the pelagic longline fleet to harvest target species, because it provides a carefully controlled mechanism to allow fishermen back into areas that were previously closed. This alternative also helps with the uncertainty due to lack of data from within the closed area as to whether the area is still appropriately located or needed to meet bluefin management objectives. This alternative gives fishermen more flexibility to determine where to fish to optimize target catch in the region encompassing the Northeastern United States Closed Area. This alternative would also be expected to have neutral ecological impacts on bluefin, as it provides measures to minimize bluefin bycatch via the threshold and evaluative aspects of the program. It should allow the pelagic longline fishery vessels to continue fishing from January through May, within the same levels of IBQ allocation usage (2015–2018), and have a threshold level that provides both sufficient opportunities for fishermen to target swordfish, yellowfin tuna, bigeye tuna, as well as other pelagic species, and limits catch of bluefin while the Monitoring Area is effective. The individual accountability aspects of the IBQ Program would still be relied upon to incentivize bluefin avoidance, meaning that there is still a proven means to achieve the objectives of continuing to minimize bycatch and bycatch mortality of bluefin and other Atlantic HMS. In addition, this alternative simplifies and streamlines regulations in the Atlantic intended to reduce bluefin, and is therefore consistent with that corresponding objective for this rulemaking. For these reasons this alternative is preferred at this time. Alternative A5 would eliminate all current restrictions associated with the Northeastern United States Closed Area. Since this alternative would allow access to all vessels in the month of June by removing regulations related to the Northeastern United States Closed Area, the socioeconomic impacts would be the same as presented in the preferred alternative, Alternative A4. In the long-term, overall economic impacts are expected to range between minor positive to neutral based on the increased flexibility in fishing areas, potentially shorter trips and associated lower fuel costs, and thus potentially increased profits from fishing. Elimination of the Northeastern United States Closed Area is anticipated to have similar impacts as the evaluative option (Alternative A4), and the modification of the Northeastern United States Closed Area (Alternative A3). However, NMFS is not preferring this alternative at this time, given uncertainty with the catch estimates in the analysis and inability to quickly restrict fishing if bycatch impacts to the bluefin or other species are beyond acceptable levels. This alternative also does not provide an automatic mechanism for NMFS to initiate the review of the impacts of opening the area. This alternative does not align with the objective of adequately conserving and managing the bluefin stock and minimizing bycatch and bycatch mortality of bluefin and other Atlantic HMS with the lack of NMFS ability to quickly restrict fishing if bycatch levels of any Atlantic HMS are beyond acceptable levels. This alternative is not preferred at this time.

Cape Hatteras Gear Restricted Area

Alternative B1, the No Action alternative, would maintain the current boundaries and restrictions associated with the Cape Hatteras Gear Restricted Area. Access to the area would be based on an evaluation of performance metrics. Since implementation of the program, the majority of the pelagic longline fleet has been granted access to the gear restricted area. However, the number of permit holders with data available for analysis has declined, coincident with an increase in the number of permits in ''NOVESID'' status (*i.e.,* permits are renewed but not associated with a vessel). In the first year of the program, 136 vessels (~48 percent of the 281 pelagic longline permits) were determined to have sufficient data for the analysis, while 145 permits were either in NOVESID status, were inactive during the initial analysis period, or were in an invalid status. Approximately 75 percent of active vessels were granted access to the gear restricted area. During the 2019–2020 effective period, 89 vessels (~31.7 percent) had data available for analysis. Of these, 79 percent of active vessels met criteria for access to the gear restricted area in the 2019–2020 effective period.

Since implementation of the IBQ Program in 2015, revenue in the Cape Hatteras Gear Restricted Area for highly valued target species has increased. Although still higher than the revenue estimated for sets deployed within the Cape Hatteras Gear Restricted Area during the first two years of the program, estimated set revenue decreased by 23 percent between 2017 and 2018. These patterns likely reflect fishermen adjusting business practices to the gear restricted area and IBQ Program, and annual variability in effort, landings, and market forces. During the gear restricted area's December through April effective period, from 2015 through 2018, sets made within this gear restricted area contributed approximately 8.9 percent of the revenue generated for swordfish, 4.3 percent of the revenue from yellowfin tuna, 28.5 percent of the revenue from bigeye tuna, and 21.2 percent of the revenue from bluefin.

Retaining this gear restricted area is likely to have neutral economic impacts fleet-wide, as the majority of vessels qualified for access, and those not qualified for access to the gear restricted area did not make sets within this area either prior to implementation or after implementation when access was granted. Retaining the gear restricted area may have temporary, minor adverse economic impacts to individual vessels that either recently made sets in the gear restricted area or may be denied access in the future.

Retaining a gear restricted area with performance-based access to limit bluefin interactions (which no longer restricts many active fleet participants) while at the same time requiring fishery participants to individually account for their incidental bluefin catch with IBQ allocation, is unnecessarily restrictive of pelagic longline fishery effort, particularly where overall limits on quota are established through scientifically supported quotas and subsequently enforced and monitored through a careful management regime that further divides and manages that quota at several stages, including limits on the amount of IBQ allocation available. Given this, NMFS determined that this alternative is not aligned with the objective to simplify and streamline HMS management. Because it does not meet all the objectives of the rulemaking, NMFS is not preferring the No Action alternative at this time.

Alternative B2 would remove the current gear restricted area off Cape Hatteras, North Carolina, as currently defined in § 635.2 and all associated regulatory provisions, restrictions, and prohibitions. Removing the gear restricted area is likely to have neutral to minor and beneficial economic impacts, depending on the scale of consideration. Fleet-wide effects on fishing revenue for this time period are anticipated to be neutral as the majority of the fleet had met access criteria to the area and continued to fish in it following implementation of Amendment 7 management measures. Vessels that recently did not meet criteria for access (*e.g.,* for the 2019–2020 effective period) to the gear restricted area fished in a variety of locations between 2016 and 2018. Many of these vessels did not make sets within this area either prior to implementation or after implementation when they did meet the criteria for access to the gear restricted area. Revenue for these vessels may therefore be based on factors other than access to the gear restricted area. Removing the gear restricted area may have temporary, localized and minor beneficial economic impacts to a small number of individual vessels. Removing this restriction would remove regulations that are perceived by fishery participants to be a regulatory burden and no longer necessary in tandem with the IBQ Program. It may also reduce year-to-year uncertainty associated with access decisions for fishermen that do fish in the Cape Hatteras region. These fishermen may also have more options regarding fishing locations. The gear restricted area is situated in a location where wintertime fishing activities are largely dependent on weather and wind direction. Cape Hatteras and adjacent Diamond Shoals shelter fishing grounds to the south and west from northerly and westerly winds, and to the north from southerly and westerly winds. Removing the closures could enable greater flexibility for fishermen to safely conduct fishing activities in short, favorable wintertime weather windows. Removing the Cape Hatteras Gear Restricted Area balances the objectives to optimize ability to harvest target species with continuing to minimize bycatch and bycatch mortality. It also simplifies and streamlines HMS management by reducing redundant regulations. For these reasons, this alternative is preferred at this time.

Spring Gulf of Mexico Gear Restricted Area

Alternative C1, the No Action alternative, would maintain the current regulations regarding the Spring Gulf of Mexico Gear Restricted Area (comprised of two areas). NMFS would maintain current restrictions which prohibit fishing to all vessels with pelagic longline gear onboard from April 1 through May 31 each year (vessels may transit the area if gear is properly stowed). Outside of the gear restricted area, average annual revenue for bluefin tuna and target species from April-May in 2015 through 2018 was $677,007. There were 34 pelagic longline vessels active in the Gulf of Mexico during that time period, thus each vessel generated an average of $19,912 annually between April-May. This alternative would maintain the recent landings levels and resulting revenues, resulting in neutral direct economic impacts. Although the No Action alternative could meet the objective of continuing to minimize bycatch and bycatch mortality of bluefin, it does not meet the objectives of optimizing the ability of the pelagic longline fleet to harvest target species quotas or streamlining and simplifying HMS management by reducing regulations that may be redundant in effect and pose an unnecessary regulatory burden on fishery participants. For these reasons, NMFS does not prefer this alternative at this time.

Alternative C2 would apply performance-based access to the Spring Gulf of Mexico Gear Restricted Area. Vessels would be evaluated against criteria (*i.e.,* performance metrics) evaluating their ability to avoid bluefin tuna, comply with Pelagic Observer Program requirements, and comply with HMS logbook submission requirements using the three most recent years of available data associated with a vessel. If no data are available, then NMFS would not be able to make a determination about vessel access, and such vessels would be excluded from gear restricted area access until NMFS has collected sufficient data for assessment (consistent with current operational Amendment 7 implementation procedures). Those vessels that meet the criteria for performance metrics would be allowed to fish in the closed area. This measure would be evaluated after at least three years of data have been collected to determine whether it effectively achieves the management objectives of this rulemaking. In the analyses of gear restricted area access for 2015 through 2019, up to 3 pelagic longline vessels associated with Gulf of Mexico IBQ shares have been excluded from the Cape Hatteras Gear Restricted Area in any given year, out of a total of 52 vessels associated with Gulf of Mexico IBQ shares. Those same vessels would also be excluded from the Spring Gulf of Mexico Gear Restricted Area under this alternative. Therefore, given these past access determinations, at least 94 percent of vessels with Gulf of Mexico IBQ allocation would be expected to have access to the Spring Gulf of Mexico Gear Restricted Area under this alternative. As noted under Alternative C1, average annual revenue per vessel for bluefin tuna and target species in April-May of 2015 through 2018 was $19,912. The predicted range of average annual revenue per vessel under this alternative would be $15,828 to $20,234. Revenue from some species is predicted to decrease during these two months, particularly for swordfish, because anticipated catch rates for some species in the Spring Gulf of Mexico Gear Restricted Area with performance access were lower than those in the open portions of the Gulf of Mexico. Revenue from bigeye tuna, on the other hand, is predicted to remain the same or increase. Some of the analyses in the DEIS predicted that, if fishing effort moved directly and proportionately from the now-open areas to the newly-opened areas, catch rates could be lower for most species, and revenue would also be lower. This analysis rests, however, on the presumption of direct movement of the same levels of effort from one area to the other. It does not account for a critical element of fishing behavior that is determinative of how and where effort changes would actually occur under this rule: Namely, fishermen selection of productive fishing grounds. In practical application, we expect that fishermen would make decisions about productive fishing grounds and move their effort responsively and accordingly, thus offsetting any impact that the change in area could otherwise produce. Fishermen will make decisions about productive fishing grounds in any given year depending on fish availability. Access to the gear restricted areas will provide increased flexibility for fishermen to adapt to changing distributions and concentrations of bluefin tuna and target catch. This alternative will also give fishermen the ability to make choices on where to fish to optimize target catch while minimizing bycatch. Thus, fishing revenue impacts for this alternative are expected to be neutral.

Long-term impacts on these species would depend on future trends in performance-based access to the Spring Gulf of Mexico Gear Restricted Area. If the number of vessels allowed access to

these areas remains consistent over time, long-term impacts would be expected to be the same as short-term impacts. As described above, this analysis assumes that all vessels with Gulf of Mexico IBQ shares would have access to the gear restricted areas. There could be a slight decrease in revenues within the gear restricted areas from the values described here, with a corresponding increase in revenues in the open area, due to vessels excluded from the areas, but the predicted ranges of catch still represent the best estimate for these areas.

Since the majority of vessels fishing in the Gulf of Mexico would be expected to have access to the Spring Gulf of Mexico Gear Restricted Area under this alternative, any benefit to applying performance-based access would likely be minimal. This alternative does not present much difference in ecological or socioeconomic impacts from opening these areas as Monitoring Areas (Alternative C3) or eliminating the Spring Gulf of Mexico Gear Restricted Area (Alternative C4). In order to meet the objective of optimizing the ability of the fleet to harvest target species, this alternative would add additional, somewhat complicated regulations to the area instead of streamlining and simplifying regulations. Therefore, this alternative is not strongly aligned with the objective to streamline and simplify HMS regulations. For these reasons, NMFS does not prefer this alternative at this time.

Alternative C3, the preferred alternative, would convert the ''Spring Gulf of Mexico Gear Restricted Area'' to a ''Spring Gulf of Mexico Pelagic Longline Monitoring Area'' (which will continue to be comprised of two areas) (''Monitoring Area''). This area has been closed to pelagic longline fishing during the months of April and May since 2015. This alternative would have a three-year evaluation period (January 1, 2010 through December 31, 2022) for the Monitoring Area, which would be managed as follows:

—The Monitoring Area would initially remain open to pelagic longline fishing from April 1 through May 31.
—There would be an annual 63,150 pound IBQ allocation threshold for landings and dead discards of bluefin caught within the Monitoring Area.
—If the threshold is reached, or is projected to be reached, NMFS would file a closure notice for the Monitoring Area with the Office of the Federal Register.
—On or after the effective date of the notice, the Monitoring Area would be closed to pelagic longline fishing each year from April 1 through May 31, unless NMFS takes further action.
—If no closure notice is filed between April 1, 2020 through December 31, 2022, the Monitoring Area would remain open, unless and until NMFS decides to take additional action regarding the area.

The area would be closely monitored by NMFS under a process that would prohibit fishing if the fleet were to use Gulf of Mexico IBQ allocation in exceedance of an established annual threshold to account for bluefin landings or dead discards caught within the boundaries of the Monitoring Area. The 63,150 lb threshold is based on the amount of IBQ annual allocation distributed to vessels that fished in the region while the closures were effective between 2015 and 2017. NMFS decided that this was an appropriate threshold because it will accommodate data collection in the area while keeping landings and dead discards in the fishery within the science based Longline category sub-quota. This threshold would limit the amount of IBQ allocation that could be used to account for bluefin landings and dead discards in the monitoring area to the amount of IBQ allocation that could be used by the portion of the fleet that was recently (2015 through 2017) active during these months in the Gulf of Mexico. The intent of this threshold design is to discourage a level of fishing beyond what has recently occurred in the Gulf of Mexico. Basing the threshold for closure on the annual allocation of active vessels from 2015 to 2017 would allow pelagic longline vessels to continue fishing in the same manner as they have in the past three years, and have a threshold level that provides sufficient opportunities for fishermen to target swordfish and yellowfin and bigeye tunas while the Monitoring Area are effective. It should be noted that the threshold does not mean that 63,150 lb of Gulf of Mexico IBQ allocation can be used only in the Monitoring Area. IBQ allocation is still subject to the same regulations previously applicable. The threshold is for NMFS' monitoring and evaluation purposes of the Monitoring Area only. The 63,150 lb threshold is approximately 55 percent of the adjusted total Gulf of Mexico IBQ allocation currently distributed to the fleet. In the event that the western Atlantic bluefin quota later is reduced at ICCAT and the U.S. allocation of bluefin quota is adjusted downward as a result, the threshold would also be adjusted. Such adjustment would make the threshold 55 percent of the total Gulf of Mexico IBQ allocation disbursed to the fleet as a result of the lower U.S allocation. After the 2020–2022 evaluation period, NMFS will evaluate data collected from the Monitoring Area and compile a report. Based on the findings of the report, NMFS may then decide to initiate a follow-up action to implement new, longer-term management measures for the area.

As noted under Alternative C1, average annual revenue per vessel for bluefin and target species in April-May of 2015 through 2018 was $19,912. The predicted range of average annual revenue per vessel under this alternative would be $15,828 to $20,234. Revenue from some species is predicted to decrease during these two months, particularly for swordfish, because anticipated catch rates for some species in the Spring Gulf of Mexico Pelagic Longline Monitoring Area were lower than those in the open portions of the Gulf of Mexico. Revenue from bigeye tuna, on the other hand, is predicted to remain the same or increase. Some of the analyses in the DEIS predicted that, if fishing effort moved directly and proportionately from the now-open areas to the newly-opened areas, catch rates could be lower for most species, and revenue would also be lower. This analysis rests, however, on the presumption of direct movement of the same levels of effort from one area to the other. It does not account for a critical element of fishing behavior that is determinative of how and where effort changes would actually occur under this rule: Namely, fishermen selection of productive fishing grounds. In practical application, we expect that fishermen would make decisions about productive fishing grounds and move their effort responsively and accordingly, thus offsetting any impact that the change in area could otherwise produce. Fishermen will make decisions about productive fishing grounds in any given year depending on fish availability and will likely decide not to fish in the Spring Gulf of Mexico Pelagic Longline Monitoring Area if they discover it could lower their fishing revenue. The Monitoring Area will provide increased flexibility for fishermen to adapt to changing distributions and concentrations of bluefin and target catch. This alternative will also give fishermen the ability to make choices on where to fish to optimize target catch while minimizing bycatch. Thus, fishing revenue impacts for this alternative are expected to be neutral.

Long-term economic impacts would depend on the result of the three-year evaluation period for this Monitoring Area. If NMFS decides to take action to

keep these areas open after three years, long-term impacts would be expected to be the same as short-term impacts.

This alternative would give fishermen the flexibility to determine where in the Gulf of Mexico they choose to fish to optimize target catch. The individual accountability aspects of the IBQ Program would still be relied upon to incentivize bluefin avoidance, meaning that there is still a proven means to achieve the objectives of continuing to minimize bycatch and bycatch mortality of bluefin and other Atlantic HMS. In addition, this alternative simplifies and streamlines regulations in the Gulf of Mexico intended to reduce bluefin, and is therefore consistent with that corresponding objective for this rulemaking. For these reasons, NMFS prefers this alternative at this time.

Alternative C4 would remove the Spring Gulf of Mexico Gear Restricted Area. Since this alternative would allow access to all vessels by removing regulations related to the Spring Gulf of Mexico Gear Restricted Area, the short-term socioeconomic impacts would be the same as presented in the preferred Alternative C3. As noted under Alternative C1, average annual revenue per vessel for bluefin and target species in April-May of 2015 through 2017 was $19,912. The predicted range of average annual revenue per vessel under this alternative would be $15,828 to $20,234. Revenue from some species is predicted to decrease during these two months, particularly for swordfish, because anticipated catch rates for some species in the Spring Gulf of Mexico Gear Restricted Area were lower than those in the open portions of the Gulf of Mexico. Revenue from bigeye tuna, on the other hand, is predicted to remain the same or increase. Overall economic impacts for this alternative are expected to be neutral in the short-term, despite the predicted decrease in overall revenue. Fishermen will make decisions about where to fish in any given year depending on fish availability. This alternative will also give fishermen the ability to make choices on where to fish to optimize target catch while minimizing bycatch. Long-term economic impacts would be expected to be the same as short-term impacts. Although this alternative gives fishermen the most flexibility to determine where in the Gulf of Mexico they choose to fish to optimize target catch and minimize bycatch under the IBQ Program, and although this alternative would be expected to have neutral ecological impacts on bluefin, this alternative does not have the agency control provided by performance access in Alternative C2 or by the monitoring aspects of the evaluation process in Alternative C3, resulting in more uncertainty in the long-term. For these reasons, NMFS does not prefer this alternative at this time.

Weak Hooks

Under Alternative D1, NMFS would maintain the current regulations at 50 CFR 635.21(c)(5)(iii)(B)(*2*)(*i*) requiring vessels fishing in the Gulf of Mexico, that have pelagic longline gear on board, and that have been issued, or are required to have been issued, a swordfish, shark, or Atlantic Tunas Longline category LAP for use in the Atlantic Ocean, including the Caribbean Sea and the Gulf of Mexico, to use weak hooks year-round when operating in the Gulf of Mexico. Because this alternative does not change current regulations, economic impacts on small entities would be neutral. However, this alternative would not address the higher bycatch of other species, such as white marlin, that occurs in the second half of the year on weak hooks. It also would not address comments NMFS has received from pelagic longline fishermen expressing concern about their perception that swordfish catches have been reduced with weak hooks. Under this alternative, fishermen would not have any additional flexibility to choose a stronger circle hook (that also meets other existing requirements for hook size and type) that they feel may work better for their fishing operations. Weak hook research conducted by NMFS from 2008–2012 indicated that there was no significant difference in the catch rates of any targeted species when compared to previously allowed stronger circle hooks, even though the catch rates of legally sized swordfish did in fact decrease with weak hooks. This alternative is not consistent with the objective of continuing to minimize bycatch of all Atlantic HMS; because this alternative would not mitigate the adverse impacts to white marlin and roundscale spearfish when they are present in the Gulf of Mexico. NMFS does not prefer Alternative D1 at this time.

Alternative D2, the preferred alternative, would modify the regulations described under Alternative D1 to only require use weak hooks from January through June. This time period is when spawning bluefin are highest in abundance in the Gulf of Mexico, and it includes the April through June bluefin tuna spawning season. Fishermen may voluntarily choose to continue to use weak hooks when they are not required. This alternative would likely result in short- and long-term minor beneficial economic impacts since it would give fishermen more flexibility in choosing how to fish. During the months without the weak hook requirement, fishermen could choose whether to use the gear based on their knowledge of bluefin tuna presence and distribution. Furthermore, weak hooks can help fishermen manage their IBQ allocation by reducing the number of captured bluefin tuna that would be counted against their IBQ allocation. NMFS prefers this alternative at this time because it increases fishermen's flexibility and helps fishermen manage their IBQ allocation by reducing the number of captured bluefin tuna that would be counted against their IBQ allocation. There may be potential economic benefits for recreational fishermen that fish for white marlin or roundscale spearfish as a result of the anticipated decrease in commercial bycatch rates and associated fishing mortality and potential improvements to stock health and status. This alternative is expected to strike the best balance between the objectives of continuing to minimize, to the extent practicable, bycatch and bycatch mortality of bluefin and optimize the ability for the pelagic longline fishery to harvest target species quotas. This alternative provides increased flexibility with respect to hook requirements in the second half of the year (provided basic circle hook requirements are still met). This alternative also balances the objective of reducing potentially redundant regulations against continuing to minimize bluefin mortality by removing weak hook requirements in the second half of the year when weak hooks are not expected provide an ecological benefit in relation to spawning bluefin. For these reasons, NMFS is preferring this alternative at this time.

Under Alternative D3, NMFS would remove the weak hook regulations described under Alternative D1. NMFS would continue to encourage voluntary use of weak hooks in the Gulf of Mexico as a conservation strategy for bluefin tuna. This alternative would likely result in short- and long-term neutral economic impacts since it would give fishermen more flexibility in choosing how to fish. In the absence of a weak hook requirement, fishermen could choose whether to use the gear based on their knowledge of bluefin tuna presence and distribution. Weak hooks may have, in some cases, assisted fishermen in reducing use of IBQ allocation because large bluefin were able to free themselves from gear before coming to the boat, and therefore never needed to be counted against a vessel's IBQ allocation. Some fishermen may

still find their use beneficial in conserving their IBQ allocation, and would still have the option to deploy weak hooks under this alternative. For example, pelagic longline fishermen that plan to fish in areas with high rates of bluefin tuna interactions may wish to deploy weak hooks to reduce interactions and conserve their IBQ allocation. There could be some risk that not requiring weak hooks from January through June could result in an increased risk for high bluefin tuna interactions for pelagic longline vessels that fish during those months but decide not to use weak hooks, and therefore, those vessels could face a higher risk in depleting their IBQ allocation for the year. Under Alternative D3, NMFS would encourage the voluntary use of weak hooks and leave the decision up to individual fishermen based on their experience and on-the-water knowledge. Any potentially risky fishing practices leading to elevated interactions with Gulf of Mexico bluefin tuna would still be dis-incentivized under the IBQ Program. There may be potential economic benefits for recreational fishermen that fish for white marlin or roundscale spearfish as a result of the anticipated decrease in commercial bycatch rates and associated fishing mortality and potential improvements to stock health and status. Removing the weak hook requirement entirely does not align as closely as other alternatives with the objective to continue to minimize, to the extent practicable, bycatch and bycatch mortality of bluefin especially if fishermen do not elect to use weak hooks during spawning season when the risk of encountering spawning bluefin is higher. Although the current IBQ Program likely provides adequate protection for the bluefin stock in the Gulf of Mexico by limiting fishing mortality in the absence of weak hooks (as described in Chapter 1 and in the Three-Year Review of the IBQ Program), the required use of weak hooks may help fishermen manage their IBQ allocation by reducing each fisherman's catch of bluefin. The IBQ Program likely provides sufficient biological protection but weak hooks may provide socioeconomic benefits for fishermen by extending their IBQ allocation, allowing them to fish for a longer period each year. Additionally, during scoping NMFS received more support for retaining a seasonal weak hook requirement (Alternative D2) than removing weak hooks (this alternative) from multiple constituent groups including recreational fishermen, environmental non-government organizations, and commercial (pelagic longline and directed categories) fishermen. Overall, Alternative D2 is considered as the alternative that would achieve a better balance between ecological needs of the resource and socioeconomic needs of the fishery over Alternative D3. Therefore, Alternative D3 is not preferred at this time.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, NMFS has prepared a listserv notice summarizing fishery information and regulations for the pelagic longline fishery. This listserv notice also serves as the small entity compliance guide. Copies of the compliance guide are available from NMFS (see **ADDRESSES**).

List of Subjects in 50 CFR Part 635

Fisheries, Fishing, Fishing vessels, Gear Restricted Areas, Performance metrics, Individual Bluefin Quota, Penalties, Fishing gear, Closed Areas.

Dated: March 30, 2020.

Samuel D. Rauch III,

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

For the reasons set out in the preamble, 50 CFR part 635 is amended as follows:

PART 635—ATLANTIC HIGHLY MIGRATORY SPECIES

■ 1. The authority citation for part 635 continues to read as follows:

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

■ 2. Amend § 635.2 as follows:

■ a. Remove the definitions of ''Cape Hatteras gear restricted area'' and ''Northeastern United States closed area'';

■ b. Add in alphabetical order a definition for ''Northeastern United States Pelagic Longline Monitoring Area''; and

■ c. Remove the definition of ''Spring Gulf of Mexico gear restricted area'' remove the words ''Spring Gulf of Mexico gear restricted area''; and

■ d. Add in alphabetical order a definition for ''Spring Gulf of Mexico Pelagic Longline Monitoring Area''.

The additions read as follows:

§ 635.2 Definitions.

* * * * *

Northeastern United States Pelagic Longline Monitoring Area means the area bounded by straight lines connecting the following coordinates in the order stated: 40°00′ N lat., 74°00′ W long.; 40°00′ N lat., 68°00′ W long.; 39°00′ N lat., 68°00′ W long.; and 39°00′ N lat., 74°00′ W long.

* * * * *

Spring Gulf of Mexico Pelagic Longline Monitoring Area means two areas within the Gulf of Mexico described here. The first area is bounded by straight lines connecting the following coordinates in the order stated: 26°30′ N lat., 94°40′ W long.; 27°30′ N lat., 94°40′ W long.; 27°30′ N lat., 89° W long.; 26°30′ N lat., 89° W long.; 26°30′ N lat., 94°40′ W long. The second area is bounded by straight lines connecting the following coordinates in the order stated: 27°40′ N lat., 88° W long.; 28° N lat., 88° W long.; 28° N lat., 86° W long.; 27°40′ N lat., 86° W long.; 27°40′ N lat., 88° W long.

* * * * *

§ 635.14 [Removed and Reserved]

■ 3. Remove and reserve § 635.14.

■ 4. In § 635.15, revise paragraph (c)(3)(ii) to read as follows:

§ 635.15 Individual bluefin tuna quotas.

* * * * *

(c) * * *

(3) * * *

(ii) *History of leased IBQ allocation use.* The fishing history associated with the catch of bluefin tuna will be associated with the vessel that caught the bluefin tuna, regardless of how the vessel acquired the IBQ allocation (*e.g.,* through initial allocation or lease), for the purpose of any relevant restrictions based upon bluefin tuna catch.

* * * * *

■ 5. In § 635.21:

■ a. Revise paragraphs (b)(2), (c)(1)(i), (c)(2) introductory text, and (c)(2)(i) through (iii);

■ b. Remove paragraphs (c)(2)(iv) through (vi) and redesignate paragraph (c)(2)(vii) as paragraph (c)(2)(iv);

■ c. In newly redesignated paragraph (c)(2)(iv)(D), remove ''(c)(2)(vii)(E)'' and add in its place ''(c)(2)(iv)(E)'' in its place;

■ d. In newly redesignated paragraph (c)(2)(vii)(E), remove ''(c)(2)(vii)(D)'' and (c)(2)(vii)(C)'' and add ''(c)(2)(iv)(D)'' and ''(c)(2)(iv)(C) in their places, respectively;

■ e. In newly redesignated paragraph (c)(2)(vii)(F), remove ''(c)(2)(vii)(D)'' in four places and remove ''(c)(2)(vii)(C)''

and add ''(c)(2)(iv)(D)'' and ''(c)(2)(iv)(C) in their places, respectively;

■ f. In newly redesignated paragraph (c)(2)(vii)(g), remove ''(c)(2)(vii)(D)'' in four places and remove ''(c)(2)(vii)(C)'' in two places and add ''(c)(2)(iv)(D)'' and ''(c)(2)(iv)(C) in their places, respectively;

■ g. Revise paragraph (c)(3);

■ h. In paragraph (c)(5)(ii)(C)(1), remove ''(c)(2)(vii)(D)'' and add ''(c)(2)(iv)(D)'' in its place;

■ i. Revise paragraph (c)(5)(iii)(B); and

■ j. Add paragraph (c)(5)(iii)(C).

The revisions and additions read as follows:

§ 635.21 Gear operation and deployment restrictions.

* * * * *

(b) * * *

(2) Transiting and gear stowage: If a vessel issued or required to be issued a LAP under this part has pelagic or bottom longline gear onboard and is in a closed or gear restricted area as designated in paragraph (c)(2) of this section or a monitoring area designated in paragraph (c)(3) of this section that has been closed, it is a rebuttable presumption that any fish on board such a vessel were taken with pelagic or bottom longline gear in the area except where such possession is aboard a vessel transiting such an area with all fishing gear stowed appropriately. Longline gear is stowed appropriately if all gangions and hooks are disconnected from the mainline and are stowed on or below deck, hooks are not baited, and all buoys and weights are disconnected from the mainline and drum (buoys may remain on deck).

* * * * *

(c) * * *

(1) * * *

(i) Has bottom longline gear on board and is in a closed or gear restricted area designated under paragraph (c)(2) of this section or is in a monitoring area designated under paragraph (c)(3) of this section that has been closed, the vessel may not, at any time, possess or land any pelagic species listed in table 2 of appendix A to this part in excess of 5 percent, by weight, of the total weight of pelagic and demersal species possessed or landed, that are listed in tables 2 and 3 of appendix A to this part.

* * * * *

(2) If pelagic longline gear is on board a vessel issued or required to be issued a LAP under this part, persons aboard that vessel may not fish or deploy any type of fishing gear:

(i) In the Charleston Bump closed area from February 1 through April 30 each calendar year;

(ii) In the East Florida Coast closed area at any time;

(iii) In the Desoto Canyon closed area at any time;

* * * * *

(3) From April 2, 2020 to December 31, 2022, a vessel issued or required to be issued a LAP under this part may fish with pelagic longline gear in the Northeastern United States Pelagic Longline Monitoring Area during the month of June or in the Spring Gulf of Mexico Pelagic Longline Monitoring Area during the months of April and May until the annual IBQ allocation threshold for the monitoring area has been reached or is projected to be reached. The annual IBQ allocation threshold is 150,519 lb for the Northeastern United States Pelagic Longline Monitoring Area, and 63,150 lb for the Spring Gulf of Mexico Pelagic Longline Monitoring Area. If between April 2, 2020 and December 31, 2022, the U.S. allocation of ICCAT bluefin tuna quota codified at § 635.27(a) is reduced, and the BFT Longline category quota established at § 635.26 (a)(3) is subsequently reduced, the annual IBQ allocation thresholds for each monitoring area will be modified as follows: The Gulf of Mexico threshold will be 55 percent of the Gulf of Mexico regional designation as defined at § 635.15 (b)(2) and 72 percent of the Atlantic regional designation as defined at § 635.15 (b)(2). When the relevant threshold is reached, or is projected to be reached, NMFS will file for publication with the Office of the Federal Register a closure for that monitoring area, which will be effective no fewer than five days from date of filing. From the effective date and time of the closure forward, vessels issued or required to be issued a LAP under this part and that have pelagic longline gear on board are prohibited from deploying pelagic longline gear within the boundaries of the relevant monitoring area during the months specified for that area in this paragraph above. After December 31, 2022, if no closure of a particular monitoring area has been implemented under the provisions of this paragraph, vessels with pelagic longline gear on board may continue to deploy pelagic longline gear in that area; if a closure has been issued for a particular monitoring area under the provisions of this paragraph, vessels with pelagic longline gear on board will continue to be prohibited from deploying pelagic longline gear in that area.

* * * * *

(5) * * *

(iii) * * *

(B) *Bait.* Vessels fishing outside of the Northeast Distant gear restricted area, as defined at § 635.2, that have pelagic longline gear on board, and that have been issued or are required to be issued a LAP under this part, are limited, at all times, to possessing on board and/or using only whole finfish and/or squid bait except that if green-stick gear is also on board, artificial bait may be possessed, but may be used only with green-stick gear.

(C) *Hook size and type.* Vessels fishing outside of the Northeast Distant gear restricted area, as defined at § 635.2, that have pelagic longline gear on board, and that have been issued or are required to be issued a LAP under this part are limited, at all times, to possessing on board and/or using only 16/0 or larger non-offset circle hooks or 18/0 or larger circle hooks with an offset not to exceed 10°. These hooks must meet the criteria listed in paragraphs (c)(5)(iii)(C)(*1*) through (*3*) of this section. A limited exception for the possession and use of J hooks when green-stick gear is on board is described in paragraph (c)(5)(iii)(C)(*4*) of this section.

(*1*) For the 18/0 or larger circle hooks with an offset not to exceed 10°, the outer diameter of an 18/0 circle hook at its widest point must be no smaller than 2.16 inches (55 mm), when measured with the eye of the hook on the vertical axis (y-axis) and perpendicular to the horizontal axis (x-axis). The distance between the hook point and the shank (*i.e.,* the gap) on an 18/0 circle hook must be no larger than 1.13 inches (28.8 mm). The allowable offset is measured from the barbed end of the hook, and is relative to the parallel plane of the eyed-end, or shank, of the hook when laid on its side. The only allowable offset circle hooks are those that are offset by the hook manufacturer.

(*2*) For the 16/0 or larger non-offset circle hooks, the outer diameter of a 16/0 circle hook at its widest point must be no smaller than 1.74 inches (44.3 mm), when measured with the eye of the hook on the vertical axis (y-axis) and perpendicular to the horizontal axis (x-axis). The distance between the hook point and the shank (*i.e.,* the gap) on a 16/0 circle hook must be no larger than 1.01 inches (25.8 mm).

(*3*) Between the months of January through June of any given calendar year in the Gulf of Mexico, all circle hooks must also be constructed of corrodible round wire stock that is no larger than 3.65 mm in diameter. For the purposes of this section, the Gulf of Mexico includes all waters of the U.S. EEZ west and north of the boundary stipulated at 50 CFR 600.105(c).

(*4*) If green-stick gear, as defined at § 635.2, is also on board, a vessel that has pelagic longline gear on board, may possess up to 20 J-hooks. J-hooks may be used only with green-stick gear, and no more than 10 hooks may be used at one time with each green-stick gear. J-hooks used with green-stick gear may be no smaller than 1.5 inch (38.1 mm) when measured in a straight line over the longest distance from the eye to any other part of the hook.

* * * * *

■ 6. In § 635.71, revise paragraphs (a)(31), (54), (57) and (58), and (b)(36) through (40) to read as follows:

§ 635.71 Prohibitions.

* * * * *

(a) * * *

(31) Deploy or fish with any fishing gear from a vessel with a pelagic longline on board in any closed or gear restricted areas during the time periods specified at § 635.21(c)(2).

* * * * *

(54) Possess, use, or deploy, in the Gulf of Mexico, with pelagic longline gear on board, any circle hook that is constructed of round wire stock that is larger than 3.65 mm in diameter during the months of January through June of any calendar year as specified in § 635.21(c)(5)(iii).

* * * * *

(57) Fail to appropriately stow longline gear when transiting a closed or gear restricted area or a monitoring area that has been closed, as specified in § 635.21(b)(2).

(58) Deploy or fish with any fishing gear from a vessel with a pelagic longline gear on board in a monitoring area that has been closed as specified at § 635.21(c)(3).

* * * * *

(b) * * *

(36) Possess J-hooks onboard a vessel that has pelagic longline gear on board, and that has been issued or required to be issued a LAP under this part, except when green-stick gear is on board, as specified at § 635.21(c)(2)(v)(A) and (c)(5)(iii)(C).

(37) Use or deploy J-hooks with pelagic longline gear from a vessel that has been issued, or required to be issued a LAP under this part, as specified in § 635.21(c)(5)(iii)(C).

(38) As specified in § 635.21(c)(5)(iii)(C), possess more than 20 J-hooks on board a vessel that has been issued or required to be issued a LAP under this part, when possessing onboard both pelagic longline gear and green-stick gear as defined in § 635.2.

(39) Use or deploy more than 10 hooks at one time on any individual green-stick gear, as specified in § 635.21(c)(2)(v)(A), (c)(5)(iii)(C), or (j).

(40) Possess, use, or deploy J-hooks smaller than 1.5 inch (38.1 mm), when measured in a straight line over the longest distance from the eye to any part of the hook, when fishing with or possessing green-stick gear on board a vessel that has been issued or required to be issued a LAP under this part, as specified at § 635.21(c)(2)(v)(A) or (c)(5)(iii)(C).

* * * * *

[FR Doc. 2020–06925 Filed 3–30–20; 4:15 pm]

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FEDERAL REGISTER

Vol. 85 Thursday,

No. 64 April 2, 2020

Part VII

The President

Proclamation 10000—National Doctors Day, 2020

Memorandum of March 30, 2020—Extending the Wind-Down Period for Deferred Enforced Departure for Liberians

Federal Register
Vol. 85, No. 64
Thursday, April 2, 2020

Presidential Documents

Title 3—

The President

Proclamation 10000 of March 30, 2020

National Doctors Day, 2020

By the President of the United States of America

A Proclamation

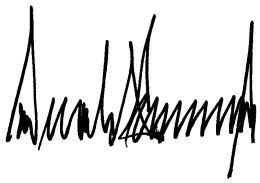
Our Nation is tremendously grateful for all Americans who have chosen the noble profession of healing and caring for others. This is especially true as our extraordinary doctors and other talented medical professionals have collectively risen to the challenge of combating the coronavirus pandemic in communities large and small across the United States. This year in particular, on National Doctors Day, we recognize the remarkable men and women who treat their fellow Americans, find cures for the diseases and illnesses we face, and never waver in their efforts to treat every patient with the dignity, respect, and empathy they deserve.

As our Nation continues to combat the novel coronavirus, the tireless work and dedication of our medical and healthcare professionals is evident in the hospitals and treatment centers where they care for the sick, inside the labs and research facilities where vaccines and treatments are being developed, and from the podiums where they have continuously reassured and informed the American people. These brave patriots on the frontlines of the war against this invisible enemy are the most talented, innovative, and hardworking medical professionals in the world. Thanks to their incredible, life-saving work, no country is better prepared to fight this pandemic than the United States, and we remain confident that their steadfast resolve will see our Nation through to victory over this disease.

This National Doctors Day, we express our immense gratitude to the men and women who are caring for and treating patients across our country and whose commitment to serving others has never been clearer. Their contributions to the health and well-being of every American are immeasurable. As one Nation, we pray for their continued health and strength, and we ask God to bless them with the wisdom and resolute spirit to care for all those who need healing.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim March 30, 2020, as National Doctors Day. I call upon the people of the United States to observe this day with appropriate ceremonies and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of March, in the year of our Lord two thousand twenty, and of the Independence of the United States of America the two hundred and forty-fourth.



[FR Doc. 2020–07091
Filed 4–1–20; 11:15 am]
Billing code 3295–F0–P

Presidential Documents

Memorandum of March 30, 2020

Extending the Wind-Down Period for Deferred Enforced Departure for Liberians

Memorandum for the Secretary of State [and] the Secretary of Homeland Security

Since March 1991, certain Liberian nationals and persons without nationality who last habitually resided in Liberia (collectively, ''Liberians'') have been eligible for either Temporary Protected Status (TPS) or Deferred Enforced Departure (DED), allowing them to remain in the United States when they would otherwise be removable.

In a memorandum dated March 27, 2018, I determined that although conditions in Liberia had improved and no longer warranted a further extension of DED, the foreign policy interests of the United States warranted affording an orderly transition (''wind-down'') period to Liberian DED beneficiaries. In a memorandum dated March 28, 2019, I determined that an additional 12-month wind-down period was appropriate. By the terms of my memorandum, the wind-down period expires on March 30, 2020. In making my determination, I noted that there were efforts underway by Members of Congress to provide legislative relief for Liberian DED beneficiaries, and that extending the wind-down period would give the Congress time to consider the propriety of enacting such legislation.

On December 20, 2019, I signed the National Defense Authorization Act for Fiscal Year 2020 (Public Law 116–92) (NDAA), which included as section 7611, the Liberian Refugee Immigration Fairness (LRIF) provision. The LRIF provision provides certain Liberians, including those who have been continuously present in the United States since November 20, 2014, as well as their spouses and children who meet the criteria of the provision, the ability to apply to adjust their status to that of United States lawful permanent resident (LPR). Eligible Liberian nationals have until December 20, 2020, to apply for adjustment of status under the LRIF provision.

The LRIF provision, however, did not provide for continued employment authorization past the expiration of the existing DED wind-down period. Once the DED wind-down period expires, most covered Liberians will have no basis upon which to renew or maintain employment authorization before applying to adjust their status.

I have, therefore, determined that it is in the foreign policy interests of the United States to extend the DED wind-down period for current Liberian DED beneficiaries through January 10, 2021, to facilitate uninterrupted work authorization for those currently in the United States under DED who are eligible to apply for LPR status under the LRIF provision.

The relationship between the United States and Liberia is unique. Former African-American slaves were among those who founded the modern state of Liberia in 1847. Since that date, the United States has sought to honor, through bilateral diplomatic partnership, the sacrifices of individuals who suffered grievous wrongs in the United States, but who were determined to build a modern African democracy mirroring America's representative political institutions. As President, I am conscious of this special bond. Providing those Liberians for whom we have long authorized temporary status or deferred enforced departure in the United States, and for whom the Congress has now provided the ability to adjust status to that of lawful permanent resident, with the ability to continue to work to support themselves while they complete the process to adjust their status, honors the historic, close relationship between our two countries and is in the foreign policy interests of the United States.

Pursuant to my constitutional authority to conduct the foreign relations of the United States, I hereby direct the Secretary of Homeland Security to take appropriate measures to accomplish the following:

(1) A continuation of the DED wind-down period through January 10, 2021, during which current Liberian DED beneficiaries who satisfy the description below may remain in the United States; and

(2) As part of that wind-down, continued authorization for employment through January 10, 2021, for current Liberian DED beneficiaries who satisfy the description below.

This further extension of the wind-down of DED and continued authorization for employment through January 10, 2021, shall apply to any current Liberian DED beneficiary, but shall not apply to Liberians in the following categories:

(1) Individuals who would be ineligible for TPS for reasons set forth in section 244(c)(2)(B) of the Immigration and Nationality Act (8 U.S.C. 1254a(c)(2)(B));

(2) Individuals who sought or seek LPR status under the LRIF provision but whose applications have been or are denied by the Secretary of Homeland Security;

(3) Individuals whose removal the Secretary of Homeland Security determines to be in the interest of the United States, subject to the LRIF provision;

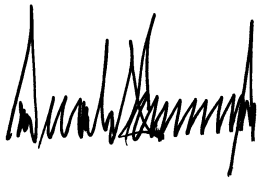
(4) Individuals whose presence or activities in the United States the Secretary of State has reasonable grounds to believe would have potentially serious adverse foreign policy consequences for the United States;

(5) Individuals who have voluntarily returned to Liberia or their country of last habitual residence outside the United States beyond the timeframe specified in subsection (c) of the LRIF provision;

(6) Individuals who were deported, excluded, or removed before the date of this memorandum; or

(7) Individuals who are subject to extradition.

The Secretary of Homeland Security is authorized and directed to publish this memorandum in the *Federal Register.*



THE WHITE HOUSE,
Washington, March 30, 2020

[FR Doc. 2020–07092
Filed 4–1–20; 11:15 am]
Billing code 4410–10–P

FEDERAL REGISTER

Vol. 85 Thursday,

No. 64 April 2, 2020

Part VIII

The President

Notice of April 1, 2020—Continuation of the National Emergency With Respect to South Sudan

Federal Register
Vol. 85, No. 64
Thursday, April 2, 2020

Presidential Documents

Title 3—

The President

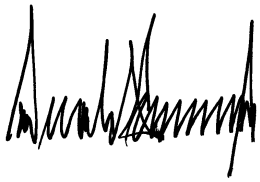
Notice of April 1, 2020

Continuation of the National Emergency With Respect to South Sudan

On April 3, 2014, by Executive Order 13664, 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 situation in and in relation to South Sudan, which has been marked by activities that threaten the peace, security, or stability of South Sudan and the surrounding region, including widespread violence and atrocities, human rights abuses, recruitment and use of child soldiers, attacks on peacekeepers, and obstruction of humanitarian operations.

The situation in and in relation to South Sudan continues 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 April 3, 2014, to deal with that threat must continue in effect beyond April 3, 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 13664.

This notice shall be published in the *Federal Register* and transmitted to the Congress.



THE WHITE HOUSE,
April 1, 2020.

[FR Doc. 2020–07126
Filed 4–1–20; 11:15 am]
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